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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LAWRENCE FRANKLIN HILL,

Defendant and Appellant.

E054675

(Super.Ct.No. SWF10002689)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge.

Affirmed with directions.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Gary Brozio, and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Lawrence Franklin Hill, held up the victim, David Mathis, at gunpoint, demanding \$1,200 for guns the defendant alleged he had left on the victim's porch earlier

in the day but which were gone when the victim returned home from work. He was convicted by a jury of robbery (Pen. Code,¹ § 211) involving the use of a firearm (§ 12022.53, subd. (b)), and he admitted having been previously convicted of a serious or violent felony. (§ 667, subds. (a) [five-year enhancement], (c), (e)(1) [Strike prior].) He was sentenced to an aggregate term of 21 years in prison and appealed.

On appeal, defendant asserts (1) there is insufficient evidence to support the firearm enhancement absent proof that the weapon was a real firearm; (2) his due process rights were violated because the jury instruction, CALCRIM No. 315, regarding eyewitness identification, lessens the prosecution's burden of proof; and (3) the abstract of judgment must be modified to reflect that the trial court struck, rather than stayed, enhancements relating to prior prison terms. (§ 667.5, subd. (b).) The People concede that the abstract should be modified. As modified, we affirm.

BACKGROUND

David Mathis knew the defendant from the trailer park where Mathis lived, and was introduced to defendant by the defendant's sister, when the defendant moved into his sister's trailer. Mathis lived in a modular home in the trailer park. On October 15, 2010, at approximately 1:00 p.m., Mathis received a telephone call from the defendant while Mathis was at work. Defendant told Mathis that he had dropped off some "hardware" on

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

Mathis's deck for Mathis to check out. Mathis told defendant he could not talk to defendant then, and said he would call defendant back.

When Mathis returned home from work that evening, he spoke to his two friends, Briana and Fidel, who had stayed overnight at Mathis's residence and had been there all day while Mathis was away at work. Briana and Fidel told Mathis that a man had come up on the deck and left a box there. Mathis went out to the porch and checked the locker he kept there. Inside the locker, Mathis could see an ammunition box. Mathis retrieved the box and opened it in the kitchen, but it was empty. Mathis tried to telephone defendant to find out why he left an empty box on his deck. When defendant did not answer, Mathis left him a recorded message. Mathis then went to work on his motorcycle.

Later, defendant arrived at Mathis's residence accompanied by another individual. Defendant jumped out of his vehicle and proceeded into the house to confront Briana and Fidel, accusing them of stealing his guns. Mathis intervened and informed defendant that his friends would not take anything. Defendant demanded the return of his guns or money to pay for them. Defendant became increasingly angry and started to crowd Mathis, getting close to him. Defendant pulled a black handgun from his waistband, and poked it into Mathis's chest. The gun was black and had a slide action.

Defendant again demanded the return of his guns or money to pay for them. Defendant then replaced the gun in his waistband and struck Mathis in the face.² Defendant and his companion continued to demand their money and told Mathis they were not going to leave until they got either the money or the guns. Mathis again insisted that he did not take the guns. Defendant told Mathis the guns were worth about \$1,200, an amount Mathis did not have. Mathis offered the defendant the \$200 he had in his wallet, and a generator, if defendant would leave them alone. Defendant took the cash and the generator and left.

Approximately six weeks after the incident, defendant sent a text message to Mathis demanding the rest of the money and saying he would see Mathis soon. Mathis decided to report the incident at that point. Under the guidance of a sheriff's department investigator, Mathis called the defendant's telephone number and when defendant did not answer, Mathis left a voicemail message that he had some money and wanted to know what to do to finish it. Later, Mathis received a text message from defendant with instructions to pay the balance of \$500. Mathis received this text while he was at work, so he telephoned the sheriff's investigator to report defendant's response.

Defendant was charged with robbery (§ 211, count 1), and being an ex-felon in possession of a firearm. (§ 12021, subd. (a)(1), count 2.) In connection with count 1, it was further alleged that in the commission of the robbery, defendant personally used a

² Briana testified that defendant struck Mathis twice: once before and once after he pulled out the gun.

firearm (§ 12022.5, subd. (a)), and used a firearm in the commission of an enumerated felony. (§12022.53, subd. (b).) In addition, it was alleged that defendant had previously been convicted of five felonies for which he served prison terms (§ 667.5, subd. (b) [prison priors]), one serious felony (§ 667, subd. (a)), and one serious or violent felony under the Strikes law. (§ 667, subds. (c), (e)(1).)

Defendant was tried by a jury which returned guilty verdicts on both counts and true findings on the gun-use allegations. Defendant admitted all prior conviction allegations in a separate proceeding. The court sentenced defendant to a term of six years for the robbery (low term of three years, doubled under the Strikes law), plus 10 years for the gun-use enhancement under section 12022.53, subdivision (b), plus five years for the prior conviction of a serious felony under section 667, subdivision (a). The court struck all the enhancements for the prison priors under section 667.5, subdivision (b), and stayed the sentence for count 2 pursuant to section 654. Defendant appealed.

DISCUSSION

1. There Is Substantial Evidence to Support the Firearm Enhancements.

Defendant argues that there was insufficient evidence to prove that the weapon used during the robbery was a firearm, capable of firing bullets, as opposed to a pellet gun, replica or toy gun, which do not qualify as firearms. As a result, he argues that reversal of the enhancement imposed pursuant to section 12022.53, subdivision (b), is required. We disagree.

In assessing a claim of insufficiency of evidence, our task is to review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect, for purposes of satisfying federal due process. (*Rodriguez*, at p. 11.) The standard is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*Ibid.*) Thus, while it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, on appeal, if the circumstances reasonably justify the trier of fact’s findings, the fact that the circumstance might reasonably be reconciled with a contrary finding does not warrant a reversal. (*Ibid.*)

Section 12022.53, subdivision (b) provides for an additional and consecutive term of 10 years added to the sentence of any person who personally uses a firearm in the commission of a felony specified in subdivision (a), among which robbery is listed as one of the specified felonies. (§ 12022.53, subd. (a)(4).) Section 12022.53, subdivision (b) further provides that the firearm need not be operable or loaded for the enhancement to apply.

As used in section 12022.53, subdivision (b), the term “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a

projectile, by the force of any explosion or other form of combustion. (§ 16520, subd. (a) [formerly § 12001, subd. (b)]; *People v. Law* (2011) 195 Cal.App.4th 976, 983 [citing § 12001, subd. (a)].) Circumstantial evidence suffices to establish the sentence enhancement. (*Law*, at pp. 978-979, citing *People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435.) Thus, where the victim testifies that a particular object looked like a gun, that testimony provides substantial evidence that the weapon was a firearm. (*Id.* at pp. 1436-1437.)

Here, the robbery victim Mathis, as well as Briana and Fidel, testified that they saw defendant pull a handgun from his waistband and point it at Mathis's chest, with the barrel touching Mathis's chest, as defendant demanded money. There was no objection to any of the testimony on the grounds the witnesses were speculating or that their conclusions that the weapon was a gun lacked foundation. It may be reasonably inferred that if the gun were anything but a firearm, Mathis would have noticed a difference as it was poked in his chest. The testimony of the witnesses that the defendant pulled out a gun and poked it into the chest of Mathis constitutes substantial evidence that the defendant used a firearm in the commission of the crime. The fact that the circumstantial evidence might reasonably be reconciled with a contrary finding does not warrant a reversal. (*People v. Rodriguez, supra*, 20 Cal.4th at p. 11.)

2. Defendant’s Due Process Rights Were Not Violated by Instructing the Jury With CALCRIM No. 315 Because the Instruction Does Not Lessen the Prosecution’s Burden of Proof.

Defendant argues that the court’s reading of CALCRIM No. 315, regarding factors to consider in proving identity by eyewitness identification, lowered the prosecution’s burden of proof in violation of defendant’s due process rights. We disagree.

The court read to the jury from the standard instruction, CALCRIM No. 315, as follows: “You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? [¶] What were the conditions affecting the witness’s ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation? [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description, and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendant? [¶] Did the witness ever change his or her mind about the identification? [¶] How certain was the witness when he or she made an identification? [¶] Are the witness and the defendant of different races? [¶] Was the

witness able to identify other participants in the crime? [¶] Was the witness able to identify the defendant in a photographic or physical lineup? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.”

CALCRIM No. 315 is the successor of CALJIC No. 2.92. In *People v. Wright* (1988) 45 Cal.3d 1126, at page 1144, the court held that CALJIC No. 2.92 or a comparable instruction should be given *when requested* in a case in which identification is a *crucial issue* and there is not substantial corroborative evidence. (Italics added.) CALJIC No. 2.92 derived from a well-known model instruction originally promulgated in *United States v. Telfaire* (D.C. Cir. 1972) 469 F.2d 552, 558-559. The instruction is a “cautionary charge” which does not pose a rule of substantive law. (*People v. Hernandez* (1988) 204 Cal.App.3d 639, 652.) Additionally, it does not constitute an affirmative defense, and the general instructions on credibility and burden of proof are sufficient to inform the jury of the test it should apply to identification evidence. (*People v. Alcala* (1992) 4 Cal.4th 742, 802-803; *People v. Blair* (1979) 25 Cal.3d 640, 663.) Thus, there is no sua sponte duty to instruct on the factors affecting eyewitness identification. (*Alcala*, at pp. 802-803, citing *Blair*, at pp. 662-663.)

Although neither party refers to this fact in its briefs, the clerk's transcript includes a written request for instructions filed by defense counsel. Among the requested

instructions is CALCRIM No. 315. During the discussion between the court and counsel prior to instructing the jury, the court went through the list of instructions it intended to give. When it reached CALCRIM No. 315, the court stated, “In some ways I don’t think this is particularly an eyewitness case.³ It seems like more – and maybe I’m wrong. I don’t want to speak for Mr. Bejarano. But the defense attack is that this thing just didn’t happen, by the six weeks after [*sic*]. It’s not a question of Mr. Hill. However, in an abundance of caution, I think this should be given.”

Because the instruction was given at the request of defense counsel, on behalf of the defendant, any error is considered invited error. ““The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal.”” (*People v. Bailey* (2012) 54 Cal.4th 740, 753, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 330; see also *People v. Marshall* (1990) 50 Cal.3d 907, 929-931 [where defendant requested and drafted an instruction on factors in mitigation or aggravation of the death penalty, error was invited].)

Here, the submission of a written request for CALCRIM instructions, including the instruction at issue here, constitutes a conscious, deliberate tactical choice to have the

³ The court was correctly referring to the fact that the defendant was well known to the victim, when it questioned whether the instruction was appropriate.

instruction read to the jury. Defendant cannot complain on appeal that the court did as he requested.

3. The Abstract Should Be Amended.

Defendant argues that the abstract of judgment should be corrected because it erroneously indicates that his five prison priors were stayed rather than stricken. Respondent agrees to the requested modification. The modification is ordered as requested. We have also noted that the clerk omitted to check the box on item 4 of the abstract of judgment, to reflect that the defendant was sentenced under the Strikes⁴ law. Instead, reference to the defendant's sentence under the Strikes law is typed in on line 11 of the second page of the form, for "Other orders."

The abstract of judgment constitutes the commitment and is the order sending the defendant to prison, and the process and authority for carrying the judgment and sentence into effect; no other warrant or authority is necessary to justify or require its execution. (§ 1213; *People v. Mitchell* (2001) 26 Cal.4th 181, 185, citing *In re Black* (1967) 66 Cal.2d 881, 890.) It goes without saying that accuracy is essential in a document that prescribes the execution of sentence and is provided to Criminal Investigation and Identification (CII). (§ 1213, subd. (a).)

⁴ There are several typographical errors on this form: Line 4's box indicates a sentence under "PC 667(b)-(i) or PC 1170.12 (two **stirkes**)." The next box under that item refers to "PC 1170(a)(3) Pre-confinement credits equal or exceed time imposed (Paper **Commitement**)." Finally, the footer of the form indicates this form was adopted for mandatory use by the "Judicial **Counsel** of California."

This court has the authority to correct clerical errors at any time. (*People v. Mitchell, supra*, 26 Cal.4th at pp. 186-187.) The clerk is directed to amend the abstract of judgment to reflect that (1) the prison priors (§ 667.5, subd. (b)) were stricken, not stayed, and (2) the sentence was imposed under the Strikes law by checking the box on line 4, and to delete reference to the Strikes law under “other orders” on line 11.

DISPOSITION

The trial court is directed to amend the abstract to reflect the corrections indicated in section 3 and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.