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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LIMONT HENDERSON,
JR.,

Defendant and Appellant.

B276701

(Los Angeles County
Super. Ct. No. BA439646)

APPEAL from a judgment of the Superior Court of Los Angeles County. Douglas W. Sortino, Judge. Affirmed.

James Limont Henderson, Jr., in pro. per.; and Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

James L. Henderson appeals from the judgment entered following a jury trial in which he was convicted of one count of second degree robbery (Pen. Code,¹ § 211). The jury found a personal firearm use allegation not true (§ 12022.53, subd. (b)). Appellant admitted a prior robbery conviction as a prior serious and/or violent felony under the Three Strikes law (§§ 667, subd. (d), 1170.12, subd. (b)), as a prior serious or violent felony pursuant to sections 667.5, subdivision (c)(19) and 1170, subdivision (h)(3), and as a prior serious felony pursuant to section 667, subdivision (a)(1).

At the sentencing hearing, the trial court denied the defense *Romero*² motion to strike the prior strike conviction. The court imposed an aggregate sentence of 15 years in state prison, consisting of the upper term of five years for the current robbery conviction, doubled for the strike, plus five years pursuant to section 667, subdivision (a)(1). Appellant received 85 days of precommitment custody credit, including 11 days of conduct credit.

Appellant timely appealed the judgment of conviction, and we appointed counsel to represent appellant on appeal. After examination of the record, counsel filed an opening brief raising no issues and asking this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant filed his own supplemental brief, in propria persona.

¹ Undesignated statutory references are to the Penal Code.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

FACTUAL BACKGROUND

On September 4, 2015, at 4:31 p.m. appellant and a male companion entered and immediately left the lobby of the Pot Spot Collective marijuana dispensary. Approximately ten minutes later the two men returned. Milagros Vargas, a “budtender” (the marijuana dispensary equivalent of a bartender) and dispensary manager, took appellant’s medical marijuana recommendation letter and his California identification, and gave him an application to complete. Appellant and his companion sat on one of the couches in the lobby while appellant filled out the application. It took appellant an unusually long time to complete the application, and by the time he handed it back to Vargas, no patients remained in the lobby.

Vargas stapled the application to photocopies of appellant’s recommendation letter and identification, and set the originals at the reception window for appellant to pick up. She then buzzed him into the dispensary showroom.³ As appellant approached the door to the showroom, Vargas noticed he had failed to take one of his documents, so she picked it up and walked with him through the door. Appellant left the door slightly open, allowing his companion to enter the showroom as well. Vargas told them the second person was not permitted in the showroom and ordered him to leave.

³ In the showroom were two cash registers and showcases containing jars of marijuana, edibles, and marijuana paraphernalia. The showroom is not open to the public, and a person may enter only upon being buzzed in by a dispensary employee through a locked door.

Appellant then removed a gun from his partner's backpack and his companion took a gun out of his pocket. Vargas ran to the reception area, joining the dispensary's unarmed security guard, who was already there. Vargas watched on the security camera monitors as appellant's accomplice removed cash from the register which he stuffed into his backpack along with jars of marijuana, edibles and other merchandise he had taken from the showcases. While his partner plundered the showroom, appellant stood in the middle of the room moving his gun back and forth. At some point appellant directed Vargas to return to the showroom with other employees. Pointing his gun at them, he ordered them all to the floor.

When appellant and his accomplice had filled a duffle bag and the backpack, they left the showroom through the lobby and exited the dispensary. Appellant never retrieved his California identification card.

Pearlyn Nazareno, a dispensary employee, was able to slip out through the back door immediately after appellant and his partner began brandishing their firearms. She went to a liquor store across the street from the collective. As she watched the dispensary Nazareno saw appellant and his accomplice exit carrying duffle bags which appeared to be very full. The two men got into a black Lincoln or Jaguar with the bags and sped away. Nazareno called the police. She then returned to the dispensary to find the showroom in disarray and all the jars of marijuana, many edibles, and other merchandise gone.

At trial a firearms expert explained that some replica firearms are virtually indistinguishable in appearance from real firearms. To illustrate the point, he identified what looked like a real M92A automatic pistol as a replica, another apparently real

gun as a BB gun, a real-looking semiautomatic as a replica, and a firearm that also appeared real as a pellet gun.

DISCUSSION

In his supplemental brief, appellant argues: (1) the trial court abused its discretion in imposing the upper term for the personal use of a gun, which the jury had found not true beyond a reasonable doubt; (2) the court's consideration of appellant's prior prison term to double the upper base term under the Three Strikes law and also impose the enhancement under section 667, subdivision (a)(1) constituted an improper dual use of facts; and (3) the trial court abused its discretion in imposing the enhancement under section 667, subdivision (a)(1) because the prior conviction was beyond the five-year "washout period." Appellant concludes that the court's sentencing errors mandate remand for resentencing to an aggregate term of 7 years, consisting of the mid-term of three years for the current robbery conviction, doubled for the strike, plus one year for the prior prison term pursuant to section 667.5, subdivision (b). We disagree and affirm.

I. The Trial Court Acted Within Its Discretion in Sentencing Appellant to the Upper Term for his Robbery Conviction

While acknowledging circumstances in mitigation, including appellant's remorse, acceptance of responsibility, and the strong support of family and friends, the trial court nevertheless found the aggravating factors substantially outweighed the mitigating factors. On that basis the court selected the high term of five years for the current robbery conviction.

In evaluating the aggravating factors presented by this case, the court emphasized what it viewed as the “very aggravated nature” of the crime. Even though the jury found the personal gun use allegation not to be true, the court viewed appellant’s use of a replica handgun as still creating a threat of great violence to everyone present. (Cal. Rules of Court, rule 4.421(a)(1).) The court explained that because the weapon appeared to be real, the use of deadly force by the security guard (had he been armed) or the police to stop the robbery would have been justified, putting everyone present at risk of being killed or seriously injured. The court also identified several other factors in aggravation:

(1) Appellant has two prior felony convictions: one for robbery, and another for grand theft person, which started out as an attempted robbery. (Cal. Rules of Court, rule 4.421(b)(3).)

(2) Appellant was on active parole for the prior robbery conviction when he committed the current offense. (Cal. Rules of Court, rule 4.421(b)(4).)

(3) Because only authorized persons who had been pre-screened could enter the area of the shop where the robbery took place, the victims were particularly vulnerable. (Cal. Rules of Court, rule 4.421(a)(3).)

(4) The manner in which the crime was executed showed planning, sophistication, and professionalism. (Cal. Rules of Court, rule 4.421(a)(8).) As the court explained, this was a takeover robbery of a medical marijuana dispensary, which appellant and his partner had cased beforehand. They had a getaway vehicle parked nearby. And after one person got permission to enter, he held the door for the other to assist in the robbery.

(5) The crime involved the taking of a large quantity of marijuana of great monetary value. (Cal. Rules of Court, rule 4.421(a)(9), (10).)

(6) Appellant has an increasingly serious criminal history. (Cal. Rules of Court, rule 4.421(b)(2).)

Appellant contends that the trial court improperly considered “the *fact* that it was an actual handgun” in imposing the upper term, even though the jury expressly found that appellant did not use an actual handgun in the commission of the crime. We disagree.

We review the trial court’s sentencing decision for abuse of discretion and generally presume the court exercised its broad discretion properly. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.) In the absence of a clear showing that the sentence is arbitrary or irrational, the trial court’s sentencing discretion will not be disturbed on appeal. (*People v. Ogg* (2013) 219 Cal.App.4th 173, 185.)

We find no abuse of discretion in the trial court’s selection of the upper term here. The court found numerous aggravating factors which had nothing to do with the use of a weapon.⁴ Any one of these factors in aggravation constituted a sufficient basis

⁴ While the court referred to appellant’s use of a replica handgun several times, it emphasized that it accepted the jury’s determination that appellant did not use an actual handgun in the robbery. However, the court concluded that the use of a replica handgun nevertheless made this an aggravated offense justifying imposition of the upper term.

for the court's sentencing choice. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

Moreover, contrary to appellant's contention, even if the trial court did take the use of a weapon into account as one of the aggravating factors, the court's sentencing choice was not an unauthorized sentence for the gun use allegation. Both the United States Supreme Court and the California Supreme Court "have expressly held that a trial court, in exercising its discretion in sentencing a defendant on an offense of which he or she has been convicted, may take into account the court's own factual findings with regard to the defendant's conduct related to an offense of which the defendant has been acquitted, so long as the trial court properly finds that the evidence establishes such conduct by a preponderance of the evidence." (*In re Coley* (2012) 55 Cal.4th 524, 557, citing *United States v. Watts* (1997) 519 U.S. 148, 155–157, and *People v. Towne* (2008) 44 Cal.4th 63, 85–88 (*Towne*).) Our Supreme Court has explained that "[p]ermitting a judge to consider evidence of conduct underlying counts of which the defendant was acquitted does not in any way undermine the jury's role in establishing, by its verdict, the maximum authorized sentence." (*Towne, supra*, 44 Cal.4th at p. 87; see, e.g., *S. Union Co. v. United States* (2012) 567 U.S. 343, 348 ["while judges may exercise discretion in sentencing, they may not 'inflic[t] punishment that the jury's verdict alone does not allow'"].)

Here, the jury's verdict convicting appellant of second degree robbery authorized the trial court to sentence appellant to a base term of two, three, or five years in prison. (§ 213, subd. (a)(2).) A true finding on the gun enhancement allegation would have resulted in the imposition of an additional and consecutive

term of 10 years. (§ 12022.53, subd. (b).) The jury’s verdict convicting appellant of second degree robbery while acquitting on the gun use allegation thus limited the trial court to imposing a maximum base term of five years with no discretion to impose the 10-year term for the gun enhancement. The trial court did not exceed its discretion in sentencing appellant to the upper term for the robbery conviction.

II. The Doubling of the Upper Base Term and Imposition of the Five-year Enhancement Did Not Involve a Dual Use of Facts

Appellant next contends that the court’s use of his prior robbery conviction to double the upper base term under the Three Strikes law and also to impose the enhancement under section 667, subdivision (a)(1) constituted an improper dual use of facts. We disagree.

Our Supreme Court has explained the sentencing consequences for a defendant—like appellant—whose current offense is a robbery who has a prior strike conviction for robbery:⁵ “When a defendant with one prior ‘strike’ is convicted of a subsequent felony, the second strike provision of the ‘Three Strikes’ law requires that he be sentenced to ‘twice the term otherwise provided as punishment for the current felony conviction.’ [(§ 667, subd. (e)(1)).] If the current offense is a serious felony, he is also subject to a five-year prior serious felony enhancement on top of that doubled term. (§ 667, subd. (a)(1).) In cases where the second strike offender has only one current

⁵ Under section 1192.7, subdivision (c)(19), any robbery qualifies as a serious felony.

offense, the sentencing arithmetic is simple: The trial court selects the base term, doubles it, and adds five years.” (*People v. Sasser* (2015) 61 Cal.4th 1, 6.)

In imposing appellant’s 15-year sentence, the trial court followed the mandatory sentencing requirements of section 667, subdivisions (a)(1) and (e)(1); there was no improper dual use of facts.

III. The So-Called “Washout Period” Is Irrelevant to the Imposition of the Five-year Enhancement Under Section 667, Subdivision (a)(1)

Appellant asserts that the trial court abused its discretion in imposing the enhancement under section 667, subdivision (a)(1) because the prior conviction was beyond the five-year “washout period.” We reject the contention.

Where the new offense is any felony for which a prison sentence is imposed, section 667.5, subdivision (b) requires the trial court to impose a consecutive one-year term for each prior separate prison term served for any felony, “provided that *no additional term shall be imposed under this subdivision for any prison term [served] prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody.*” (Italics added.) The italicized phrase refers to the “washout period,” “where a prior felony conviction and prison term can be ‘washed out’ or nullified” for purposes of imposing the one-year enhancement under section 667.5. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.) “According to the ‘washout’ rule, if a defendant is free from both prison custody *and* the commission of a new felony for *any* five-year period following discharge from

custody or release on parole, the enhancement does not apply.”
(*Ibid.*)

Unlike section 667.5, subdivision (b), however, section 667, subdivision (a) has no “washout” period for remote convictions. (See, e.g., *People v. Smith* (1988) 206 Cal.App.3d 599, 601–602; see also *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1514.) Indeed, “[t]here is no requirement of prior incarceration or commitment for [subdivision (a)(1) of section 667] to apply.” (§ 667, subd. (a)(2); *People v. Park* (2013) 56 Cal.4th 782, 796.) Accordingly, even if appellant had suffered his prior robbery conviction more than five years before he committed the robbery in the instant case (which he did not), the washout rule would not apply to the court’s imposition of the five-year enhancement under section 667, subdivision (a)(1).

* * *

Based on our examination of the entire record, we reject appellant’s claims, finding no abuse of discretion in the trial court’s imposition of sentence. Moreover, we are satisfied that appellant’s attorney has fully complied with her responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende, supra*, 25 Cal.3d at p. 441.)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.