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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR JAMES ROSS, JR.,

Defendant and Appellant.

B238327

(Los Angeles County
Super. Ct. No. MA028210)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Mangay Chung, Judge. Judgment modified with directions.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Daniel C. Chang and Nima Razfar, Deputy Attorneys General for Plaintiff and Respondent.

Arthur James Ross, Jr., stands convicted of crimes involving multiple victims: false imprisonment (Pen. Code,¹ § 237, subd. (a)) (count 1); second degree robbery (§ 211) (count 2); three counts of attempted second degree robbery (§§ 211, 664) (counts 3, 4, 5); and two counts of semiautomatic firearm assault (§ 245, subd. (b)) (counts 6 and 7). The jury also found as to all counts that a principal was armed with a firearm. (§ 12022, subd. (a)(1).) The trial court found defendant was previously convicted of a serious felony. (§§ 667, subd. (b)-(i), 1170.12.) He was sentenced to 20 years, 8 months in state prison. Defendant appeals from the denial of his motion to vacate the judgment and correct an unauthorized sentence.

Defendant contends, the Attorney General concedes, and we agree that the trial court imposed an unauthorized sentence insofar as it enhanced counts 6 and 7 pursuant to section 12022, subdivision (a)(1).² Under the present narrow circumstances, the post judgment order denying defendant's motion to vacate the judgment and correct an unauthorized sentence is appealable. (*People v. Thomas* (1959) 52 Cal.2d 521, 527-529; see *People v. Totari* (2002) 28 Cal.4th 876, 885-886; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1422-1423, 1425-1428.) It is well established that we have jurisdiction to correct an unauthorized sentence whenever it comes to our attention. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1048, fn. 7; *People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6; *People v. Scott* (1994) 9 Cal.4th 331, 354; *In re Ricky H.* (1981) 30 Cal.3d 176, 191; *People v. Serrato* (1973) 9 Cal.3d 753, 763, disapproved on another point in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *In re Sandel* (1966) 64 Cal.2d 412, 417-419.) Section 12022, subdivision (a)(1) provides: “. . . [A]ny person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and

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

² Defendant addresses his argument to count 6 only. However, the trial court also imposed the section 12022, subdivision (a)(1) enhancement on count 7, assault with a semiautomatic firearm. The sentence on count 7 was ordered to run concurrent to count 6.

consecutive term of imprisonment . . . for one year, *unless the arming is an element of that offense*. This additional term shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.” (Italics added.) Here, defendant was convicted of two counts of assault with a semiautomatic firearm where a principal was armed with a firearm. Use of a firearm is an essential element of assault with a semiautomatic firearm. (Cf. *People v. Sinclair* (2008) 166 Cal.App.4th 848, 855-856 [§ 245, subd. (a)(2)]; *People v. Hill* (1989) 207 Cal.App.3d 1574, 1577, fn. 8 [same].) Therefore, the punishment for that crime may not be enhanced pursuant to section 12022, subdivision (a)(1). (Cf. *People v. Sinclair, supra*, 166 Cal.App.4th at pp. 855-856 [§ 245, subd. (a)(2) conviction cannot be enhanced under § 12022, subd. (a)(1)]; *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1069-1070 [§ 245, subd. (a)(1) conviction cannot be enhanced under § 12022, subd. (b)]; *People v. McGee* (1993) 15 Cal.App.4th 107, 110 [§ 245, subd. (a)(1) conviction cannot be enhanced pursuant to § 12022, subd. (b)].)

The section 12022, subdivision (a)(1) one-year enhancements imposed on counts 6 and 7, assault with a semiautomatic firearm, are stricken. Upon remittitur issuance, the clerk of the superior court shall prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.