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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. ALEX RUSSELL SMALL, Defendant and Appellant.	B269180 (Los Angeles County Super. Ct. No. VA136534)

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

Winston Kevin McKesson for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel., Jr., Supervising Deputy Attorney General, and Stacy S.

Schwartz, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Alex Russell Small (Small) of second degree robbery (Pen. Code, § 211[1]) and found true a special allegation that Small used a firearm within the meaning of section 12022.53, subdivision (b), making the robbery a serious felony pursuant to section 1192.7, subdivision (c)(8) and a violent felony within the meaning of section 667.5, subdivision (c)(8).

On appeal, Small contends that there was insufficient evidence to support the jury's finding with regard to the firearm allegation and that the trial court improperly denied his motion for a new trial due to a purported lack of evidence supporting the firearm finding. We disagree and, accordingly, affirm the judgment.

BACKGROUND

I. The robbery

On August 21, 2014, around 9:00 a.m., while Vanessa Sharp (Sharp), a Wal-Mart cashier, assisted a patron at the customer service counter, Small and Tiequan Wilson (Wilson) entered the store. The two men sat at a bench to the right of Sharp's cash register.

At some point, both men stood up at the same time. Wilson jumped over the counter and demanded that Sharp

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

give them the money in her cash register. As Sharp attempted to open her register, Small, who remained in front of the counter, raised up his sweatshirt, showing Sharp a black semi-automatic pistol that he had partially in his pants waistband and "in his left hand." Although Small "displayed" the gun to Sharp, he did not point the gun at Sharp or press it against her. Sharp saw the pistol for approximately five seconds.[2]

Sharp, "afraid . . . that [she was] going to be harmed," opened the register and stepped aside. After taking approximately $7,000 from Sharp's register, Wilson ordered Sharp to " '[o]pen up the next register.' " Sharp again complied because she was "afraid." Wilson took $5,000 more from the second register. Small and Wilson then fled the store. Once Wilson and Small had fled, Sharp "[b]roke down and cried."

During the course of the robbery, Small said nothing to Sharp.

II. The trial

On September 22, 2014, the People filed an information charging Small with second degree robbery and alleged that

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[2] At trial, a store manager, who had been alerted by another employee that a robbery was in progress at the customer service counter, saw Wilson at one point holding a cash register till in one hand and a gun in the other. During the trial, after the store manager testified, Wilson pleaded no contest.

he used a firearm during the robbery. At his arraignment, Small denied the allegations and pleaded not guilty.

On September 9, 2015, the trial court impaneled a jury. The People presented a number of witness, including Sharp. During the trial, Small presented no witnesses on his behalf. Moreover, Small did not dispute that he was one of the robbers. Instead, he argued only that the evidence did not show that he "personally used a gun in the commission of th[e robbery]." More specifically, Small argued to the jury that his actions were not menacing: "Point[ ] the gun at someone. That's menacing. Threatening to kill someone with a gun, that's menacing. The act of pulling the gun and showing [it] is not menacing."[3]

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[3] Small's characterization of his actions as not being menacing derives from the jury instructions in this case. With regard to the firearm enhancement, the trial court instructed the jury as follows: "Someone personally uses a firearm if he or she intentionally does any of the following: [¶] 1. Displays the firearm in a menacing manner; [¶] 2. Hits someone with the firearm; [¶] or [¶] 3. Fires the firearm." This instruction is similar to CALJIC No. 17.19.

The instruction regarding the firearm enhancement was apparently drawn from section 1203.06, which distinguishes between a person who " 'used a firearm' " and one who was merely " 'armed with a firearm.' " To be " 'armed with a firearm' " means to "knowingly carry or have available for use a firearm as a means of offense or defense." (§ 1203.06, subd. (b)(3).) In contrast, used a firearm means to "display a firearm in a menacing manner, to intentionally fire it, to intentionally strike or hit a human being with it, or

On September 15, 2015, after less than three hours of deliberation, the jury found Small guilty of second degree robbery and found true the firearm allegation.

Pursuant to section 1118, Small moved for a new trial on the ground that the evidence did not establish that he used the pistol in a menacing manner (the motion). On October 28, 2015, after hearing oral argument on the motion, the trial court denied it. That same day, the trial court sentenced Small to 13 years in state prison. Small timely appealed.

DISCUSSION

With regard to the firearm enhancement, Small makes two arguments. First, he contends that the jury's finding was not supported by substantial evidence, because the

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to use it in any manner that qualifies under Section 12022.5." (§ 1203.06, subd. (b)(2).) Section 12022.5, like the operative provision here (section 12022.53), imposes a sentence enhancement for the use of a firearm in the commission or attempted commission of a felony. California courts have held that the definition of used a firearm in section 1203.06 applies equally to section 12022.5, suggesting that such an application would also apply to section 12022.53. (See *People v. Cory* (1984) 157 Cal.App.3d 1094, 1101–1104.) Although we are unaware of any California court that has expressly held that section 1203.06's definition of "use" a firearm is applicable to section 12022.53 allegations, some courts have come close to doing so. (See, e.g., *People v. Thiessen* (2012) 202 Cal.App.4th 1397, 1404–1405; *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1059.)

enhancement was "based on mere possession/display of a firearm not actual usage." Second, Small argues that he was entitled to a new trial based on the lack of substantial evidence to support the firearm enhancement, because the trial court "did not understand the meaning of the word menacing when making [its] ruling." We are not persuaded by either argument.

I. The jury's firearm finding was supported by substantial evidence

A. STANDARD OF REVIEW

Whether a defendant used a weapon in committing a crime is a question "for the trier of fact to decide." (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1007.) We review such findings only to determine if they are supported by substantial evidence and, thus, "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could" make the challenged finding "beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66; accord, *People v. Johnson* (1980) 26 Cal.3d 557, 578.) We must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Reversal under this standard "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

B. "USE" OF FIREARM IS BROADLY CONSTRUED

Section 12022.53, subdivision (b) provides that any person who, in the commission of a felony, such as robbery "personally *uses* a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply." (Italics added.)

The Legislature created enhancements for defendants who are *armed* with a firearm in the commission of a felony (see § 12022, subd. (a)(1)) and those who personally *use* a firearm in the commission of a felony (see e.g., §§ 12022.5, 12022.53). The penalties for the use of a firearm are greater than that those provided for merely being armed at the time a felony is committed. (Compare § 12022, subds. (a)(1) [one-year enhancement for being armed], and subd. (c) [three, four, or five-year term for being "personally" armed in commission of certain drug offenses] with §§ 12022.5, subd. (a) [three, four, or 10-year term for personally using a firearm] and 12022.53, subd. (b) [10-year enhancement for personally using firearm in commission of listed offenses].) The difference in penalties corresponds to the difference between the danger presented by one merely being *armed*, in which case there is the potential that the firearm will be employed in the commission of a felony, and the *use* of the weapon, in which case the firearm was employed in the commission of the felony. (See *People v. Chambers* (1972) 7 Cal.3d 666, 672 (*Chambers*).)

In *Chambers*, *supra*, 7 Cal.3d 666, our Supreme Court defined "use" for purposes of a firearm enhancement. " 'Use' means, among other things, 'to carry out a purpose or action by means of,' to 'make instrumental to an end or process,' and to 'apply to advantage.' [Citation.] The obvious legislative intent to deter the use of firearms in the commission of the specified felonies requires that 'uses' be broadly construed." (*Id.* at p. 672.)

Two cases—*People v. Granado* (1996) 49 Cal.App.4th 317 (*Granado*) and *People v. Hays* (1983) 147 Cal.App.3d 534 (*Hays*)[4]—illustrate how use should be construed in the context of firearm enhancements.

In *Granado*, *supra*, 49 Cal.App.4th 317, the defendant and a cohort approached two men to demand money. The defendant's partner pulled out a machete, causing one victim to run away with the machete wielder in pursuit. The defendant pulled a gun from his waistband without pointing it at anyone, and demanded money from the remaining victim. The defendant was convicted of attempted robbery of both victims and of personally using a firearm against both. (*Id.* at pp. 320–321.) On appeal, the defendant argued that with regard to the second victim the use enhancement could not apply because merely displaying the gun did not constitute using it. (*Id.* at p. 326.) In rejecting defendant's contention, the *Granado* court observed that the personal

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[4] In both of these cases, the enhancement at issue was section 12022.5, not as here section 12022.53.

gun use statutes are broadly construed in order to deter the increased risk of serious injury that accompanies any deployment of a gun during the commission of a crime. (*Id.* at p. 322.) Although mere possession of a gun is not enough, if the defendant displays a gun or otherwise makes its presence known for the purpose of intimidating the victim or others in order to carry out the underlying crime, there is sufficient facilitative use of the weapon for purposes of the firearm use enhancements. (*Id.* at p. 325.)

In *Hays*, *supra*, 147 Cal.App.3d 534, the defendant, with a sawed-off rifle strapped to his shoulders, crashed through the ceiling of a drugstore he planned to rob. (*Id.* at p. 539.) The gun was in full view of two store employees while the defendant committed the underlying crime. (*Ibid.*) But there was no evidence that "during the robbery" the defendant ever handled the rifle, let alone "display[ed] it in a menacing manner." (*Id.* at pp. 544, 549.) The *Hays* court struck the use enhancement because the defendant only "passively displayed" the rifle. (*Id.* at pp. 548–549.)

Hays, *supra*, 147 Cal.App.3d 534 and *Granado*, *supra*, 49 Cal.App.4th 317 make clear that the dividing line between use and merely armed or in possession of a firearm is determined by whether the defendant's gun-related conduct constitutes an affirmative act in furtherance of a crime or is merely a passive or inadvertent exposure of the gun. "The litmus test for the distinction [between use and armed] is functional: did the defendant take some action with the gun in furtherance of the commission of the crime?

If so the gun was 'used,' and the more severe penalty . . . applies. If, on the other hand, the defendant engaged in no weapons-related conduct, or such conduct was incidental and unrelated to the offense, no 'use' occurred, and only the lesser enhancement . . . applies." (*Granado*, at p. 324, fn. 7, italics omitted.)

"Thus when a defendant deliberately shows a gun, or otherwise makes its presence known, and there is no evidence to suggest any purpose other than intimidating the victim (or others) so as to successfully complete the underlying offense, the jury is entitled to find a facilitative use rather than an incidental or inadvertent exposure. The defense may freely urge the jury not to draw such an inference, but a failure to actually point the gun, or to issue explicit threats of harm, does *not* entitle the defendant to judicial exemption from section [12022.53]." (*Granado*, *supra*, 49 Cal.App.4th at p. 325, italics added.)

C. THERE WAS SUBSTANTIAL EVIDENCE THAT SMALL USED A FIREARM IN COMMITTING THE ROBBERY

Small argues that the testimony at trial established only that Sharp "knew he had a gun, which is mere possession not usage." According to Small, "[a]ll he did was stand on the other side of the counter and flash[] his gun" at Sharp for five seconds. Small's argument misses the point. Under the law, that was more than enough to justify the firearm enhancement.

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or

immediate presence, and against his will, accomplished by means of *force or fear*." (§ 211, italics added; see generally *People v. Gomez* (2008) 43 Cal.4th 249, 254–257; *People v. Anderson* (1966) 64 Cal.2d 633, 638–640.) Here, Sharp knew Small had a gun, because he very deliberately showed it to her. More critically, he showed her the gun in such a way as to intimidate Sharp—that is, Small displayed the gun in order to show her that he had the capability to use deadly force against her if she did not comply with Wilson's demands. And, the jury reasonably found, based on Sharp's testimony about being afraid, that his intimidating display was successful. Moreover, there was no evidence to suggest any purpose in Small's display of the gun other than to intimidate Sharp.

In sum, there was substantial evidence that Small's gun-related conduct was not incidental to the charged crime, but functionally related thereto—that is, the display of the pistol was employed to further the commission of the robbery. Accordingly, we uphold the jury's finding with respect to the firearm enhancement.

II. The trial court did not abuse its discretion when it denied Small a new trial

A. STANDARD OF REVIEW

Section 1181 provides that the trial court may grant a new trial when it finds that the verdict or finding is contrary to the law or the evidence. Section 1181, in relevant part provides: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his

application, grant a new trial . . . [¶] . . . [¶] [w]hen the verdict or finding is contrary to law or evidence."

"In reviewing a motion for a new trial, the trial court must weigh the evidence independently. [Citation.] It is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' " (*People v. Davis* (1995) 10 Cal.4th 463, 523–524.) "A trial court has broad discretion in ruling on a motion for a new trial . . . . ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' " (*Id.* at p. 524; see generally *People v. Robarge* (1953) 41 Cal.2d 628, 633–634.)

B. THE TRIAL COURT PROPERLY DENIED THE MOTION

Here, as discussed above, there was substantial evidence supporting the jury's finding with regard to the firearm allegation—Small purposefully displayed the pistol at the exact moment when Wilson, after jumping over the customer service counter, was demanding that Sharp open the register and give him the money inside. As our Supreme Court has stated, "A firearm use enhancement attaches to an offense, regardless of its nature, if the firearm use aids the defendant in completing one of its essential elements."

(*People v. Masbruch* (1996) 13 Cal.4th 1001, 1012.) Because there was substantial evidence that Small's display aided the robbery by intimidating Sharp, the trial court did not abuse its discretion in denying the motion.[5]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.

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[5] As for Small's assertion that the trial court "did not understand the meaning of the word menacing when making its ruling," there is nothing in the record before us to support this assertion.