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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY PAUL NAVARRO,

Defendant and Appellant.

D058994

(Super. Ct. No. FBA900385)

APPEAL from a judgment of the Superior Court of San Bernardino County, John B. Gibson, Judge. Affirmed as modified.

A jury found Anthony Paul Navarro guilty of one count of aggravated mayhem (Pen. Code, § 205),¹ two counts of assault with a firearm (§ 245, subd. (a)(2)), one count of assault with a deadly weapon (§ 245, subd. (a)(1)), and one count of intimidation of a witness (§ 136.1, subd. (c)(1)) arising out of a confrontation he and his father, Michael

¹ Subsequent undesignated statutory references are to the Penal Code.

Ray Navarro, had with Jessica Dickinson and Sandra Robles.² The jury also found true allegations that Anthony had two prior felony convictions for purposes of the "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12.)

The trial court sentenced Navarro to prison for 100 years to life, imposing a consecutive prison term of 25 years to life for each conviction (§§ 667, subd. (e)(2)(A)(ii), 1170.12, subd. (c)(2)(A)(ii)), but staying execution of the term imposed for the conviction of assault with a deadly weapon (§ 654). The court also ordered Anthony to pay \$70 per conviction for court security and facilities fees. (§ 1465.8, subd. (a)(1); Gov. Code, § 70373, subd. (a).)

On appeal, Anthony contends the trial court erred in denying his motion for new trial, which was based on new evidence from Jessica's brother Jesse that Anthony was not present when Jessica was assaulted. Anthony also contends the court imposed an excessive amount of court security fees.

We modify the judgment to reduce the amount of court security fees and also to add to the sentence for each of Anthony's current convictions the mandatory consecutive prison term of five years for each of his prior serious felony convictions, which the superior court failed to impose. In all other respects, we affirm the judgment.

² Michael was a codefendant at trial but filed a separate appeal, which we decided in an unpublished opinion. (*People v. Navarro* (Aug. 24, 2011, D058176).) Because Anthony and Michael have the same surname, we use their first names for clarity and brevity; in doing so, we intend no disrespect or undue familiarity. We shall do the same with respect to Jessica and her brother Jesse Dickinson.

FACTUAL BACKGROUND

Jessica and Robles were sitting outside Robles's apartment complex one evening while their children played nearby. As Jessica was talking to a friend, a van drove out of the complex and stopped between them.

Michael exited the passenger side of the van, yelled at Jessica and Robles, and asked whether they had a problem. Michael pointed a gun and told Robles he was going to "light up" the house and "shoot anybody over there." He told Jessica he was going to shoot her three-month-old daughter, whom she was holding at the time.

Anthony exited the driver's side of the van, approached Jessica and told her he wanted to fight Jesse. While Jessica and Anthony were arguing, Jesse arrived. Anthony then began arguing with Jesse, swung at him and stabbed him in the chin with a box cutter.

Jessica tried to break up the fight by stepping between Jesse and Anthony, but Anthony stabbed her. She fell to the ground and shouted that she had been stabbed. Jessica then saw a "flash" and heard a "loud bang" as Anthony and Michael ran toward the van and then drove away.

Jessica went to the hospital for treatment of stab wounds to her neck and right arm. While at the hospital, Jessica told a police officer that during the confrontation outside Robles's apartment, Michael pulled a black handgun from his waistband, pointed it at her and Robles, and shouted an obscenity.

Later that evening, the police officer interviewed Robles about the confrontation at her apartment complex. Robles also told him that Michael had a gun.

The following day, Anthony telephoned Jessica and Robles and warned them not to go to the police or he would harm their children. After having received these threats, Jessica and Robles testified at trial that they did not see a gun during the confrontation with Anthony and Michael.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Denying the Motion for New Trial*

Anthony contends the trial court abused its discretion by denying his motion for new trial, which was based on new testimony from Jesse that Anthony was not present during the confrontation. After setting forth additional background information and the generally applicable rules governing the determination of Anthony's motion, we shall analyze and ultimately reject this contention.

1. *Additional Background*

After the jury returned its guilty verdicts but before sentencing, Anthony moved the court to order a new trial based on testimony from Jesse that Anthony was unable to produce at the trial. Anthony's attorney and investigators had made several efforts to locate Jesse before trial; but in part because Jesse was in and out of prison, they did not find him and obtain his testimony until after the jury reached its verdicts.

At a hearing held before the new trial motion was actually filed, Jesse testified on direct examination by Anthony's counsel that the confrontation in which Jessica was injured occurred in the following way:

"I was coming from the liquor store. Bought some beer. Went back to the apartments, and there's a dark blue van outside. I walked up. There was a lot of Black people outside. Got in an argument with one of the Blacks.

Black stabbed me. Ran inside [and] grabbed a rag, came back out, seen my sister on the floor. Seen the Blacks jump in the van and take off."

Jesse also testified he did not see anyone cut Jessica, but did see a Black man "[r]unning away from her." When Anthony's counsel asked Jesse whether Anthony was present when Jessica was cut, Jesse responded, "No, sir."

On cross-examination by the prosecutor, Jesse testified Jessica and Robles would have been lying had they testified that Anthony cut Jessica. Jesse also testified his cousin would have been lying had he testified that he drove Jesse back to the apartment complex and saw Anthony there right before Jessica was cut.

In his written new trial motion, Anthony described his unsuccessful efforts to present Jesse as a witness at trial and argued Jesse's "testimony was immensely critical to the defense . . . and should be presented to a jury in the form of a new trial." The People opposed the motion on the grounds that Jesse's testimony was not credible and was not different from testimony the jury heard from other witnesses favorable to Anthony.

At the hearing on the new trial motion, the parties agreed and the court found that Anthony had been diligent in trying to obtain Jesse's testimony before trial and that his testimony was material. The court, however, denied the motion, noting Jesse was "well on his way to becoming a career criminal" and "ha[d] every reason on earth not to want to be labeled . . . a snitch," and finding his testimony "completely unbelievable" and "entitled to no credibility."

2. *General Legal Principles*

A trial court "may, upon [a defendant's] application, grant a new trial" when "new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181, subd. 8.) For a court to grant a new trial on this ground, the newly discovered evidence must not "simply corroborate[] the defendant's story" (*People v. Cooper* (1979) 95 Cal.App.3d 844, 852 (*Cooper*)) or "simply contradict[] . . . the testimony of the people" (*People v. Cesena* (1891) 90 Cal. 381, 383; accord, *People v. Hall* (2010) 187 Cal.App.4th 282, 299 (*Hall*)). Nor is a new trial warranted if the new evidence is "merely cumulative" (*People v. Fong Ah Sing* (1886) 70 Cal. 8, 10 (*Fong Ah Sing*); *People v. Butts* (1965) 236 Cal.App.2d 817, 827 (*Butts*)) or "merely impeaching in character" (*People v. Snyder* (1940) 36 Cal.App.2d 528, 535; accord, *Hall*, at p. 299). Rather, to justify a new trial the "'newly discovered evidence . . . must make a different result probable on retrial.'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 308 (*Verdugo*)). To determine whether a different result is likely on retrial, "the trial court may consider the credibility as well as materiality of the evidence." (*People v. Beyea* (1974) 38 Cal.App.3d 176, 202 (*Beyea*), disapproved on other grounds by *People v. Blacksher* (2011) 52 Cal.4th 769, 808; accord, *People v. Delgado* (1993) 5 Cal.4th 312, 329 (*Delgado*)).

On appeal from an order denying a motion for new trial, we apply the deferential abuse of discretion standard. (E.g., *Verdugo, supra*, 50 Cal.4th at p. 308; *People v. Earp* (1999) 20 Cal.4th 826, 890.) "[W]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.'" (*Verdugo*,

at p. 308.) In addition, "we justifiably accord considerable deference to the trial judge 'because of "his observation of the witnesses, [and] his superior opportunity to get 'the feel of the case.'"" (*People v. Hayes* (1985) 172 Cal.App.3d 517, 524-525 (*Hayes*); accord, *People v. Cua* (2011) 191 Cal.App.4th 582, 608 (*Cua*).)

3. *Analysis of Anthony's Claim*

Anthony argues we should not defer to the trial court's credibility determination because no substantial evidence supports the trial court's statements that "Jesse was well on his way to being a career criminal" and "would not want to be labeled a snitch." He also surveys the conflicting testimony at trial to argue that "[b]ecause the evidence in this matter was fairly balanced, [we] must conclude that it is probable that [Anthony] would have obtained a better result had Jesse testified for the defense at trial." We disagree.

First, there was substantial evidence to support the trial court's statements about Jesse's lack of credibility. As to Jesse's becoming a "career criminal," Anthony's counsel submitted a declaration as part of the new trial motion in which he stated that (1) after the jury had found Anthony guilty, counsel learned Jesse was incarcerated; (2) at the trial court's suggestion, counsel prepared a transportation request and order to make Jesse available as a witness; (3) after Jesse had been released, counsel spoke to Jesse's parole officer; and (4) Jesse finally became accessible "when he was taken into custody for new criminal charges." In addition, Anthony acknowledges in his briefing that there was testimony at trial that Jesse was involved with Anthony and Michael in a fraudulent check cashing scheme. As to Jesse's desire to avoid being labeled a "snitch," the trial court heard testimony during trial that Anthony threatened harm to their children if

Jessica or Robles went to the police; and that, after Anthony threatened them, they both changed their story about seeing Michael with a gun. Anthony reasonably concedes in his briefing that "there undoubtedly is some truth to [the People's] assertion that being labeled a snitch can be hazardous to the individual's well being." Further, and perhaps most importantly, we must give substantial deference to the trial court's credibility assessment because, although the court did not specifically comment on Jesse's demeanor, the court was able to observe him on the witness stand. (*Cua, supra*, 191 Cal.App.4th at p. 608; *Hayes, supra*, 172 Cal.App.3d at pp. 524-525.) Thus, because the record supports the trial court's stated reasons for doubting Jesse's testimony, the "weight and credibility to be attached to the . . . testimony . . . was for the trial judge" (*People v. Hill* (1969) 70 Cal.2d 678, 699), and we defer to its determination (*Verdugo, supra*, 50 Cal.4th at p. 308).

Second, it is not reasonably probable that Anthony would obtain a better result at a new trial were Jesse to testify. As just explained, the trial court could properly determine that Jesse's testimony was not credible; and it was entitled to take that determination into account when deciding whether Jesse's testimony would render a different result on retrial probable. (*Delgado, supra*, 5 Cal.4th at p. 329; *Beyea, supra*, 38 Cal.App.3d at p. 202.) Moreover, Anthony correctly points out in his briefing that at trial the testimony regarding his involvement in the confrontation with Jessica and Robles was in conflict, and several witnesses (mostly family members) testified Anthony was at a relative's birthday party at the time Jessica was stabbed. Jesse's testimony that Anthony was not involved in the confrontation thus would have been "merely cumulative" of the testimony

of the witnesses who testified on Anthony's behalf (*Butts, supra*, 236 Cal.App.2d at p. 827) and would have "simply corroborated [their] story" (*Cooper, supra*, 95 Cal.App.3d at p. 852). Although Jesse's testimony clearly would have contradicted that of Jessica and Robles, "[a] new trial on the ground of newly discovered evidence is not granted where the only value of the newly discovered evidence is as impeaching evidence' or to contradict a witness of the opposing party." (*Hall, supra*, 187 Cal.App.4th at p. 299.)

In sum, we hold that "[b]ecause the assertedly newly discovered evidence was cumulative and would not have rendered a different result on retrial probable for [Anthony], the trial court did not abuse its discretion in denying his new trial motion." (*People v. Gonzales* (2011) 52 Cal.4th 254, 333; see also *Fong Ah Sing, supra*, 70 Cal. at p. 10 ["It is well settled that in cases of conflicting testimony, newly discovered evidence merely cumulative will not furnish ground for new trial."].)

B. *The Trial Court Imposed an Incorrect Amount for Court Security Fees*

Anthony contends the trial court erred by imposing \$40 per conviction in court security fees under the version of section 1465.8, subdivision (a)(1) in effect at the time of sentencing. He argues the court should have charged him only \$30 per conviction, the amount specified by the version of the statute in effect when the jury found him guilty. The People agree with Anthony, and so do we.

As originally enacted in 2003, section 1465.8, subdivision (a)(1) stated in relevant part: "To ensure and maintain adequate funding for court security, a fee of twenty dollars (\$20) shall be imposed on every conviction for a criminal offense, including a traffic

offense, except parking offenses" (Stats. 2003, ch. 159, § 25.) The fee increased to \$30 effective July 28, 2009 (Stats. 2009-2010, 4th Ex. Sess., ch. 22, § 29), and to \$40 effective October 19, 2010 (Stats. 2010, ch. 720, § 33).³ The \$30 fee applied when the jury returned guilty verdicts against Anthony; but the \$40 fee applied when the court sentenced him to prison. The question, therefore, is on which of these dates Anthony was convicted.

The Court of Appeal answered a similar question in *People v. Davis* (2010) 185 Cal.App.4th 998 when construing Government Code section 70373, subdivision (a)(1), which provides: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses" The court asked, "what constitutes a 'conviction'—is it the verdict or guilty plea, or the ensuing sentence and judgment of conviction?" (*Davis*, at p. 1001.) The court noted the ordinary rule that "a person stands 'convicted' upon the return of a guilty verdict by the jury or by the entry of a plea admitting guilt," and held "the ordinary rule applie[d]" to construction of the term "conviction" as used in the statute. (*Ibid.*) Given that the language and purpose of the statute construed in *Davis* are nearly identical to those of section 1465.8, we adopt the same construction of "conviction" for section 1465.8, subdivision (a)(1). Accordingly,

³ Amendments that took effect after Anthony was sentenced retained the \$40 figure; changed the term "fee" to "charge" and then to "assessment"; and broadened the scope of use of the funds from "court security" to "court operations." (Stats. 2011, ch. 10, § 8, ch. 40, § 6.)

because the amount of the court security fee in effect on the date the jury found Anthony guilty was \$30 per conviction, we will modify the judgment to impose that amount.

C. *The Trial Court Erred by Not Imposing Mandatory Five-year Enhancements Based on Anthony's Prior Convictions*

After briefing was completed, we noticed the trial court had not imposed the five-year enhancements for Anthony's two prior serious felony convictions prescribed by section 667, subdivision (a)(1) and requested letter briefs from the parties on the issue. (See Gov. Code, § 68081.) Anthony contends the trial court was not authorized to impose the five-year enhancements because the accusatory pleadings identified the prior convictions as serious or violent felonies for purposes of enhancement under section 667, subdivisions (b) through (i), not subdivision (a)(1). The People contend that the pleadings provided adequate notice that they were alleging Anthony had two prior serious felony convictions, and that the trial court was required to impose the five-year enhancements. We agree with the People.

As pertinent here, section 667, subdivision (a)(1) provides 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.) Under this statute, "when the defendant is convicted of a current serious felony . . . and has been previously convicted of a serious felony, the trial court must impose a five-year enhancement for each such prior conviction that was brought and tried separately. The terms of the present offense and

each section 667[, subdivision (a)(1)] enhancement must run consecutively." (*People v. Dotson* (1997) 16 Cal.4th 547, 553 (*Dotson*)). Further, "under the Three Strikes law, section 667[, subdivision (a)(1)] enhancements are to be applied individually to each count of a third strike sentence." (*People v. Williams* (2004) 34 Cal.4th 397, 405 (*Williams*); see also *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560 ["in cases where multiple indeterminate terms are imposed, all section 667, subdivision (a) five-year serious felony enhancements must be imposed on every count"].) "The trial court has no discretion and the sentence is mandatory." (*People v. Purata* (1996) 42 Cal.App.4th 489, 498 (*Purata*)). The conditions for imposition of the mandatory five-year enhancements are satisfied here.

In the current case Anthony was convicted of five serious felonies: aggravated mayhem, assault with a deadly weapon (two counts), assault with a firearm and intimidation of a witness. (§§ 667, subd. (a)(4), 1192.7, subd. (c)(2), (31), (37)). In the current case, the People also alleged Anthony previously had been convicted of two serious felonies: attempted robbery and assault with a deadly weapon (§§ 667, subd. (a)(4), 1192.7, subd. (c)(19), (31), (39)); and the jury found these allegations true. On this record, the trial court was required to impose a consecutive 10-year prison term based on Anthony's two prior serious felony convictions. (§ 667, subd. (a)(1); *Dotson, supra*, 16 Cal.4th at p. 553; *Purata, supra*, 42 Cal.App.4th at p. 498.) Further, under the Three Strikes law, the consecutive 10-year term based on those prior convictions had to be added to the sentence imposed on each of Anthony's five current convictions. (§§ 667, subd. (e)(2)(B), 1170.12, subd. (c)(2)(B); *Williams, supra*, 34 Cal.4th at p. 405.)

Anthony argues, however, that the trial court was not authorized to impose the section 667, subdivision (a)(1) enhancements because they were never specifically charged. Although the prior conviction allegations listed only statutory sections and subdivisions corresponding to the Three Strikes law, "the imposition of the five-year enhancement for the prior serious felony conviction [is] part and parcel of the Three Strikes statutory scheme." (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 425.) Moreover, "it is clear that a valid accusatory pleading need not specify by number the statute under which the accused is being charged" (*People v. Thomas* (1987) 43 Cal.3d 818, 826); it is sufficient that the pleading identify the *factual basis* for imposition of an enhanced penalty (*People v. Flynn* (1995) 31 Cal.App.4th 1387, 1392-1395; *People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1118). Here, the People alleged in separate allegations that Anthony "suffered the following prior conviction(s) of a serious or violent felony," and then indentified two prior convictions by court case number, Penal Code section violated, date of conviction, county and state of conviction, and court type. The facts that Anthony had two prior serious felony convictions were thus adequately charged. (§ 969; *People v. Ashcraft* (1956) 138 Cal.App.2d 820, 825.) Although it would be better practice for the People to allege the specific statutes by which they seek to enhance a defendant's sentence, we conclude the information here provided sufficient notice of the potential five-year enhancements by stating the facts supporting them in separate allegations.⁴

⁴ A contrary conclusion is not required by *People v. Mancebo* (2002) 27 Cal.4th

In sum, we conclude that based on Anthony's two prior serious felony convictions the trial court was required to impose a consecutive 10-year term on the sentence for each of his five current convictions. Its failure to do so resulted in an unauthorized sentence. (*People v. Turner* (1998) 67 Cal.App.4th 1258, 1269.) It is our duty to correct an unauthorized sentence on appeal even where, as here, doing so results in a longer prison sentence. (*People v. Serrato* (1973) 9 Cal.3d 753, 764, disapproved on unrelated grounds by *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Solórzano* (2007) 153 Cal.App.4th 1026, 1040-1041.) Further, because imposition of the prior serious felony conviction enhancements is mandatory, we need not remand for resentencing, as suggested by the People, but instead modify the judgment to impose the enhancements. (*Purata, supra*, 42 Cal.App.4th at pp. 498, 499.)

735, on which Anthony relies. In *Mancebo*, the information charged the defendant with various sex crimes against multiple victims, and alleged firearm use and kidnapping to support an enhancement under section 667.61. At the sentencing hearing, the trial court sua sponte substituted a multiple-victim circumstance for the firearm-use allegation to support the enhancement under section 667.61 and to free up the firearm-use allegation for use to support other enhancements, even though the multiple-victim circumstance had not been alleged by either statute number or descriptive facts. The Supreme Court reversed the sentence, holding that the trial court erred when it used an unpled multiple-victim circumstance to support an enhanced sentence under section 667.61. (*Mancebo*, at pp. 742-745.) "*Mancebo* thus stands for the limited proposition that a defendant is entitled to notice of the specific facts that will be used to support an enhanced sentence. Facts alleged and proved only as part of the substantive crime charged cannot later be used to support a sentencing enhancement." (*People v. Tardy* (2003) 112 Cal.App.4th 783, 789.) *Mancebo* is therefore not on point because Anthony's sentence, unlike the defendant's in *Mancebo*, will be enhanced on the basis of facts that were specifically and separately pleaded and proved for the purpose of enhancement.

DISPOSITION

The judgment is modified (1) to reduce the amount of court security fees imposed pursuant to section 1465.8, subdivision (a)(1) to \$30 for each current conviction, for a total of \$150; and (2) to add to the prison term imposed for each current conviction a consecutive term of 10 years based on Anthony's two prior serious felony convictions pursuant to section 667, subdivisions (a)(1) and (e)(2)(B), with execution of the additional 10-year term to be stayed pursuant to section 654 for the conviction on count 4 (assault with a deadly weapon), for a total additional consecutive prison term of 40 years. As so modified, the judgment is affirmed.

Upon remand, the superior court is directed to prepare an amended abstract of judgment reflecting the above modifications and to forward a certified copy of the abstract to the Department of Corrections and Rehabilitation.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.