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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL NAVA CERVANTES,

Defendant and Appellant.

B281572

(Los Angeles County
Super. Ct. No. NA104123)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Affirmed as modified and remanded.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Miguel Nava Cervantes guilty of corporal injury to a cohabitant or girlfriend (Pen. Code, § 273.5, subd. (a); count 1),¹ criminal threats (§ 422, subd. (a); count 2), brandishing a firearm at a person in a motor vehicle (§ 417.3; count 4), attempted murder (§§ 187, subd. (a), 664; count 5), and two counts of assault with a firearm (§ 245, subd. (a)(2); counts 6 & 7). The jury found true allegations that Cervantes personally used a firearm as to counts 2, 5, 6 and 7 (§ 12022.5, subd. (a)), personally discharged a firearm which caused great bodily injury as to count 5 (§ 12022.53, subd. (d)), and personally committed great bodily injury as to count 6 (§ 12022.7, subd. (a)).

On appeal, Cervantes contends there was insufficient evidence to support the conviction for brandishing a firearm at a person in a vehicle. Alternatively, he contends he received ineffective assistance of counsel. He also argues the trial court erred in calculating his presentence custody credit. In supplemental briefing, he contends we should remand the matter for resentencing to allow the trial court to exercise its discretion under new legislation effective January 1, 2018, which ended the statutory prohibition on a trial court's ability to strike a firearm enhancement. We remand for resentencing and order the abstract of judgment modified, but otherwise affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

The People's Evidence

1. May 31, 2014 - Count 1

Monica Z. lived in Torrance with her roommate, Brian G., and her boyfriend, Cervantes, whom she had been dating for

¹ All further statutory references are to the Penal Code.

about two months. On May 31, 2014, Monica Z. was arguing with Cervantes because he wanted to see her cell phone. Cervantes, a gardener, believed Monica Z. was providing his customers' phone numbers to his competitors, other gardeners. When Monica Z. refused to give Cervantes her cell phone, he twisted her arm and grabbed her neck and squeezed it so that it was difficult for her to breathe. Cervantes then grabbed Monica Z.'s cell phone from her hand and took out the memory card and threw it on the floor. He also threw the cell phone at her chest. Monica Z. suffered bruising on her neck, chest, and left arm. She did not immediately report the incident to the police because she was afraid of Cervantes.

2. June 3, 2014 - Count 2

Sometime in the early morning on June 3, 2014, Brian G. was sleeping in his bed when Cervantes began hitting him in the head and kicking him. Cervantes then pointed a gun at Brian G.'s face and stated that he was going to kill him. Monica Z. also witnessed Cervantes kick and punch Brian G. in his face and body while he was in his bed. She saw Brian G. attempt to defend himself by blocking the punches with his feet. Monica Z. did not see Cervantes threaten Brian G. with a gun. The entire incident lasted less than two minutes. Brian G. was terrified of Cervantes.

Los Angeles Police Department (LAPD) Officer Esmeralda Ruiz, along with her partner, received a "firearm radio call" and arrived at the location around 9:00 a.m. They made contact with both Monica Z. and Brian G. Officer Ruiz noticed a large scratch on Brian G.'s cheek and that his right toe was swollen. She also noticed Monica Z. had bruises on her neck, breast area, and left arm, and scratches on her neck. While speaking with Monica Z.,

Officer Ruiz learned her injuries were inflicted from a prior incident with Cervantes that had taken place on May 31, 2014.

3. July 5, 2014 - Counts 5, 6, and 7

Around 2:00 a.m. on July 5, 2014, down the block from Monika G.'s home, Jorge M. was hanging out with Brian G. and his friend, Alex L., outside of Alex L.'s residence. Brian G. pointed out a white truck that was coming towards the residence, and he stated to Alex L. not to tell the driver, Cervantes, where he was because Cervantes was "dangerous." Brian G. went inside the residence and hid behind some cardboard boxes.

Jorge M. saw the white truck pass the residence slowly, but then it stopped and reversed until it was in front of Jorge M. and Alex L. Alex L. was standing behind Jorge M. looking at his cell phone. Cervantes stated, "What happened to Brian?" Jorge M. responded, "I don't know who Brian is." Cervantes stated, "What do you mean you don't know him? He was right there with you." Jorge M. again stated, "I don't know him." Cervantes then pulled out a gun and pointed it at Jorge M. and fired. Jorge M. heard the bullet whistle past his head. He then heard Alex L. yell, "Momma," and saw that Alex L. was bleeding from his chest. Cervantes drove away.

An ambulance arrived about 20 to 30 minutes later. The bullet had pierced through Alex L.'s chest and was lodged in his back. Alex L. was taken to the hospital and had surgery, but the doctors were unable to remove the bullet; he remained in the hospital for four days. He experienced excruciating pain. About four months later, Alex L. flew to Nicaragua and had the bullet removed from his back, which he gave to the police. Alex L.'s back is still numb and it is unlikely he will be able to regain feeling in that area.

4. July 9, 2014 - Count 4

LAPD Detective Carlos Carias, along with his partner, were part of the team designated to locate Cervantes, the alleged shooter on July 5, 2014. Around 11:45 a.m. on July 9, 2014, Detective Carias became aware that Officer Maughan, another individual who was part of the operation, had located Cervantes's white truck. Officer Maughan was in plain clothes, driving an unmarked vehicle, and was responsible for maintaining a visual surveillance of Cervantes.

When they arrived at the location, Detective Carias saw that Officer Maughan's vehicle had pulled over to the curb, and the white truck was perpendicular to Officer Maughan's vehicle. Detective Carias pulled his vehicle approximately three car lengths away from the white truck in order to observe the driver, Cervantes. He saw that Cervantes was armed with a gun, and was pointing it toward the ground about two feet away from Officer Maughan's window. While holding the gun, Cervantes also "motioned twice up and down towards the ground." Cervantes never pointed the gun directly at Officer Maughan, but it appeared as if he was "displaying" the gun to Officer Maughan. There was nothing obstructing the view between Officer Maughan and Cervantes. Detective Carias did not see Officer Maughan's reaction because Officer Maughan's window was tinted. Detective Carias then activated the lights on his vehicle.

When Cervantes saw Detective Carias, he lowered the gun and drove away. Another LAPD officer stopped the white truck and detained Cervantes. When the police searched the vehicle, they did not find a gun. Detective Carias then approached Cervantes and asked him to tell him where the gun was because they were in a residential neighborhood and it was possible a

child may find the gun. Cervantes complied and led Detective Carias to another location; the gun was recovered in a planter next to a sidewalk. The police found three live rounds in the chamber of the gun, and two additional live rounds on the ground. The police later determined that the bullet recovered from Alex L.'s back was fired from the recovered gun.

The Verdict and Sentencing

The jury convicted Cervantes of corporal injury to a cohabitant or girlfriend (§ 273.5, subd. (a); count 1), criminal threats (§ 422, subd. (a); count 2), brandishing a firearm at a person in a motor vehicle (§ 417.3; count 4), attempted murder (§§ 187, subd. (a), 664; count 5), and two counts of assault with a firearm (§ 245, subd. (a)(2); counts 6 & 7.) The jury found true allegations that Cervantes personally used a firearm as to counts 2, 5, 6 and 7 (§ 12022.5, subd. (a)), personally discharged a firearm which caused great bodily injury as to count 5 (§ 12022.53, subd. (d)), and personally committed great bodily injury as to count 6 (§ 12022.7, subd. (a)).²

The trial court sentenced Cervantes to a total term of 35 years to life in state prison, comprised of the midterm of seven years for the attempted murder count as charged in count 5, plus an additional and consecutive 25 years to life pursuant to section 12022.53, subdivision (d). The trial court did not select a term for the firearm enhancement under section 12022.5 subdivision (a), but ordered it stayed. The court imposed consecutive, one third the midterm sentences as follows: in count 1, one year; in count

² The jury found not true the allegation that the attempted murder in count 5 was committed willfully, deliberately, and with premeditation.

2, eight months as to the base term and 16 months for the enhancement. The trial court imposed the midterm of two years as to count 4 and ordered that it run concurrently to counts 1, 5, and 2. The court initially imposed a one third the middle term consecutive sentence on count 6, but then decided to stay the sentences on counts 6 and 7 pursuant to section 654. The court did not re-select a full base term as to count 6 or any of its attendant enhancements, nor did it choose a term for count 7.³

The trial court also found Cervantes was entitled to 981 days of presentence custody credit.

Cervantes filed a timely notice of appeal.

DISCUSSION

I. Sufficient Evidence Supports the Jury's Finding that Cervantes Brandished a Firearm at a Person in a Vehicle

Cervantes contends his conviction for brandishing a firearm at a person in a motor vehicle is not supported by substantial evidence because Officer Maughan did not testify at trial, and therefore the jury could not find that he was aware of, or fearful of, the drawn gun. Cervantes is mistaken as to the law and the evidence.

³ We remind the trial court that when it determines a count should be stayed pursuant to section 654, the trial court must select a term from the triad normally applicable to the crime (not a one-third middle term sentence), impose that term, and order it stayed. We also note that the abstract of judgment does not reflect the sentence imposed for the enhancements in counts 6 and 7. Because the matter must be remanded for the trial court to exercise its discretion pursuant to the statutory amendment of sections 12022.53, subdivision (h), and 12022.5, subdivision (c), we point these errors out to the trial court to correct at that time.

A. Standard of Review

“To determine whether sufficient evidence supports a jury verdict, a reviewing court reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Smith* (2014) 60 Cal.4th 603, 617.) “ “[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]” [Citation.]’ [Citation.]” (*People v. White* (2014) 230 Cal.App.4th 305, 315, fn. 13.)

B. Analysis

Section 417.3 provides, “Every person who, except in self-defense, in the presence of any other person who is an occupant of a motor vehicle proceeding on a public street or highway, draws or exhibits any firearm, whether loaded or unloaded, in a threatening manner against another person in such a way as to cause a reasonable person apprehension or fear of bodily harm is guilty of a felony” (§ 417.3.)

Contrary to Cervantes’s assertion, Officer Maughan’s testimony was not required to prove the element of fear of bodily harm. The statute sets forth an objective, not subjective, standard for the element of apprehension or fear of bodily harm. As a result, that element need not be proved by the victim’s

testimony that he or she was actually in fear of bodily harm.⁴ (§ 417.3.) Instead, the evidence need only show that a reasonable person would be in fear of bodily harm.

There was evidence of that element here. Detective Carias testified that Officer Maughan had located Cervantes's white truck, and was observing the vehicle on behalf of the team of officers. Officer Maughan had pulled his vehicle over to the curb in order to observe Cervantes, whose white truck was perpendicular to Officer Maughan's vehicle. Detective Carias observed Cervantes holding a handgun and pointing it to the ground only two feet away from Officer Maughan's window. According to Detective Carias, it appeared as if Cervantes was "displaying" the gun toward Officer Maughan. Although Detective Carias did not see Officer Maughan's reaction to the gun due to the tinted window, given the proximity of the vehicles and the fact Officer Maughan was observing Cervantes, who was

⁴ The People's reliance on *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 and *People v. Mercer* (1980) 113 Cal.App.3d 803, 806 for the proposition that the victim's awareness of the firearm is not required for a violation of section 417.3 is misplaced. The People argue that Cervantes's violation of section 417.3 is analogous to a violation of 417, subdivision (a)(2), which provides, "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel is punishable" (§ 417, subd. (a)(2).) We disagree. Section 417.3 has the additional requirement that the exhibition of the firearm must be made in such a way "as to cause a reasonable person apprehension or fear of bodily harm," which requires the victim's awareness of the firearm even though the statute sets forth an objective standard.

the alleged shooter on July 5, 2014, the jury could reasonably infer that Cervantes's actions caused a reasonable person in Officer Maughan's position to fear bodily harm. (*People v. Brooks* (2017) 3 Cal.5th 1, 57 ["Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence." . . .].) This evidence, taken as a whole and viewed in the light most favorable to the judgment, was more than sufficient to conclude Cervantes brandished a firearm at a person in a vehicle in violation of section 413.7.

II. Cervantes Fails to Establish His Defense Counsel Provided Ineffective Assistance

Cervantes's related claim of ineffective assistance of counsel, based on his defense counsel's closing argument, also falters. Here, Cervantes contends that his counsel was ineffective for failing to counter the People's argument that the jury should convict him of the brandishing a firearm charge based solely on Detective Carias's testimony. We are not persuaded.

A. Standard of Review

"The constitutional standard for determining whether counsel has failed to provide adequate legal representation is by now well known: First, a defendant must show his or her counsel's performance was 'deficient' because counsel's 'representation fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Second, he or she must then show prejudice flowing from counsel's act or omission. [Citation.] We will find prejudice when a defendant demonstrates a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient

to undermine confidence in the outcome.’ [Citations.] ‘Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.’ [Citation.]” (*People v. Gurule* (2002) 28 Cal.4th 557, 610–611.)

B. Background

During closing argument, the People asserted that Officer Maughan’s testimony was not required to convict Cervantes for brandishing a firearm at a person in a motor vehicle, as follows: “Does Detective Sean Maughan have to testify in order to convict [Cervantes] of brandishing toward someone inside a car? The answer is no. That’s not required by law. Detective Carias’s testimony, if you believe it in its entirety, is sufficient to convict [Cervantes] of that count.” Cervantes’s counsel did not directly respond to the People’s contention; rather, his counsel argued Detective Carias’s testimony showed that Cervantes did not point the gun “in an assaultive manner.”

C. Analysis

The decision of how to argue to the jury after the presentation of evidence is inherently tactical. (*People v. Freeman* (1994) 8 Cal.4th 450, 498.) “Closing argument is as much an art as a science Counsel must establish as much credibility with the jurors as possible if his effort to persuade them is to succeed.” (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1251.) “It is within the permissible range of tactics for defense counsel to candidly recognize the weaknesses in the defense in closing argument.” (*People v. Jones* (1991) 53 Cal.3d 1115, 1150.) “Reversals for ineffective assistance of counsel during closing argument rarely occur; when they do, it is due to an argument against the client which concedes guilt, withdraws a crucial

defense, or relies on an illegal defense.” (*People v. Moore* (1988) 201 Cal.App.3d 51, 57.)

Here, defense counsel’s decision to argue that Cervantes did not display the gun in a threatening manner was not a concession, but instead a reasonable tactical choice. As we have pointed out, the element of fear under section 417.3 is measured by an objective standard; therefore, the People were correct in arguing that evidence as to what Detective Maughan actually saw or how he reacted was not essential to prove that Cervantes was guilty. As a result, Cervantes’s counsel’s argument that the gun was not displayed in a threatening manner, meaning no reasonable person would be fearful as a result, was the most effective argument against conviction. Accordingly, we conclude Cervantes failed to establish his defense counsel provided ineffective representation.

III. The Abstract of Judgment Must Be Modified to Correctly Reflect Presentence Credits

The People agree with Cervantes, as do we, that the abstract of judgment must be modified to accurately reflect the presentence credit.

Although the trial court found Cervantes was entitled to 981 days of actual custody time, both parties agree the total number of days in between and including the day of Cervantes’s arrest and sentencing was actually 982 days. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 735 [“a sentencing court must award credits for all days in custody up to and including the day of sentencing”].)

In addition, though the abstract correctly notes that Cervantes was entitled to 147 days of conduct credit, the parties agree, as do we, this should appear under item 16 in the column

entitled “local conduct” of the abstract of judgment, not in item 13. Accordingly, we order the abstract of judgment to be modified to reflect 982 days of presentence actual custody time and 147 days of presentence conduct credit, for total credits of 1129 days.

IV. The Trial Court May Exercise its Discretion to Strike the Firearm Enhancements

We agree with the parties that this case must be remanded for resentencing under sections 12022.53, subdivision (h), and 12022.5, subdivision (c).⁵

At the time Cervantes was sentenced, the trial court was prohibited from striking the firearm enhancements imposed in this case under sections 12022.53, subdivision (h), and 12022.5, subdivision (c). Senate Bill No. 620 (SB 620), effective January 1, 2018, however, amended the statutes and granted the trial court discretion to strike or dismiss those firearm enhancements. (Stats. 2017, ch. 682, § 2.)

The discretion to strike a firearm enhancement under sections 12022.53 and 12022.5 may be exercised as to any defendant whose conviction is not final as of its effective date. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) Here, there is no dispute Cervantes’s appeal was not final when SB 620 went into effect on January 1, 2018. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 [“a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal”];

⁵ Although Cervantes’s opening brief appears to only challenge the firearm enhancement as to count 5, we note that the trial court imposed and stayed firearm enhancements as to counts 2, 6, and 7. On remand, the trial court must consider all firearm enhancements subject to SB 620.

see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 [“[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it”].) As a result, we agree with the parties and find remand is necessary to allow the trial court the opportunity to exercise its new discretion under sections 12022.53, subdivision (h), and 12022.5, subdivision (c).

As to count 5, the court may strike all of the firearm enhancements or impose any one of the enhancements. If the court chooses to impose a firearm enhancement, it must strike any enhancement(s) providing a longer term of imprisonment, and impose and stay any enhancement(s) providing a lesser term. (§ 12022.53, subds. (f) & (h).)

For example, the court may choose to impose the 25-year-to-life enhancement under subdivision (d). If so, it should impose and stay the enhancements under subdivisions (c) and (b). If the court imposes the 20-year enhancement under subdivision (c) of section 12022.53, it must then strike the 25-year-to-life enhancement under subdivision (d), and impose and stay the 10-year enhancement under subdivision (b).

In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subd. (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) If the trial court exercises its discretion in this manner, the gun enhancement will remain in the defendant’s criminal record, and may affect the award of custody credits. Specifically, section 667.5, subdivision (c)(8), provides that a violent felony is “[a]ny felony in which the defendant . . . uses a firearm which use has been charged and proved as provided in subdivision (a) of Section . . . 12022.5.” Similarly, section 667.5, subdivision (c)(22),

provides that all offenses where a defendant has been convicted of a violation of 12022.53 are violent felonies. As a violent felony, the defendant would be entitled to a maximum of 15 percent conduct credits. (§ 2933.1, subd. (a).)

DISPOSITION

Cervantes's abstract of judgment is ordered modified to reflect, in item 16, 982 days of presentence actual custody time and 147 days of presentence conduct credit, for total credits of 1129 days. The matter is remanded to the trial court to exercise its discretion under sections 12022.53, subdivision (h), and 12022.5, subdivision (c). If the court chooses not to strike the enhancement pursuant to section 12022.5, subdivision (a), in count 5, it must select a term for that enhancement as a part of its resentencing. The court must also select terms from the triad in counts 6 and 7, impose them, and then stay the terms. The judgment is otherwise affirmed as modified.

BIGELOW, P.J.

We concur:

RUBIN, J.

ROGAN, J.*

* Judge of Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.