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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JESSIE EMILIO ARELLANO et al., Defendants and Appellants.	B278576 (Los Angeles County Super. Ct. No. MA065139)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed in part, reversed and remanded in part.

Law Offices of Allen G. Weinberg and Derek K. Kowata for Defendant and Appellant Calvin R. Kelly.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Amber Lee Griffin.

Cannon & Harris and Donna L. Harris for Defendant and Appellant Jessie Emilio Arellano.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted codefendants Amber Griffin, Calvin Kelly, Jessie Arellano, and Angelina Olsen of robbery and related charges. The information was based on two separate incidents: the carjacking of P.H. by Kelly and Olsen, and the aggravated kidnapping of R.N. by Kelly, Griffin and Arellano. The two incidents were initially filed separately and later were consolidated by the trial court. On appeal, Griffin and Arellano challenge the court's decision to consolidate the cases, and raise claims of insufficiency of the evidence, instructional and evidentiary error, and prosecutorial misconduct.[1] Kelly claims the trial court made various sentencing errors, an argument in which Arellano joins. Finally, all appellants ask that the case be remanded for resentencing under Senate Bill No. 620 dealing with firearm enhancements. We affirm the conviction as modified, and reverse for a new sentencing hearing as to Kelly, Arellano and Griffin.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Crimes Against P.H.*

On December 31, 2014, victim P.H. was at a hotel with defendant Olsen, a prostitute. According to P.H.'s testimony at trial, he and Olsen smoked crystal methamphetamine. Olsen then brought defendant Kelly, known as "Crazy," over to the room. Kelly asked P.H. for his wallet, and pointed a silver, semi-automatic handgun at him. Kelly removed the clip from the gun and showed P.H. it was loaded. Kelly rifled through the wallet but P.H. did not have any money.

Kelly told P.H. he was "too involved" with Olsen and "had to pay" with his car. Olsen and Kelly escorted P.H. to his 1997

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[1] Codefendant Angelina Olsen did not appeal.

Cadillac. Olsen got in the driver's seat, and Kelly, who was still holding the gun, sat behind P.H. Olsen wrote out a bill of sale for P.H.'s car for $1,100; the document stated that she gave P.H. $500 cash for the car. Olsen did not, in fact, pay P.H. anything. Kelly then exited the vehicle and Olsen drove P.H. to a liquor store. She left him there with a bag of his personal property. She drove off with P.H.'s laptop.

Olsen was arrested and interviewed by detectives. She claimed P.H. voluntarily sold her his car. She said Kelly was in the car with her and P.H., and Kelly took P.H.'s laptop.

2. Crimes Against R.N.

Approximately two weeks later, on the afternoon of January 14, 2015, victim R.N. went to a hotel with defendant Griffin, another prostitute. According to his testimony at trial, Griffin told R.N. to wash up in the restroom. She then took his car keys, his ATM card, and his driver's license, and drove off in his car. R.N. waited until morning for Griffin to return. He then started walking in the neighborhood, and happened to see his car parked in front of an unfamiliar house. He knocked on the door and defendant Arellano answered.

R.N. said he was looking for Griffin, and Arellano suggested he check next door. R.N. walked back to his car and stood by it. Kelly (the same defendant involved in the P.H. robbery) then came out of the house and invited R.N. inside. Once inside the house, Kelly pulled out a black revolver, pointed it at R.N., and cocked the gun. Kelly told R.N. to go into the garage. R.N. walked to the garage at gunpoint.

Arellano and Griffin were in the garage, holding automatic handguns. Kelly was wearing brass knuckles and said he had R.N.'s wallet and knew where he lived. Kelly told R.N. that

Griffin and Arellano were going to take him to the bank and withdraw all his money. Arellano and Griffin both hit R.N. with their guns throughout the conversation. Kelly told R.N. that if he did not comply, Kelly would kill him and his family. They then all went out to R.N.'s car.

R.N. sat on the passenger side of the car, and Arellano sat behind him with his gun. Kelly handed Griffin her gun, locked R.N.'s door, and left. Arellano pointed his gun at R.N.'s neck and said they were going to "go to this ATM [and] get the money. If you don't get the money, we gonna kill you." Griffin burned R.N. with a cigarette.

When they arrived at the ATM, Griffin attempted to use R.N.'s ATM card. R.N. tried to open the car door, but Arellano said, "No. You stay right here. If you move, I'll kill you." R.N. then opened the door and screamed for help. Arellano exited the car and ran off. Griffin attempted to drive away but a police car stopped her. She was arrested. Photographs of Griffin, Arellano and R.N. at the bank were introduced at trial.

Griffin told detectives that she saw Arellano hit R.N. Arellano did not want R.N. to get out of the car because he might yell. Someone was carrying a silver and black gun. Griffin had "Crazy" tattooed on her chest, which was Kelly's nickname. One of the detectives testified that the tattoo represented Griffin's loyalty to her pimp.

Arellano and Kelly were arrested the following month. The police searched Kelly's room and discovered metal knuckles and ammunition. The ammunition was for a revolver. Kelly told detectives he had heard that Griffin and Arellano had tied up a man after he had tried to shortchange her for sex. She told the man she wanted his car and then "walked him in the bank."

Upon further questioning, Kelly acknowledged that Griffin had taken the man's car to the house Kelly was staying in. She told Kelly, "I got this motherfucker's car, I got his card, and I left this motherfucker at the room." Arellano was at the house as well. Kelly saw the man standing outside by his car and invited him inside to see Griffin. Kelly then left the vicinity and when he returned, he saw that Griffin and Arellano had "roughed up [R.N.] . . . the boy looked scared." Someone had a revolver. Kelly admitted that the ammunition found in his room belonged to him.

3. *The Court Proceedings*

Kelly and Olsen were charged with carjacking (Pen. Code, § 215, subd. (a); count 8) and second degree robbery (Pen. Code, § 211; count 9) for the December 31, 2014 incident involving P.H.[2] They were also alleged to have personally used a firearm within the meaning of section 12022.53, subdivision (b) in the commission of both crimes. They pled not guilty.

Griffin, Arellano and Kelly were charged with kidnapping to commit robbery (§ 209, subd. (b)(1); count 1) and assault with a firearm (§ 245, subds. (b) & (a)(2); counts 2 and 7) for the January 14, 2015 incident involving R.N. Griffin was also charged with driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a)(3); count 3), and Kelly with possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); count 4) and unlawful possession of ammunition (Pen. Code, § 30305, subd. (a)(1); counts 5 & 6). All three defendants were alleged to have personally used a firearm in the commission of the kidnapping (Pen. Code, § 12022.53, subd. (b)) and the assault with a firearm (Pen. Code, § 12022.5). Kelly was also alleged to

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[2] All further statutory references are to the Penal Code unless otherwise stated.

have suffered four prior prison terms (Pen. Code, § 667.5, subd. (b)). Griffin, Arellano and Kelly pled not guilty.

The trial court consolidated the cases, and the trial was heard by dual juries: the "orange" jury for Kelly, and the "green" jury for Griffin, Arellano and Olsen. The juries found defendants guilty of all charges and the firearm enhancements true.

The trial court sentenced Griffin to a total of 18 years, 4 months to life: 7 years to life for the R.N. kidnapping plus 10 years for the firearm enhancement added to the low term of 1 year 4 months for the unlawful taking of a vehicle conviction. The sentence for assault with a firearm was stayed pursuant to section 654.

Arellano was sentenced to a total of 17 years to life: 7 years to life for the R.N. kidnapping plus 10 years for the firearm enhancement. The sentence for assault with a firearm was stayed pursuant to section 654.

Kelly was sentenced to a total of 45 years, 364 days to life: 7 years to life for the R.N. kidnapping plus 10 years for the firearm enhancement; 9 years for the P.H. carjacking plus 10 years for the firearm enhancement; 8 months for the possession of a firearm conviction (one-third the midterm of three years); 1 year for the P.H. robbery (one-third the midterm of three years) plus 3 years, 4 months for the firearm enhancement; 4 years for the four prior prison term enhancements; and 364 days for one of the possession of ammunition convictions. Kelly was sentenced to a concurrent term of 364 days on the other possession of ammunition count. The assault with a firearm sentence was stayed pursuant to section 654.

Griffin, Arellano and Kelly timely appealed.

DISCUSSION

1. *Calvin Kelly*

Kelly raises three primary arguments on appeal.[3] All relate to sentencing errors. He does not join in any of the non-sentencing arguments by the others.

Kelly contends that (1) the trial court erred in finding that he had suffered four prison priors under section 667.5, subdivision (b), (2) his robbery sentence should have been stayed under section 654 because it was incidental to the carjacking, and (3) the abstract of judgment must be corrected. Respondent concedes that the court did not conduct a trial on the section 667.5 subdivision (b) enhancements, and agrees that the case must be remanded "for a proper determination" on this issue.

As to the section 654 argument, respondent contends that the trial court properly imposed consecutive sentences for the robbery and carjacking because they involved separate intents and objectives. Lastly, respondent concedes that the abstract of judgment must be corrected.

A. *The Trial Court Erred in Imposing Prior Prison Term Enhancements*

Following the jury verdict, the court stated that Kelly had previously waived his right to a jury trial on his prior convictions, and informed him that he could admit them or have a court trial. Kelly chose a court trial, however, no trial was conducted on the priors nor did Kelly later admit them. At the sentencing hearing, the court imposed four years, one year "for each of the priors found true, within the meaning of [] section 667.5(b)."

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[3] Kelly also contends remand is required for the exercise of the trial court's discretion to strike the firearm enhancements. We address this contention later on.

Kelly now argues that he never waived his right to a jury trial on the priors, no trial was conducted on his previous convictions, and he never admitted the priors. Respondent concedes these points. However, while Kelly argues that the true findings on prior prison terms must be stricken and the enhancements stricken, respondent contends remand is required.

Section 667.5, subdivision (b) provides that under certain circumstances when the current offense is a felony, the trial court "shall impose a one-year term for each prior separate prison term . . . imposed . . . for any felony." The "question of whether or not the defendant has suffered the prior conviction shall be tried by the jury . . . or by the court if the jury is waived." (§ 1025, subd. (b).) " 'Imposition of a sentence enhancement under . . . section 667.5[(b)] requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.' " (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.)

As there was no evidence proving the elements of the section 667.5, subdivision (b) allegations, the true finding on those allegations must be reversed and the enhancements imposed thereon must be stricken. Because state and federal double jeopardy protections do not bar retrial of a prior conviction allegation (*People v. Monge* (1997) 16 Cal.4th 826, 845), the matter is remanded for a trial of these enhancements.

B. *The Court Correctly Imposed Consecutive Terms for the Robbery and Carjacking Counts*

Kelly was convicted of carjacking (§ 215, subd. (a)) and robbery (§ 211) of victim P.H. on December 31, 2014.[4] Kelly's sentence included nine years for the carjacking plus a consecutive midterm of one year for the robbery. He argues that the robbery sentence should have been stayed under section 654 because he committed the crimes with the same intent and objective—to steal P.H.'s car and property.

Section 654 provides, in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (*Id.,* subd. (a).)

"Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a ' "single physical act." ' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act-i.e., a course of conduct-do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents. [Citations.]" (*People v. Corpening* (2016) 2 Cal.5th 307,

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[4] As earlier observed, Kelly's cohort in the crimes against P.H. was Olsen, a codefendant at trial but not involved in the present appeal.

311–312.) We review for substantial evidence the trial court's determination that a defendant had two criminal objectives under 654. (*People v. Capistrano* (2014) 59 Cal.4th 830, 887.)

On appeal Kelly acknowledges that the evidence showed that he robbed P.H. both in the hotel room when he pointed a gun at him and took his wallet, and later on when Kelly told P.H. he was going to take his car and Olsen drove off with the car and laptop. However, Kelly maintains that the prosecutor's theory of the case was that the robbery count was based solely on the taking of the laptop, and not the wallet, because the prosecutor said in closing argument that "Count 9 [the robbery], is robbery of [P.H.] for taking his laptop because he took not only his car, they took his laptop, as well." Respondent does not address the effect of the prosecutor's decision to ground count 9 on the taking of the laptop or Kelly's section 654 argument on the point. Respondent argues both that (1) the taking of the wallet involved a separate intent and objective than the taking of the laptop, and (2) Kelly "forcefully took [P.H.'s] computer" when Kelly "put it in the trunk of his car before carjacking the car." We agree the robbery was not predicated on the admittedly separate act of taking and then returning the wallet.

For purposes of section 654, the trial court is required to consider the acts upon which the prosecutor based the prosecution of each charge. (See *People v. McKinzie* (2012) 54 Cal.4th 1302, 1368–1369.) Thus, "where there is a basis for identifying the specific factual basis for a verdict, a trial court cannot find otherwise in applying section 654." (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1339.) Here, the prosecution argued to the jury that Olsen and Kelly forced P.H. "to sign over the title to the car . . . and then . . . [Kelly] takes Mr. P.H.'s

laptop." Because the prosecutor elected to ground the prosecution of the robbery charge on the specific act of taking the laptop *after* P.H. was forced to sign over the bill of sale, we must analyze the applicability of section 654 with respect to that act, and not the taking of the wallet or the initial loading of the laptop into the car.

This was substantial evidence that the taking of the laptop and car were accomplished by separate acts: Olsen took the laptop when she dropped P.H. off and chose to only give him some of his belongings but not the laptop; Olsen took the car when she drove off with it. This was also substantial evidence that each act involved a separate objective: the objective of the robbery was to steal P.H.'s laptop, and the objective of the carjacking was to steal the car, an objective actually formulated much earlier in the hotel room when Kelly told P.H. that the car was the cost of P.H. spending too much time with Olsen. The existence of a course of conduct involving independent objectives was sufficient to justify multiple punishments.

C. *The Abstract of Judgment Must Be Corrected*

Kelly argues, respondent concedes, and we agree that the abstract of judgment incorrectly indicates that the section 12022.5(a)/(d) firearm enhancement on count 4 (§ 29800, subd. (a)(1)) was stayed, when it should indicate that the enhancement was stayed on count 7 (§ 245, subd. (a)(2)). In addition, the firearm enhancement on count 9 is listed as 12022.5, subdivision (a) when it should refer to 12022.53, subdivision (b).

2. *Amber Griffin and Jessie Arellano*

Griffin and Arellano raise two arguments jointly on appeal. They contend that (1) the trial court erred in consolidating the

P.H. case with the R.N. case, and (2) the prosecutor committed prejudicial misconduct. We disagree.[5]

A. *The Trial Court Did Not Err in Consolidating the Cases*

The P.H. and R.N. cases were initially filed separately. The prosecutor moved to consolidate them on the grounds that they involved overlapping evidence. Defendants objected on state and federal due process grounds. The trial court granted the motion, finding that: the "majority of the charges are of the same class—taking of property from other persons . . . with the use of a firearm"; "the factual scenario[s] appear to be quite similar . . . a female engaging an alleged victim in a hotel setting, and then Mr. Kelly making an appearance with the use of a firearm, and then the taking of property is alleged to have occurred"; and "the one commonality was the actual display of the firearm to the extent to ensure that the alleged victim was aware that the respective firearms were loaded."

" '[I]f two or more indictments or informations are filed in cases where the charges may be charged in separate counts in one indictment or information *the court may order them to be consolidated*.' " (*People v. Van De Wouwer* (1949) 91 Cal.App.2d 633, 639; § 954.) Charges may be joined when the accusatory pleading alleges "two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses." (§ 954.)

The following factors guide the court's determination of whether the trial court abused its discretion in denying a motion

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[5] Although Kelly participated in the R.N. kidnapping and related crimes, he does not join in the non-sentencing arguments made by Griffin and Arellano.

to consolidate. (See *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939.) "The pertinent factors are these: (1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case." (*People v. Marshall* (1997) 15 Cal.4th 1, 27–28.) "A determination that the evidence was cross-admissible ordinarily dispels any inference of prejudice." (*Id.* at p. 28.)

Here, some of the evidence of the crimes against R.N. and P.H. was cross-admissible as a common plan. (See Evid., § 1101, subd. (b).) Griffin and Olsen—both prostitutes who worked for Kelly—acted as lures for the victim "Johns," Kelly brandished a loaded firearm to induce the victims' compliance, and the victims were then robbed. When the evidence is cross-admissible, "that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*People v. Soper* (2009) 45 Cal.4th 759, 775.) Here, in addition, none of the charges were more likely to inflame the jury against the defendants given the similarity of the two cases. Both cases were strong—supported both by the victims' detailed testimony and incriminating statements by Griffin, Kelly, and Olsen. Lastly, the death penalty was not at issue. Accordingly, the trial court did not err in consolidating the cases.

B. *Prosecutorial Misconduct*

Griffin and Arellano contend that the prosecutor committed misconduct in closing argument. Arellano argues that the prosecutor shifted the burden of proof to the defense, misstated the law and facts, and suggested he had personal knowledge of facts outside the record. Griffin argues that the prosecutor misrepresented the statements she made to detectives. Griffin and Arellano have forfeited these arguments by failing to object. (*People v. Osband* (1996) 13 Cal.4th 622, 696.) We also find no prosecutorial misconduct.

" ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

i. *Shifting the Burden of Proof*

Arellano argues the prosecutor twice tried to shift the burden of proof, first, by arguing that "either what [defendants] said happened is how it happened, or what the victim said happened is what happened," and, second, by suggesting defendants had to come up with an explanation for the robberies. We address each argument in turn.

Arellano first argues that the prosecutor attempted to shift the burden of proof by telling the jury they had to choose between believing the victims' testimony or Griffin's and Olsen's accounts of events, "there is no sort of third option." According to Arellano, this implied that the defendants had the burden of producing evidence to prove their innocence. Arellano relies on *People v. Hill* (1998) 17 Cal.4th 800 (*Hill*) in support of this claim.

In *Hill*, the prosecutor addressed the concept of reasonable doubt in her rebuttal argument, stating "There has to be some evidence on which to base a doubt." (*Hill*, *supra*, 17 Cal.4th at p. 831.) The court concluded the prosecutor "committed misconduct insofar as her statements could reasonably be interpreted as suggesting to the jury she did not have the burden of proving every element of the crimes charged beyond a reasonable doubt. [Citations.]" (*Ibid.*)

Here, by contrast, the prosecutor did not suggest defendants had to produce "some evidence" in their defense. Rather, the prosecutor's comments are reasonably interpreted to mean the jury had to consider the evidence of both sides, and could not speculate that "it happened some other way."

Arellano next challenges the prosecutor's attempt to discredit the defense theory that P.H. owed Kelly and Olsen money for drugs. The prosecutor stated in closing, "There isn't any drug debt. They want that to be true because otherwise there's no explanation for why did the defendants take all this property. . . . They need to come up with an explanation for that so they try and make it about, oh, they owe all this money." Arellano contends that these comments suggested it was defendants' burden to prove their innocence. In fact, it is reasonably likely these comments were understood by the jury to

mean that Kelly and Olsen's account of what happened to P.H.—that they were simply collecting on a debt—was a meager attempt to fabricate an explanation for how these defendants ended up with P.H.'s property.

ii. *Privy to Facts Outside the Record*

Arellano also argues the prosecutor improperly suggested he was privy to Arellano's wife's account of the events. The prosecutor stated in closing that Arellano "call[ed] his wife to pick him up . . . I can't call her as [] a witness, obviously. They're married." Arellano argues that the prosecutor's statements suggested the wife "would have provided evidence against [Arellano] had she been *allowed* to testify." This misstates the marital privilege. Rather, a married individual is "allowed" to testify against her spouse, but may claim the privilege not to be called as an adverse witness when her spouse is a party to a proceeding. (Evid. Code, § 971.) The prosecutor statement suggested only that Arellano's wife was shielded by the privilege, not that the prosecutor had knowledge of facts outside the record. Any minor misstatement of the law was harmless.

iii. *Misstatement of Law*

Griffin and Arellano were convicted of assault with a semiautomatic firearm (§ 245, subd. (b)) with respect to R.N. They now argue that the prosecutor's comment that this charge was an "easy guilty" misled the jury into believing that "mere possession of a gun" was sufficient to establish guilt. (See *Hill*, *supra*, 17 Cal.4th at p. 829 [it is improper for a prosecutor to misstate the law].) However, the prosecutor's comments in context correctly informed the jury that that the People had to show "one, the defendant assaulted someone," and "two, they did

it . . . [with] the semiautomatic." This was not a misstatement of the law.

iv. *Vouching for Prosecution Witnesses*

Arellano argues that the prosecutor improperly vouched for the credibility of the prosecution witnesses when he said that unlike in television dramas where "there's something that is a very close call," "trials are like what you saw here, where it's very clear what happened, who is involved . . . . In fact, we shouldn't be charging people unless it's very clear what happened and who was involved." Arellano contends that the prosecutor's comments suggested "that the case against [him] would not have been filed unless it was clear [he] was guilty."

The prosecutor's comments did not vouch for any witness's credibility. Rather, viewed in the context of the entire argument, the prosecutor was seeking to highlight the abundant evidence against defendants as compared with the stereotypical fictional drama. (See *Samayoa*, *supra*, 15 Cal.4th at p. 841 [prosecutor's statements must be viewed in the context of "counsel's entire argument"].) This was not improper.

v. *Mischaracterization of Evidence*

Arellano argues the prosecutor improperly stated that R.N. testified that Arellano had brass knuckles, and implied R.N. was injured by Arellano's use of the brass knuckles on him. The prosecutor stated that "Arellano has metal knuckles . . . and [h]is black semi-automatic, is what [R.N.] said. . . . I think [R.N.] on the stand said, yeah, Kelly gave the brass knuckles to Arellano. They rough him up. . . ." In rebuttal, the prosecutor again stated that "Arellano had metal knuckles on."

Arellano is correct that R.N. did not testify that Arellano was wearing brass knuckles. Rather, R.N. testified that Kelly

was wearing brass knuckles, and when the police later searched Kelly's room they found brass knuckles. However, there was other evidence Arellano possessed brass knuckles: Kelly stated that Arellano gave him the brass knuckles.

The prosecutor's misstatements as to who was wearing the brass knuckles when R.N. was assaulted do not establish a reasonable likelihood the jury misapplied the statement in an erroneous manner. Arellano was charged with kidnapping and assault with a firearm, and there was substantial evidence he used a firearm to intimidate R.N. into withdrawing money from the ATM: R.N. testified Arellano hit him with a firearm and held the gun to his neck while threatening to kill him if he did not comply with the robbery scheme. That the prosecutor misstated Arellano was wearing brass knuckles was a minor detail in that scheme, especially because no crime depended on whether the assailant was wearing brass knuckles.

Arellano also contends the prosecutor misrepresented the evidence in closing argument by stating that "[t]hey basically all admit, yeah, kidnapping, robbery, carjacking, guns used. It's just every one of them says . . . all the other people did it." Because Arellano did not testify and did not make statements to the detectives, he argues this misstated the evidence. However, the prosecutor's statements read in context of his entire argument were not misleading.

The prosecutor told the jury in closing that detectives had recorded interviews with Olsen, Kelly and Griffin. Olsen "admits that P.H. was carjacked at gunpoint . . . she just says she wasn't part of it"; Kelly "admits the kidnap, admits the robbery, and says, no, it wasn't me"; and Griffin "admitted that R.N. was

robbed and kidnapped." The prosecutor then summarized this evidence when he said "they basically all admit" the crimes.

In rebuttal, the prosecutor again stated, "each of them has basically said, I was there, but I didn't have anything to do with it." The prosecutor then summarized the evidence at trial with respect to each defendant. As to Arellano, the prosecutor noted that R.N. identified Arellano as one of the perpetrators; Griffin and Kelly implicated Arellano; Arellano fled the scene when R.N. started yelling; and Arellano called his wife at the time, asking to be picked up right away. The prosecutor did not refer to any statements Arellano made.

These arguments did not misinform the jury that Arellano had testified or made incriminating statements to the police. When the prosecutor said that defendants "basically all admit[ted]" the crimes had occurred, it was reasonable to infer he was referring Olsen's, Kelly's, and Griffin's statements.

As for Griffin, she argues that the evidence did not support the prosecutor's statement that she had admitted the kidnapping and robbery, or the presence of a gun. Griffin told detectives she saw a "silver and black" gun that the "Mexican dude" "drew [] out in front of everybody." She also said the Mexican man, "Chico," hit R.N., and that Chico did not want R.N. to exit the car because R.N. "was gonna probably, like, yell." Arellano was referred to as both "Chico" and "Chuco." It was reasonable to infer from these statements that Griffin admitted that Arellano had hit R.N. and had also drawn a gun and restrained R.N. from exiting the car at the ATM. This supported the prosecutor's statements she had admitted the kidnapping, robbery, and gun allegation.

Arellano contends the prosecutor also erroneously suggested R.N.'s testimony about firearms was supported by an

exhibit. R.N. testified that Arellano had a "dark in color," "medium sized," ".380," "automatic" "handgun." R.N. also testified that Griffin had a "little .380," "chrome," "automatic weapon." The prosecution submitted into evidence a demonstrative exhibit depicting both a semi-automatic and a revolver. In closing, the prosecutor said that R.N. testified that "both of them pointed guns at him. We saw that picture. And he said, yeah, it was a semi-automatic like the gun on the left. Right. That's the semi-automatic. The one on the right is a revolver. And he said it was like this one." The prosecutor's statements properly referred the jury to the demonstrative exhibit to explain R.N.'s testimony.

3. *Substantial Evidence of Griffin's Assault with a Firearm and Use of a Firearm*

Griffin argues there was no substantial evidence supporting the assault conviction or firearm use enhancement. We disagree with both contentions.

Griffin first argues there was insufficient evidence to support her conviction of assault with a semi-automatic firearm because no witness testified that she pointed a gun at R.N. The elements of assault with a semi-automatic firearm are (1) a person was assaulted; and (2) the assault was committed with a semiautomatic firearm. (§ 245, subd. (b).) " 'An assault is an unlawful attempt coupled with a present ability, to commit a violent injury on the person of another.' [Citation.]" (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.)

Griffin is correct that R.N. did not testify that she pointed a gun at him. However, R.N. did testify that Griffin hit him with a

semi-automatic handgun.[6] This was sufficient to support a conviction for assault with a firearm. (See *Raviart*, *supra*, 93 Cal.App.4th at p. 263 ["it is not necessary to actually point the gun directly at the other person" to commit the crime of assault with a firearm].)

In response, Griffin argues that the prosecution did not pursue the theory that Griffin had assaulted R.N. by hitting him, but had argued that Griffin had pointed the gun at him. "Ordinarily, for purposes of substantial evidence review, 'the prosecutor's argument is not evidence and the theories suggested are not the exclusive theories that may be considered by the jury.' [Citation.] . . . [T]here has to be an exception, however, when the constitutional right to a unanimous jury is implicated. To protect this right, 'if one criminal act is charged, but the evidence tends to show the commission of more than one such act, "*either* the prosecution must elect the specific act relied upon to prove the

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[6] The relevant testimony was as follows: [R.N.]: ". . . I was getting slapped, man, and hit with pistols throughout the whole time.

[Prosecution]: Let me ask you, who slapped you or hit you?

[R.N.]: The Mexican guy and the girl.

[Prosecution]: They both hit you?

[R.N.]: Yeah. . . . I don't think the black guy hit me. . . . I think he probably slapped me at first but after he made me sit on the little stool, the bucket, I don't think he hit me no more. He was just the instructor. Yeah.

[Prosecution]: And you said you got hit with both of the other guns?

[R.N.]: Uh-huh.

[Prosecution]: Yes?

[R.N.]: Yes, sir."

charge to the jury, *or* the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." [Citations.]' [Citation.]" (*People v. Brown* (2017) 11 Cal.App.5th 332, 341.) Here, the general rule applies that the prosecution's suggested theory was not exclusive. The evidence did not tend to show "the commission of more than one such act": rather, the only evidence that Griffin had assaulted R.N. with a firearm came from R.N.'s testimony that she hit him with the handgun. (*Ibid.*)

Griffin next argues there was insufficient evidence she personally used a firearm in the kidnapping for robbery. Section 12022.53, subdivision (b) provides for an enhancement of 10 years for "any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm . . . ." "The evidence is sufficient to prove the use of a firearm where there is some type of display of the weapon, coupled with a threat to use it which produces fear of harm in the victim." (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 421.)

Griffin contends that her use of a gun to beat R.N. was separate from the kidnapping because the kidnapping only began when Kelly forced R.N. from the garage and into R.N.'s car. We disagree. Griffin and Arellano beat R.N. with their guns in the garage *after* Kelly had walked R.N. to the garage at gunpoint and *while* Arellano threatened to kill R.N. if he did not withdraw money from his ATM. Thus, the violence and threats in the garage occurred after R.N. had been hustled into the garage at gunpoint—which was sufficient to support a kidnapping charge—and were expressly intended to induce R.N. to go to the ATM. (See *People v. Shadden* (2001) 93 Cal.App.4th 164, 168–170 [movement of the victim nine feet from front of the store to the

back room was sufficient for aggravated kidnapping].) Accordingly, the evidence was sufficient to prove that Griffin personally used a firearm during the kidnapping for robbery within the meaning of section 12022.53, subdivision (b).

4. *The Trial Court Properly Instructed the Jury*

Griffin contends the trial court should have instructed the jury that codefendant Olsen's statements to the detectives applied only to her. The trial court did so. After Olsen's statement was played for the jury, the trial court informed the jury that "the evidence of that conversation or interview is admissible only as to Ms. Olsen, none of the other defendants." In addition, during jury instructions, the court instructed the jury that "certain evidence was admitted for a limited purpose" and not to "consider this evidence for any purpose except for the limited purpose for which it was admitted." (CALJIC No. 2.09.) Accordingly, the jury was properly instructed that Olsen's statement could not be used against the other defendants.

Griffin also argues the trial court's use of CALJIC No. 17.19 was insufficient as to the firearm enhancement, and the trial court should have also instructed the jury with CALJIC No. 17.23.[7] Because Griffin did not request that the jury be instructed with CALJIC No. 17.23, she has forfeited this issue. (See *People v. Farnam* (2002) 28 Cal.4th 107, 165.) CALJIC No. 17.23 also did not apply here. That instruction applies to situations where a defendant is alleged to have been "personally

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[7] The trial court gave CALJIC No. 17.19 which instructed the jury that "the term 'personally used a firearm' . . . means that the defendant must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it."

armed with a firearm" or for use in conjunction with a section 1203.06 allegation. (CALJIC No. 17.23; § 1203.6 [providing sentencing consequences when a person convicted of a specified felony "is convicted of a subsequent felony and [] was *personally armed with a firearm*"].) CALJIC No. 17.23 does not apply when a defendant is alleged to have a personally used a firearm under section 12022.53, subdivision (b) as was the case here.

4. *The Court Properly Admitted Kelly's Actions of Showing Victims That His Gun Was Loaded*

Griffin contends the trial court improperly admitted evidence that Kelly showed the victims his firearm was loaded as part of a common plan or scheme under Evidence Code section 1101, subdivision (b).

Character evidence is inadmissible under Evidence Code section 1101 "*when* offered to prove *his or her* conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Griffin's objection under this statute concerns evidence of a specific instance of *Kelly's* conduct. She does not have standing to object that evidence of Kelly's conduct was inadmissible "*when* offered to prove *his*" conduct. (*Ibid.*)

Griffin also argues the evidence was inadmissible under Evidence Code section 352. We review for abuse of discretion a trial court's decision that evidence's "probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." (Evid. Code, § 352; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) Here, the trial court correctly concluded that evidence that Kelly had shown P.H. his gun was loaded with bullets was similar conduct to Kelly's cocking back of the revolver when he told R.N. to go to the garage. As cocking the revolver could be

interpreted as an indication the gun was loaded, it was analogous to Kelly showing P.H. there was ammunition in his firearm. Therefore, it was probative to the prosecution's theory that Kelly engaged in a common scheme when he robbed the victims. The evidence was also not unduly prejudicial to Griffin; it was not more inflammatory than other admitted evidence and did not directly implicate her.

Griffin also contends the error was "compounded" when the court did not instruct the jury that Kelly's conduct "applied only to Kelly and the Kelly/Olsen case." It appears that Griffin is arguing the court should have given a limiting instruction as to this evidence. In a "joint criminal trial, if admission of evidence of significant probative value to one defendant would be substantially prejudicial to a codefendant the remedy is not exclusion of the evidence but rather a limiting instruction or severance. [Citation.]" (*Greenberger, supra,* 58 Cal.App.4th at pp. 351–352.) Griffin did not request a limiting instruction and has, thus, forfeited this claim. (*People v. Chism* (2014) 58 Cal.4th 1266, 1293.)

5. *There Was No Cumulative Error*

Griffin argues the cumulative effect of the trial court's and prosecutor's errors compels reversal. We have concluded that Griffin's claims of error were forfeited and/or meritless. We therefore conclude there is no cumulative prejudicial effect of error. (*People v. Linton* (2013) 56 Cal.4th 1146, 1197.)

6. *Senate Bill No. 620 Requires Remand for All Three Defendants*

Kelly's, Griffin's and Arellano's sentences all included firearm enhancements. Kelly's approximately 46-year sentence included two firearm enhancements under section 12022.53,

subdivision (b): two 10-year enhancements added to the kidnapping and carjacking charges, and one 3-years-4-months enhancement (one-third of 10 years) added to the robbery charge. Kelly's sentence on the assault with a firearm charge (which was stayed under § 654) included an enhancement of 10 years under section 12022.5, subdivisions (a)/(d). Griffin and Arellano were both sentenced 17 years to life on the kidnapping charge which included a mandatory 10 years under section 12022.53, subdivision (b). They were sentenced 19 years on the assault with a firearm charge (those sentences were stayed pursuant to § 654) which included the high term of 10 years under section 12022.5, subdivision (a).

Appellants now contend in supplemental briefing that legislation effective January 1, 2018, ending the statutory prohibition on a trial court's ability to strike a firearm enhancement applies and requires a remand for a new sentencing hearing. We agree that remand is required for the exercise of the trial court's discretion to decide whether to strike the firearm enhancements under the new legislation.

At the time of appellants' sentencing (on October 21, 2016), section 12022.53 specified that "[n]otwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.53, subd. (h).) Section 12022.5, subdivision (c), likewise specified that "[n]otwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

Effective January 1, 2018, as a result of the enactment of Senate Bill No. 620, the prohibition against striking a firearm

enhancement was eliminated. Now, section 12022.53 provides that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).) Section 12022.5, subdivision (c) now includes the same language.

The parties filed supplemental briefing on the applicability of amended sections 12022.53 and 12022.5 to defendants. Defendants argue that the new legislation applies to all cases not yet final where a firearm enhancement was imposed at sentencing. Respondent concedes and we agree that the amendments to sections 12022.53 and 12022.5 apply retroactively to nonfinal judgments.

This case is not yet final and Senate Bill No. 620 applies to defendants. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.) Appellants argue that we should remand the case to permit the trial court to exercise the discretion it now has to strike the firearm enhancements. Respondent contends that under *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*) remand is unwarranted because there is no reasonable possibility the trial court would "exercise its discretion to lessen the sentence[s]." (*Id.* at p. 1896.)

In *Gutierrez*, the trial court sentenced the defendant to the maximum possible sentence, which included an enhancement for a prior strike conviction and two other discretionary enhancements. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) While the defendant's appeal was pending, the Supreme Court

held that trial courts have discretion to strike prior convictions under the Three Strikes law. The Court of Appeal, however, declined to remand for resentencing. The court reasoned it was obvious the trial court would not exercise its newfound discretion given it increased the defendant's sentence beyond what it believed was required by the Three Strikes law and stated the maximum sentence was appropriate. (*Ibid.*)

We conclude that *Gutierrez* does not apply here. In *Gutierrez*, the trial court's actions demonstrated it would not lessen the sentence even if it had discretion to do so. Here, the court did not foreclose the possibility of some leniency. Respondent does not cite to any comments by the trial court suggesting that the maximum sentence was appropriate. Rather, respondent contends that because the court "recogniz[ed] the aggravating factors" in each case, remand would be futile.

In fact, in Griffin's case, the trial court sentenced her to the low term for the joyriding conviction. Although all three defendants also received high terms on certain counts, the court did not indicate how it balanced any mitigating or aggravating factors but simply pronounced the sentences. Based on the court's actions at the sentencing hearing, we do not believe the court foreclosed the exercise of the discretion afforded by Senate Bill No. 620. Under the new legislation, the case must be remanded to give the court an opportunity to exercise its discretion.

In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subdivision (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) "In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the

effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).) If the trial court exercises its discretion to strike only the punishment, the gun enhancement will remain in the defendant's criminal record, and may affect the award of custody credits. Specifically, subdivision (c)(22) of section 667.5 provides that a violent felony is "[a]ny violation of Section 12022.53," and subdivision (c)(8) of section 667.5 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 . . . Section 12022.5 . . . ." As a violent felony, the defendant would be entitled to a maximum of 15 percent conduct credits. (§ 2933.1, subd. (a).)

DISPOSITION

As to Kelly, the true findings as to the four prior prison terms are reversed, the four one-year enhancements are stricken, and the matter remanded for retrial of the prior conviction allegations. The abstract of judgment is modified to reflect that (1) the stayed 12022.5(a)/(d) firearm enhancement is on count 7, not count 4, and (2) the firearm enhancement on count 9 is not section 12022.5, subdivision (a) but section 12022.53, subdivision (b).

As to all three defendants, the trial court's imposition of firearm enhancements under section 12022.53, subdivision (b) and section 12022.5, subdivision (a) is reversed and the matter remanded for the trial court to exercise its discretion under section 12022.53, subdivision (h) and section 12022.5,

subdivision (c). If appropriate following exercise of that discretion, the court shall then resentence appellants accordingly.

Copies of the amended abstracts of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.