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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROMAINE LEPAUL NEVELS,

Defendant and Appellant.

A141281

(Contra Costa County
Super. Ct. No. 51316314)

Defendant Romaine LePaul Nevels was sentenced to serve 23 years in state prison after a jury convicted him of attempted voluntary manslaughter and other offenses related to an attack on his girlfriend. On appeal, he contends that certain prior conviction enhancements were not alleged by the prosecutor or found true by the court. He also argues that the court erred in failing to impose a term for enhancements that were stayed pursuant to Penal Code¹ section 654, and he claims that various errors in the abstract of judgment must be corrected. Although we reject the attack on the prior conviction enhancements, we agree with Nevels that the matter must be remanded to impose terms for the stayed enhancements, and we also agree that the abstract of judgment must be corrected in certain respects.

PROCEDURAL BACKGROUND

Because the issues raised on appeal solely concern sentencing issues, it is unnecessary to summarize the facts of the underlying offenses. We simply note that the

¹All further statutory references are to the Penal Code unless otherwise specified.

incident giving rise to this appeal took place in April 2013 and involved a domestic dispute in which Nevels viciously assaulted his girlfriend, Nakenia Peters.

In a 10-count information filed on August 16, 2013, the Contra Costa County District Attorney charged Nevels with premeditated attempted murder (§§ 187, subd. (a), 664, subd. (a); count one); inflicting corporal injury on a cohabitant, with an allegation that Nevels had suffered a prior assault conviction within the prior seven years (§ 273.5, subds. (a), (f); counts two and seven); assault with a deadly weapon (§ 245, subd. (a)(1); counts three and eight); assault by force likely to produce great bodily injury (§ 245, subd. (a)(4); counts four and nine); making criminal threats (§ 422; counts five and six); and reckless driving while evading a police officer (Veh. Code, § 2800.2, subd. (a); count ten). As to counts one through four, the district attorney alleged that Nevels had inflicted great bodily injury under circumstances of domestic violence. (§ 12022.7, subd. (e).) As to counts one, two, four, and six, the district attorney alleged that Nevels had used a deadly or dangerous weapon (a belt) in the commission of the offense. (§ 12022, subd. (b)(1).)

The information contained a number of enhancements premised on prior convictions. The district attorney alleged that Nevels had suffered two prior strike convictions within the meaning of California's Three Strikes Law (§§ 667, subds. (b)–(i), 1170.12). It was further alleged that Nevels had been convicted of two prior serious felonies within the meaning of section 667, subdivision (a), for purposes of imposing a five-year enhancement. Finally, the district attorney alleged that Nevels had served a prior prison term for a violent felony within the meaning of section 667.5, subdivision (b). At the outset of the jury trial, the prosecutor amended the information to allege one prior strike (§§ 667, subds. (b)–(i), 1170.12) and one prior serious felony conviction (§ 667, subd. (a)).

A jury returned a verdict finding Nevels guilty in count one of the lesser included offense of attempted voluntary manslaughter. (§§ 192, subd. (a), 664, subd. (a).) The jury found Nevels guilty of all the remaining counts and enhancements as charged in the information. Nevels waived his right to a jury trial on the prior conviction allegations.

The trial court found the prior conviction allegations true in a separate court trial. The court imposed an aggregate sentence of 23 years, composed of the upper term of five years, six months for attempted voluntary manslaughter (§§ 193, subd. (a), 664, subd. (a)), doubled to 11 years because of the prior strike (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), plus five years for the great bodily injury enhancement (§ 12022.7, subd. (e)), one year for the personal use of a deadly weapon (§ 12022, subd. (b)(1)), five years for suffering a prior serious felony conviction (§ 667, subd. (a)(1)), and one year for serving a prior prison term for a violent felony (§ 667.5, subd. (b)). The court imposed a two-year concurrent term for the reckless driving conviction in count ten. (Veh. Code, § 2800.2, subd. (a).) Pursuant to section 654, the court imposed but stayed two-year midterm sentences for counts five and six (§ 422), three-year midterm sentences for counts four and nine (§ 245, subd. (a)(4)), and four-year midterm sentences for counts two, three, seven, and eight (§§ 245, subd. (a)(1), 273.5, subd. (a)).

Roughly one month after initially pronouncing sentence, the court recalled the sentence, clarified which prior convictions supported the prior conviction enhancements, stayed various enhancements pursuant to section 654, and reimposed the state prison sentence of 23 years. Nevels timely appealed.

DISCUSSION

1. *Prior Convictions*

Nevels contends the case must be remanded for resentencing because the court imposed prior conviction enhancements for a 2006 prior conviction that was not alleged and not found true. As we explain, the contention is meritless. There was some confusion at trial because an abstract of judgment contained a clerical error in that it listed the 2008 *sentencing* date for a 2006 *conviction* as the conviction date. However, although there was some confusion in identifying the actual conviction date associated with the 2006 conviction, there was no confusion about the previous criminal cases supporting the prior conviction enhancements or the evidentiary support for the prior convictions.

Because a simple clerical error has engendered so much confusion and unnecessary expenditure of state resources—and because the opening and responsive briefs on appeal further the confusion and misstate the record—we go into some detail to explain how this state of affairs came to be.²

A. The Evidence of Prior Convictions

We begin by setting forth the evidence considered by the court at the time it conducted a trial on the prior convictions. The evidence established that Nevels had suffered a conviction in 2006 in case number 05-060907-3 for assault with a firearm in violation of section 245, subdivision (a)(2) (hereafter section 245(a)(2)). The date of the conviction was December 11, 2006. For purposes of clarification, we refer to this conviction as the “2006 conviction.” At the time Nevels was convicted, the court suspended imposition of sentence and placed him on probation.

The evidence before the trial court further established that Nevels had suffered a conviction in 2008 in case number 05-071656-3 for assault by means likely to produce great bodily injury in violation of former section 245, subdivision (a)(1) (hereafter section 245(a)(1)).³ The date of the conviction was May 19, 2008. We refer to this conviction as the “2008 conviction.”

The record further reflects that the 2008 conviction resulted from a plea of no contest. Pursuant to a negotiated plea, Nevels agreed to serve a prison sentence of five

²We observe that appellate counsel for Nevels finally clarified the confusion in the reply brief on appeal, in which counsel acknowledged that the 2006 conviction was erroneously identified as a 2008 conviction in an abstract of judgment. In the opening brief on appeal, counsel for Nevels added to the confusion by referring to two assault convictions with 2008 conviction dates and another assault conviction with a 2006 conviction date. As explained below, there was only one 2008 conviction and one 2006 conviction.

³Under section 245 as it currently exists, the offense of assault by means likely to produce great bodily injury is codified in subdivision (a)(4). As of 2008, that offense was codified in subdivision (a)(1) of section 245. (See former § 245, subd. (a)(1), as amended by Stats. 2004, ch. 494, § 1.)

years. He also acknowledged in his plea that his conduct credits would be limited to a maximum of 20 percent because he had admitted a prior strike.

The probation department sought to revoke Nevels's probation resulting from the 2006 conviction as a consequence of the offense supporting the 2008 conviction. The abstract of judgment filed on May 19, 2008—the conviction date associated with the 2008 conviction—reflects that the court terminated probation associated with the 2006 conviction and sentenced Nevels to a five-year sentence composed of four years for the section 245(a)(1) conviction (i.e., the 2008 conviction) plus a consecutive one-year term for the section 245(a)(2) conviction (i.e., the 2006 conviction).

Unfortunately, the abstract of judgment from 2008 contains an error. The dates of conviction for both the 2006 conviction and the 2008 convictions are listed as May 19, 2008. The date of conviction for the 2006 conviction should have been listed as December 11, 2006.

In sum, the evidence establishes convictions suffered by Nevels in 2006 and 2008. He was sentenced to prison on both convictions at the same time, on May 19, 2008.

Before proceeding further, we note that it appears to be undisputed at this point that the 2006 conviction qualifies as a serious felony and a strike because of the use of a firearm (§ 1192.7, subd. (c)(8)), whereas the 2008 conviction does not qualify as a strike because it is not a serious or violent felony. (See §§ 667.5, subd. (c)(8), 1192.7, subd. (c)(8) [requiring actual infliction of great bodily injury to qualify as serious or violent felony].)

B. The Prior Convictions as Alleged in the Original Information

As alleged in the information, Nevels was charged with two prior strikes on the basis of the 2006 conviction and the 2008 conviction. (§§ 667, subds. (b)–(i), 1170.12.) He was also charged with two five-year priors under section 667, subdivision (a)(1) on the basis of the 2006 conviction and the 2008 conviction. Finally, he was charged with having served a prior prison term under section 667.5, subdivision (b) as a result of the 2008 conviction, although the information erroneously identified the date of conviction as May 18, 2008 (instead of May 19, 2008).

As noted above, the 2008 conviction did not qualify as a strike or support a five-year enhancement under section 667, subdivision (a) because it was not a serious or violent felony.

C. The Prior Conviction Allegations as Amended before Trial

Before trial, when the court was considering motions in limine and the issue of whether Nevels could be impeached with evidence of his prior convictions, the prosecutor referred to the two case numbers associated with the 2006 conviction and the 2008 conviction. The court responded, “Your conviction dates are really not correct.” The court noted that the information referred to a conviction date of December 11, 2006, then stated, “I’m looking at the commitment in front of me. They’re both May the 19th, 2008.” One can infer that the court was looking at the conviction dates on the 2008 abstract of judgment—which incorrectly identified the conviction date for the 2006 conviction—instead of the supporting documents.

The prosecutor then moved to amend the information to reflect that the 2006 conviction actually had a conviction date of May 19, 2008. Consequently, the strike allegation and the five-year enhancement allegation both referred to the section 245(a)(2) conviction but incorrectly identified the conviction date as May 19, 2008. Apparently realizing that the section 245(a)(1) conviction (i.e., the 2008 conviction) did not support a strike or a five-year enhancement, the prosecutor asked to strike those allegations. Finally, the prosecutor asked to amend the conviction date associated with the prior prison commitment allegation (§ 667, subd. (b)), so that it reflected a conviction date of May 19, 2008 for the 2008 conviction. Defense counsel had no objection to the amendments. Consequently, the court granted the motion to amend and made notations on the information to reflect the amendments.

Following the amendments, Nevels was charged with one strike and one five-year enhancement under section 667, subdivision (a), both supported by the section 245(a)(2) conviction. Although the amended information properly identified the basis for the prior conviction as assault with a firearm in violation of section 245(a)(2), the conviction date

was improperly listed as May 19, 2008—the sentencing date—instead of December 11, 2006.

D. The Trial on the Prior Convictions

As noted above, the trial court had before it evidence supporting the 2006 conviction and the 2008 conviction at the time of the court trial. In addition to certified copies of documents supporting the existence of the convictions, the court was presented with a copy of Nevels’s rap sheet that included both the 2006 conviction and the 2008 conviction, with the conviction dates clearly identified on the rap sheet. Defense counsel did not object or offer any argument but instead simply submitted the matter on the documents presented by the prosecution.

The court stated, “[T]he Court does have in front of it convictions for a 245(a)(1), assault by force likely to produce great bodily injury, and a conviction for assault of a 245(a)(2), assault with a firearm, convictions which were sustained on May the 19th, 1998— excuse me— 2008. [¶] The Court is finding beyond a reasonable doubt that the priors alleged in the Information pursuant to 1170.12, pursuant to 667(a)(1), and pursuant to 667.5(b) and pursuant to 1203(e)(4) [regarding probation ineligibility], that those priors have been established beyond a reasonable doubt.”

E. Sentencing and Clarification of the Sentence

At sentencing, the trial court doubled the term for attempted voluntary manslaughter due to the prior strike, and it imposed a five-year enhancement for a prior serious felony, citing the “245(a)(2)” conviction. The court then imposed a one-year prior prison term enhancement under section 667.5, subdivision (b), also citing the “245(a)(2)” conviction as the basis for the enhancement.

The prosecutor then asked the court to clarify that the “245(a)(2)” supported the strike and the five-year enhancement, whereas the “245(a)(1)” supported the one-year prior prison term enhancement. After further discussion, the court clarified that the section 245(a)(2) conviction supported the strike and the five-year enhancement, whereas the section 245(a)(1) conviction supported the one-year enhancement under section 667.5, subdivision (b). At no time did the court refer to the conviction dates in discussing

the two prior convictions. Rather, the court referred to the relevant Penal Code section to distinguish between the two convictions.

Although defense counsel asked the court to reconsider the sentence and give Nevels a mitigated sentence, defense counsel did not otherwise object to the sentence or the enhancements associated with the prior convictions.

The matter was reconvened about one month after the pronouncement of sentence, apparently at the request of the sentencing judge, who realized she forgot to “stay all the enhancements on all the other charges.” Before staying the enhancements, the court clarified its intention with regard to the prior conviction enhancements, as follows: “In looking at this, I realized— because it was important as to which prior I was using as a 667(a) prior [for the five-year enhancement]. So, Madam Clerk, the 667(a) prior is the prior which is dated December the 11, 2006, for 245(a)(2); that’s the strike. ¶¶ The prison prior 667.5 prior is the prison prior date—this is the prison prior. It is dated May the 19th, 2008. It’s on the 245(a)(1); that’s the prison prior.”

Thus, as clarified, the court correctly identified the section 245(a)(2) conviction (i.e., the 2006 conviction) as the basis for the strike and the five-year prior, and the section 245(a)(1) conviction (i.e., the 2008 conviction) as the basis for the one-year prior prison term enhancement.

F. Analysis

We have laid out the procedural history of this matter in detail for the purpose of establishing that Nevels could not have been misled by any misstatement in the conviction date associated with the 2006 conviction. The parties and the court plainly understood that there were two separate convictions, one for a violation of section 245(a)(2) and one for a violation of section 245(a)(1). It was understood that there were separate case numbers, and it was also correctly understood that Nevels was sentenced to prison on both cases in May 2008. The only claimed misunderstanding was that the conviction date for the 2006 conviction was, on the eve of trial, incorrectly identified as May 19, 2008, as a result of a clerical error in the 2008 abstract of judgment.

It is well established that a discrepancy between the accusatory pleading and the proof offered at trial is not prejudicial unless the discrepancy misled the defendant in preparing his defense. (*People v. Williams* (1945) 27 Cal.2d 220, 226; *In re Michael D.* (2002) 100 Cal.App.4th 115, 127–128.) As set forth in section 960, “[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.” As long as the defendant is apprised of the charges against him, the charging document serves its purpose. (*In re Michael D.*, at p. 127.) As a reviewing court, we assess whether substantial evidence supports the charged crime or enhancement, not whether substantial evidence supports the specific allegations of the information. (*Ibid.*)

Here, it is undisputed that there is substantial evidence to support a strike and a five-year enhancement as a result of the section 245(a)(2) conviction. Nevels does not argue otherwise. Although he contends that the information as amended did not charge him with a 2006 conviction, he does not claim he was misled or that the misidentification of the conviction date somehow prejudiced his defense. Under the circumstances, Nevels is not entitled to relief. He was adequately apprised of the prior convictions that supported the enhancements alleged in the information. The fact that the prosecutor and the court misidentified the conviction date associated with the 2006 conviction on the eve of trial does not change our conclusion.

2. *Failure to Impose Sentence on Stayed Enhancements*

Nevels next argues that the court erred in failing to impose certain sentence enhancements before staying them pursuant to section 654. Although the People concede that the court erred, there is some dispute as to the proper disposition. Nevels requests that the matter be remanded for resentencing, whereas the People propose that we impose the terms in the first instance.

At the time Nevels was originally sentenced, the court did not mention certain enhancements that had been found true by the jury. Specifically, the court did not discuss the enhancements for infliction of great bodily injury (§ 12022.7, subd. (e)) or the use of

a deadly or dangerous weapon (§ 12022, subd. (b)(1)), except with respect to count one, the conviction for attempted voluntary manslaughter. The great bodily injury enhancements carry a term of three, four, or five years. (§ 12022.7, subd. (e).) The dangerous weapon enhancements carry a term of one year. (§ 12022, subd. (b)(1).) With respect to count one, the court imposed the upper term of five years for the great bodily injury enhancement and one year for the dangerous weapon use enhancement.

When the court reconvened to clarify the sentence, the court noted that it had forgotten to address the great bodily injury and dangerous weapon use enhancements associated with counts other than count one. Pursuant to section 654, the court proceeded to stay the enhancements for great bodily injury and use of a dangerous weapon for all remaining counts to which they applied. However, the court did not impose the enhancements or specify which of the three terms it was imposing with respect to the great bodily injury enhancements.

The court erred. The proper procedure for disposing of a term barred by section 654 is to impose it and then stay the term. (See *People v. Dominguez* (1995) 38 Cal.App.4th 410, 420.) The same procedure applies to enhancements. (*People v. Vega* (2013) 214 Cal.App.4th 1387, 1395–1396; Cal. Rules of Court, rule 4.447.)

Nevels argues that we should remand the matter to the trial court for resentencing on the stayed enhancements. (See *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327.) In response, the People state that, in order “to avoid an unnecessary remand,” the People would have no objection to this court imposing the midterms for the great bodily injury enhancements, imposing the one-year term for the dangerous weapon enhancements, and then staying imposition of the terms.

We would be inclined to agree with the People’s approach if the dispute were limited to the one-year dangerous weapon enhancements (§ 12022, subd. (b)(1)), because it would be pointless to remand the matter simply to require the trial court to impose and then stay a specified term where the court has no discretion in setting the term. In such a case, a reviewing court may simply impose and then stay the specified term. (See *People v. Vega, supra*, 214 Cal.App.4th at p. 1397.) Here, however, the dispute is not limited to

enhancements with a single, specified term. Instead, the great bodily injury enhancements allow the court in its discretion to impose one of three terms. (§ 12022.7, subd. (e).) As noted above, the court imposed the upper term of five years for the great bodily injury enhancement associated with the attempted voluntary manslaughter conviction.

The People have offered no authority to support the notion that a reviewing court may impose a discretionary sentence in the first instance when the trial court has failed to exercise its discretion. Accordingly, we shall remand for resentencing with respect to the great bodily injury enhancements (§ 12022.7, subd. (e)) associated with counts two, three, and four, and with respect to the dangerous weapon use enhancements (§ 12022, subd. (b)(1)) associated with counts two, four, and six. On remand, the court must impose a term associated with each enhancement and then order the term stayed pursuant to section 654.

3. *Corrections to Abstract of Judgment*

As a final matter, Nevels proposes three corrections to the abstract of judgment. The People have no objection to two of the three proposed corrections. There is no dispute that the abstract of judgment must be corrected to (1) specify the stayed midterms imposed in counts two through nine, and (2) specify the stayed terms for the sentence enhancements in counts two, three, four, and six.

The proposed correction with which the People disagree is the request to remove parentheses from the two-year concurrent sentence associated with count ten, the conviction for reckless driving. Nevels claims that parentheses are used to enclose terms that are stayed, but not concurrent sentences, whereas the People state that “[e]xperience teaches that parentheses are used to list both concurrent terms and terms stayed under Penal Code section 654.” Nevels offers no authority to support his position, and we have no reason to dispute the People’s statement. We fail to see how the inclusion of parentheses could be confusing to the Department of Corrections and Rehabilitation, as long as it is clear the term runs concurrently and is not included in the aggregate sentence

reflected at the bottom of the abstract. Therefore, we decline to order the proposed correction removing the parentheses surrounding a concurrent term.

DISPOSITION

The matter is remanded to the trial court for the purpose of imposing and then staying terms for the sentence enhancements associated with counts two, three, four, and six. The abstract of judgment shall specify the terms imposed but stayed in counts two through nine, as well as the terms imposed but stayed for the sentence enhancements in counts two, three, four, and six. The trial court is directed to prepare an amended abstract of judgment in accordance with this disposition and deliver it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.