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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARQUISE DAVIS, Defendant and Appellant.	B295025 (Los Angeles County Super. Ct. No. BA414555)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed.

Marta Stanton, 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, Yun K. Lee and Shezad H. Thakon, Deputy Attorneys General, for Plaintiff and Respondent.

In *People v. Davis* (June 19, 2018, B259183) [nonpub. opn.], although we affirmed Marquise Davis's convictions for several

offenses arising from the armed robbery of a fast-food restaurant, we vacated his sentence and remanded the matter for a new sentencing hearing for the court to correct sentencing errors and to consider whether to exercise its discretion to strike firearm-use enhancements imposed under the formerly mandatory provisions of Penal Code section 12022.53, subdivision (b).[1] On remand the trial court corrected the errors we had identified, determined not to dismiss the firearm enhancements previously imposed and added to the count for dissuading a witness a one-year section 12022, subdivision (a)(1), firearm enhancement that had not been part of Davis's original sentence.

On appeal Davis argues the court improperly imposed the additional section 12022, subdivision (a)(1), enhancement because neither the original nor amended information alleged a principal had been armed when committing that offense, although the People had alleged a principal was armed during the related robbery, aggravated assault and kidnapping for carjacking. The People contend Davis forfeited this argument on appeal by failing to object when the trial court instructed the jury to make a section 12022, subdivision (a), finding on the count for dissuading a witness and provided a verdict form for that allegation or when the court imposed the enhancement at the resentencing hearing. The People also contend imposition of the enhancement was proper because Davis was on notice he had to defend against the firearm allegation and the jury found the allegation true. We affirm.

PROCEDURAL BACKGROUND

1. *Davis's Convictions, Original Sentence and Appeal*

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[1] Statutory references are to this code.

Davis and his confederate, Davon Winston, were convicted following a jury trial of second degree robbery (§ 211) (count 1), assault with an assault weapon (§ 245, subd. (a)(3)) (count 2), kidnapping to facilitate a carjacking (§ 209.5, subd. (a)) (count 3) and dissuading a witness when having a prior conviction for the same offense (§ 136.1, subd. (c)(3)) (count 4). The jury also found true special allegations that all the offenses had been committed for the benefit of a criminal street gang; a principal had been armed with an assault weapon during the robbery and kidnapping and when dissuading a witness; and, as to the robbery and kidnapping charges, that a principal had personally used a firearm. On its own motion the trial court ruled the People had failed to prove the rifle used in the crimes qualified as an assault weapon and reduced the aggravated assault charge from assault with an assault weapon to assault with a firearm (§ 245, subd. (a)(2)) and the associated special allegations from a principal's use of an assault weapon (§ 12022, subd. (a)(2)) to a principal's use of a firearm (§ 12022, subd. (a)(1)).

Pursuant to California Rules of Court, rule 4.452, in sentencing Davis the court imposed a blended aggregate sentence described as 155 years to life in state prison,[2] which included resentencing Davis for numerous felony convictions arising from

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[2] The court imposed an aggregate combined determinate term of 112 years plus four consecutive life terms each with a minimum term of imprisonment of seven years pursuant to section 186.22, subdivision (b)(4)(C), plus a consecutive term of life with a 15-year minimum parole eligibility date pursuant to section 186.22, subdivision (b)(5).

other armed robberies he had committed with Winston that had been the subject of two prior superior court cases.[3]

On appeal we rejected Davis's argument the criminal street gang enhancements were not supported by substantial evidence and held any error in permitting the People's gang expert to include case-specific testimonial hearsay when giving his opinion was harmless beyond a reasonable doubt. However, we also held certain aspects of the blended aggregate sentence involving imposition of the criminal street gang and firearm enhancements were incorrect. In addition, amendments to section 12022.5 and section 12022.53, which became effective January 1, 2018 and applied retroactively to Davis and other defendants whose sentences were not final before that date, gave the trial court discretion to strike or dismiss previously mandatory firearm-use enhancements. Accordingly, we vacated Davis's sentence and remanded the case for the trial court to correct the sentencing errors we had identified and to determine whether to exercise its discretion to dismiss the firearm-use enhancements imposed pursuant to section 12022.53.

2. *Davis's New Sentence*

On remand the trial court declined to exercise its discretion to strike or dismiss any firearm enhancements, but corrected the errors we had identified, which reduced the determinate portion of Davis's sentence by eight years four months. However, for the

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[3] We affirmed the first set of convictions in *People v. Davis* (Sept. 1, 2015, B253574) [nonpub. opn.] (affirming aggregate sentence of 90 years to life) and the second in *People v. Davis* (Apr. 6, 2016, B255790) [nonpub. opn.] (affirming aggregate sentence of 53 years eight months).

witness intimidation conviction, count 4 in the instant case, rather than a straight life sentence, as previously imposed, the court ordered Davis to serve an indeterminate life term plus a one-year determinate term for a firearm enhancement pursuant to section 12022, subdivision (a). The court gave no explanation for including the firearm enhancement.

As a result of the resentencing, Davis's aggregate blended sentence now is a determinate term of 104 years eight months plus four consecutive life terms each with a minimum term of imprisonment of seven years pursuant to section 186.22, subdivision (b)(4)(C), plus a consecutive term of life with a 15-year minimum parole eligibility date pursuant to section 186.22, subdivision (b)(5) (or as would commonly, albeit imprecisely, be summarized, 147 years eight months to life).

DISCUSSION

1. *The Proceedings Leading To Imposition of the Firearm Enhancement on Count 4*

An amended felony complaint, filed August 28, 2013, alleged that on November 26, 2012 Davis and Winston committed second degree robbery, assault with a firearm, kidnapping for carjacking and dissuading a witness when having a prior conviction for that offense and specially alleged in the commission of all four offenses a principal had been armed with an assault rifle within the meaning of section 12022, subdivision (a)(2), and the offenses were committed for the benefit of a criminal street gang. It was also specially alleged that Winston had personally used an assault weapon during the kidnapping within the meaning of section 12022.5.

The information, filed September 11, 2013 following a preliminary hearing, alleged the same four crimes and repeated

the special allegations the offenses were committed for the benefit of a criminal street gang, but alleged a principal was armed with an assault rifle only with respect to the robbery, aggravated assault and kidnapping, not in connection with dissuading a witness. The information again alleged Winston had personally used an assault rifle during the kidnapping. An amended information, filed July 25, 2014, was identical to the information except it alleged as to the robbery and the kidnapping that a principal had personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1).

Notwithstanding the language of the amended information, CALCRIM No. 3116, as printed and provided to the jury, stated in part, "If you find the defendant guilty of the crimes charged in Counts One, Two, or Three of the Information, robbery, assault with an assault rifle, and kidnapping during carjacking, and witness intimidation, respectively, you must then decide whether, for each crime, the People have proved the additional allegation that one of the principals was armed with an assault weapon in the commission of that crime . . . ." In reading this instruction to the jury, the court noticed the discrepancy between referring to counts 1, 2 and 3, and identifying all four offenses charged, and said, "If you find the defendant guilty of the crimes charged in counts 1, 2, or 3 of the information, robbery, assault with an assault rifle, and kidnapping during carjacking and witness intimidation, so it's count 4 as well, you must then decide whether for each crime the People have proved the additional allegation that one of the principals was armed with an assault weapon in the commission of that crime . . . ." Defense counsel did not object to either the written or oral form of the instruction.

The verdict forms provided to the jury included a form for count 4, as well as forms for counts 1 and 3,[4] asking whether it found "true" or "not true" the special allegation a principal was armed with an assault weapon within the meaning of section 12022, subdivision (a)(2), in the commission of the offense. Davis's counsel did not object to the verdict forms. On August 20, 2014 the jury returned its verdicts, finding Davis guilty on all four counts, finding true the criminal street gang enhancement allegations as to all four counts and also finding true the firearm enhancement allegations on counts 1, 3 and 4. No objection was made to the finding of a firearm enhancement as to count 4.

Because of the criminal street gang finding, at Davis's original sentencing the court imposed an indeterminate life sentence with a minimum term of seven years of imprisonment on the witness intimidation charge, count 4, pursuant to section 186.22, subdivision (b)(4)(C). The court then stated, "There was no special allegation as far as I recall. Seven years to life on that charge." However, as discussed, when resentencing Davis on remand, the court again imposed the indeterminate life sentence, with a minimum term of seven years, but added the one-year firearm enhancement pursuant to section 12022 that the jury had found true. Davis's counsel did not object.

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[4] For reasons not reflected in the record on appeal, the jury was not provided with a verdict form for a principal being armed with an assault weapon during the commission of the aggravated assault charged in count 2.

2. *Davis's Failure To Object in the Trial Court Forfeited His Claim Imposition of the Firearm Enhancement Was Improper*

Although Davis had a due process right to notice of the charges against him, including notice of any sentencing enhancements the People would seek to prove (*People v. Mancebo* (2002) 27 Cal.4th 735, 750 (*Mancebo*); *People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3), his failure to object when the court instructed the jury and provided it with a verdict form for the section 12022, subdivision (a), firearm enhancement on count 4 forfeited the issue on appeal: "[I]t has been uniformly held that where an information is amended at trial to charge an additional offense, and the defendant neither objects nor moves for a continuance, an objection based on lack of notice may not be raised on appeal. [Citations.] There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions. . . . [A] reasonable and fair rule in both situations is that a failure to promptly object will be regarded as a consent to the new charge and a waiver of any objection based on lack of notice." (*Toro*, at p. 976; accord, *People v. Houston* (2012) 54 Cal.4th 1186, 1128 [although indictment did not allege attempted murder was premeditated, "[b]ecause defendant had notice of the sentence he faced and did not raise an objection in the trial court, he has forfeited this claim on appeal"]; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1237; see *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438 [the rule of forfeiture articulated in *Toro* "appl[ies] to enhancement allegations"].)

Davis's contention that, even when no objection was made in the trial court, an appellate court may correct an

"unauthorized" sentence—that is, a sentence that "could not lawfully be imposed under any circumstance in the particular case" (*People v. Scott* (1994) 9 Cal.4th 331, 354)—although legally sound (see, e.g., *Mancebo*, *supra*, 27 Cal.4th at p. 749, fn. 7; *People v. Smith* (2001) 24 Cal.4th 849, 854), is inapplicable here. First, although California's constitutional prohibition against double jeopardy (Cal. Const., art. I, § 15) bars imposition of a greater aggregate sentence on remand in the absence of an unauthorized initial sentence (see *People v. Hanson* (2000) 23 Cal.4th 355, 357, 360, fn. 3), it does not bar the trial court's imposition of a greater sentence on an individual count when the aggregate sentence is reduced or remains the same. (See *People v. Craig* (1998) 66 Cal.App.4th 1444, 1448 [trial court's imposition of greater sentence on burglary count after remand and retrial did not violate double jeopardy clause when aggregate sentence was less than original sentence]; *People v. Calderon* (1993) 20 Cal.App.4th 82, 89 [trial court's imposition on remand of consecutive one-year sentence on robbery count that had previously been stayed did not violate double jeopardy clause because aggregate sentence remained the same as the original sentence].)

Second, this is not a case like *Mancebo*, *supra*, 27 Cal.4th 735, cited by Davis, in which the Supreme Court considered a claim of sentencing error first raised on appeal because the trial court had violated a mandatory sentencing rule. In *Mancebo*, a violent sex crime case governed by section 667.61, the information alleged the crimes against one victim qualified for a one strike sentence because they had been committed under the circumstances of kidnapping and firearm use and those against a second victim qualified because they had been committed under

the circumstances of firearm use and binding. The information did not allege a multiple victim circumstance. Following his conviction, the trial court sentenced the defendant to two indeterminate life terms under the one strike law but also imposed two 10-year firearm-use enhancements by substituting the unpleaded (but proved) multiple victim circumstance for the firearm-use circumstance for purposes of the one strike law and then utilizing the pleaded and proved firearm-use allegation to impose the additional 10-year terms.

In considering the defendant's claim of sentencing error notwithstanding his failure to object in the trial court, the Supreme Court explained section 667.61, subdivision (f), mandated that the firearm-use circumstance, as pleaded, could only be used to support an indeterminate one strike sentence and expressly precluded the trial court from using it for another purpose, as it had done. (*Mancebo*, *supra*, 27 Cal.4th at p. 749.)[5] In addition, the Court held, by substituting the unpleaded multiple victim circumstance for the firearm-use circumstance as a basis for imposing the one strike sentences, the trial court had violated section 667.61, subdivision (f)'s requirement that each

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[5] Section 667.61, subdivision (f), provides in part, "If only the minimum number of circumstances specified in subdivision (d) or (e) that are required for the punishment in subdivision (a), (b), (j), (*l*), or (m) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a), (b), (j), (*l*), or (m) whichever is greater, rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section."

qualifying circumstance be pleaded and proved as to each count subject to the one strike law. (*Mancebo*, at p. 753.) Because of those violations of express statutory requirements, the Court explained, the sentence was the product of "legal error"; and the general rule of forfeiture was inapplicable. (*Id.* at p. 749 & fn. 7.)

No similar mandatory sentencing rules restricted the trial court's discretion here. To the contrary, as this court held in *People v. Riva* (2003) 112 Cal.App.4th 981, while distinguishing *Mancebo*, a firearm-use enhancement pleaded under section 12022.53, subdivision (d), as to two counts (attempted voluntary manslaughter and aggravated assault), but not a third, closely related count (shooting at an occupied vehicle), could be imposed on all three counts when the jury was provided, without objection, with instructions and verdict forms asking it to determine whether the allegations were true or not true as to all three counts. (*Riva*, at p. 1000.) Section 12022.53, subdivision (j), we explained, only requires the facts necessary to sustain the enhancement be alleged in the information;[6] unlike section 667.61, subdivision (f), it does not say they must be alleged in connection with a particular count in order to apply to that count. (*Riva*, at p. 1001.) More importantly, because Riva was on notice he had to defend against the firearm-use allegation in connection with the attempted voluntary manslaughter and aggravated assault counts, which were part of the same course of conduct as the charge of shooting at an occupied vehicle, we

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[6] Section 12022.53, subdivision (j), provides in part, "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

concluded "the Supreme Court's concern over lack of fair notice expressed in *Mancebo* is not applicable in the present case." (*Id.* at p. 1003.)

Here, section 12022, like the firearm enhancement at issue in *Riva*, contains no specific pleading and proof requirement. And, as in *Riva*, the charge of dissuading a witness was part of the same course of conduct as the carjacking as to which the firearm enhancement was expressly alleged—during the course of the carjacking, Davis and his confederate threatened harm to the victim if she notified the police. There was no lack of fair notice. Accordingly, the trial court's decision to have the jury determine whether the enhancement applied to the witness intimidation count, not objected to by Davis's counsel, was within the court's discretion; and its ultimate decision to include a one-year enhancement on that count was not an unauthorized sentence.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.