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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL LEWIS MURRAY,

Defendant and Appellant.

C074990

(Super. Ct. No. SF122358A)

Appointed counsel for defendant Daniel Lewis Murray has asked this court to review the record to determine whether there exist any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)). We ordered supplemental briefing to address a sentencing error we discuss *post*. We shall affirm the judgment as modified.

BACKGROUND

In the early morning hours of December 5, 2012, Danielle Skipp and her mother Linda woke to the sound of someone ringing their doorbell repeatedly.¹ Danielle got out of bed and walked toward the front door. She heard a “slight voice” then “loud banging on the door.” Danielle ran to Linda’s room, opened the door, and yelled to Linda that someone was trying to break in. Danielle and Linda both called 911.

Danielle called 911 from her bedroom; while she was on the phone with the 911 dispatcher, Danielle heard the person at the front door, later identified as defendant, yell: “ ‘Open up the fucking door, bitch, or I’m going to kill you.’ ” Then Danielle heard glass breaking from the kitchen area. Terrified, Danielle closed her bedroom door but as she did, she saw defendant walking into the living room area of the house. Danielle thought defendant was going to kill her; she locked her bedroom door and hid in her closet until the police arrived. Alone in her room, Linda feared for her life and for Danielle’s.

When the police arrived, they escorted both women outside. They cleared the house and found defendant inside a bedroom, holding a pointy white object, later identified as an elk horn, and a bundle of money from the house.

Defendant was charged with first degree burglary (Pen. Code, § 459),² making a criminal threat (§ 422), and receiving stolen property (§ 496, subd. (a)).³ The People further alleged that defendant had numerous prior strike convictions (§§ 1170.12, subd. (b), 667, subd. (d)), and five prior convictions for serious felonies (§ 667, subd. (a)).

¹ Because the Skippys share a surname, we will refer to mother and daughter by their first names.

² Further undesignated statutory references are to the Penal Code.

³ The People also alleged defendant personally used a weapon during the commission of his crimes in violation of section 12022, subdivision (b)(1), but that allegation was later stricken on the People’s own motion.

In March 2013, the trial court suspended criminal proceedings and ordered defendant's competency evaluated. Defendant was evaluated, deemed competent to stand trial, and criminal proceedings were reinstated. Jury trial began on September 3, 2013.

Defendant testified at trial. He explained that he broke into the victims' home because he was being chased by two young men who were firing guns at him. He denied threatening to kill anyone; he said he only pleaded to be let inside. He further testified that he did not remember picking up the money from the kitchen counter, and he picked up the elk horn (a dog's chew toy) just before hiding in the bedroom where the police found him. He remembered telling the police he was "glad" to see them.

On September 9, 2012, the jury found defendant guilty as charged. The court later found true the allegations of defendant's prior convictions. Defendant moved the court to strike the prior convictions; the court denied his motion. The court then sentenced defendant as follows: 25 years to life on the burglary conviction, a consecutive term of 25 years to life for making a criminal threat, five years for the serious felony conviction on April 21, 1994, five years for the (three) serious felony convictions on January 28, 1996, and five years for the serious felony conviction on July 22, 1986. The court imposed another 25 years to life for defendant's conviction on the charge of receiving stolen property, but stayed that term pursuant to section 654. In total, the court sentenced defendant to an indeterminate term of 65 years to life in state prison.

The court imposed numerous fines and fees and awarded defendant 369 days of custody credit. Defendant appeals.

DISCUSSION

Counsel filed an opening brief setting forth the facts of the case and requests that we review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days have elapsed, and we have received no communication from defendant.

In our review of the record, we found an error at the sentencing hearing that does not result in a change to defendant's prison term, but must be corrected. As we have described, the trial court imposed a five-year sentence on three of the charged five-year priors. The three serious felony convictions alleged to have occurred in the same incident, on January 28, 1996, only resulted in one enhancement imposed at sentencing. The trial court failed to address the remaining two charged priors from that same 1996 incident. The amended abstract of judgment reflects that the two remaining enhancements were imposed and stayed, but that is not what the trial court did. We asked the parties to brief for their respective positions on the appropriate disposition of those two enhancements not orally addressed by the trial court.

The parties agree that the remaining enhancements should be dismissed; we shall modify the judgment to strike the remaining enhancements and direct correction of the abstract to reflect that only three enhancements remain.

Section 667, subdivision (a)(1) provides in pertinent part that “any person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges *brought and tried separately*.” (Italics added; see *People v. Park* (2013) 56 Cal.4th 782, 795-796.) In *In re Harris* (1989) 49 Cal.3d 131 (*Harris*) our Supreme Court held that “the requirement in section 667 that the predicate charges must have been ‘brought and tried separately’ demands that the underlying proceedings must have been formally distinct, from filing to

adjudication of guilt.” (*Id.* at p. 136; see *People v. Frausto* (2009) 180 Cal.App.4th 890, 903.) Thus, where “the record plainly reveals, the charges in question were not ‘brought . . . separately,’ but were made in a single complaint” (*Harris*, at p. 136), the court can only impose a single five-year enhancement. (*Id.* at p. 137).

Here, there is no dispute that although five prior serious felony convictions were alleged, three of those convictions were *not* “brought and separately tried.” Accordingly, only three of the prior serious felonies could be used to enhance defendant’s sentence. The trial court correctly used only three. But the remaining two allegations should have been stricken and were not. (See *Harris*, *supra*, 49 Cal.3d at p. 136.) The two enhancements that should have been stricken are incorrectly recorded as separately imposed and stayed in the amended abstract of judgment.

“When sentencing error does not require additional evidence, further fact finding, or further exercise of discretion, the appellate court may modify the judgment appropriately and affirm it as modified. [Citations.]” (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1441.) We are in that situation here. We modify the judgment to strike the two five-year enhancements identified in the minute order as enhancement numbers 26 and 27, pursuant to section 667, subdivision (a). We direct correction of the abstract to delete reference to the two enhancements for which it is indicated that sentence was stayed.

Having undertaken an examination of the entire record, we find no other arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified to strike the two remaining enhancements. As modified, the judgment is affirmed. We direct the trial court to prepare an amended and corrected abstract of judgment as described by this opinion and transmit a certified copy to the Department of Corrections and Rehabilitation.

DUARTE, J.

We concur:

ROBIE, Acting P. J.

MAURO, J.