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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. ROBERT STEVEN AMAYA, Defendant and Appellant.	E056611 (Super.Ct.Nos. FSB1200161 & FSB1105684) OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek, Judge. Affirmed in part; reversed in part with directions.

Robert E. Boyce, 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, Steve Oetting and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Robert Amaya, of three counts of robbery (Pen. Code, § 211)[1] and one count each of attempted robbery (§§ 664/211), making criminal threats (§ 422) and possessing a firearm by an ex-felon (§ 12021, subd. (a)(1)). As to the robberies, attempted robbery and making criminal threats, the jury found true allegations that defendant had used a handgun (§ 12022.53, subd. (b)). In bifurcated proceedings, the trial court found true allegations that he had suffered two strike priors (§ 667, subds. (b)-(i)), a prior conviction for a serious felony (§ 667, subd. (a)(1)), and two prior convictions for which he served prison terms (§ 667.5, subd. (b)). He was sentenced to prison for four consecutive 25 years to life terms plus 64 years and appeals, claiming the jury was misinstructed, one of his gun use enhancements should be reversed and he was erroneously sentenced. The parties agree concerning the gun use enhancement and we therefore reverse it and direct the trial court to strike any mention of it from the minutes of the sentencing hearing and the abstract of judgment, and to add something to the Indeterminate Abstract. Otherwise, we reject defendant's contentions and affirm.

FACTS

On December 15, 2011, a woman (mother) and her 13-year-old daughter (daughter) were getting their nails done at a salon in Grand Terrace. While they were there, defendant entered the salon, robbed the mother, the salon owner and the salon owner's sister-in-law and he attempted to rob the daughter, as will be described more

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

fully, below. All four victims identified defendant at trial as the robber. Two days later, a deputy sheriff found defendant asleep in a vehicle which contained the gun which two of the victims testified had been used in the crimes as well as numerous items taken from the victims during the crimes. A citation in the car had been issued to defendant on December 15th. One of the victims testified that the car, which defendant claimed he was living in, was similar to the vehicle which had been driven by the robber.

1. *Unanimity Instruction*

The mother testified that defendant came into the salon and she could feel him right behind her, as the salon owner was giving her a manicure. He said, [‘R]aise your hands, everybody. Don’t say anything or I’m going to kill you.[’] The mother added, “[S]o we all raised our hands . . . .” Defendant asked the salon owner to give him money. The salon owner replied that they (meaning the salon) didn’t have any. He pointed his gun and said to give him her money. He went through drawers that were at her station. The mother also testified that where defendant was at this point, he was not near the daughter. She also said that it was not until defendant had gone through the belongings of the salon owner and her sister-in-law that defendant pointed his gun at the daughter. The mother told defendant to leave the daughter alone—that she was little. Defendant said he didn’t care and he continued to train his gun on the daughter. The mother then kicked her purse, which was on the ground, to get defendant’s attention off the daughter. Defendant asked the mother what she had there. The mother told him to take her purse. Concerning her cell phone, which she has dropped on the floor, defendant asked the

mother what she had there and what was she doing. Defendant added, to the mother, [“]You better not call the cops cuz [*sic*] I’m going to kill you.[”] The mother told defendant that she hadn’t done anything and he had told her not to do anything. He grabbed her phone and threw it into her purse, then began to leave. The mother described the location of the daughter as in back of the salon in the corner.

The daughter testified that she was in a different corner of the salon than the mother, but they could see each other. She testified that she saw defendant enter the salon with a gun and go straight to the mother, but she did not realize what was going on until the salon owner opened a drawer that had money in it and said, [“H]ere’s the money.[”] The daughter did not testify that she heard defendant say, “Raise your hands, everybody. Don’t say anything or I’m going to kill you” or that she raised her hands, as the mother testified. In fact, when asked, “Did [defendant] make *any* threats to kill?” the daughter testified that as defendant left the salon, he said, “[If] you call the cops, I’m gonna kill all of you.” The daughter corroborated the mother’s testimony that, before that, the defendant had pointed his gun at the mother’s head, then at the salon owner’s head, then at the daughter’s head, and when he did the latter, he said, “[H]ow about you? Do you have any money?” The daughter also corroborated the mother’s testimony that the mother said to defendant when he accosted the daughter, “[S]he’s little. She doesn’t have any money[,]” that defendant responded he did not care and that the mother kicked her purse and it went towards defendant.

The salon owner testified that defendant approached the mother and said, "[E]verybody freeze. [Put your] hand[s in] the air[,]" and "[e]verybody[s] hand went [in]to the air."[2] He pointed his gun at the mother's head and asked where the money was. The owner said the money was right there and she pulled open a drawer in her station and defendant walked around to the drawer and retrieved the money. Defendant demanded more money, the owner said that was all she had, defendant insisted she had more, so she opened all the drawers in her station to show him. He then went to where the owner's sister-in-law was giving the daughter a manicure. He pointed his gun at the sister-in-law, asked her what she had and where the money was. He opened all the drawers at her station and then he had her empty her pockets, giving him whatever money she had. He also took a camera from her. The owner corroborated the mother's and daughter's testimony that when defendant demanded money from the daughter, the mother told him that the daughter was only 12 years old and she had no money. The owner testified that defendant then returned to the mother and grabbed her purse and phone. Before defendant did this, he took the necklace the owner was wearing. When asked if she ever heard defendant make any threats "to kill you[,]" the owner replied that before defendant left the salon, he said, "[N]obody move or call the cop[s] or I will shoot you" while swinging his arm, which was attached to the hand he used to hold the gun.

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[2] As previously pointed out, the daughter did not testify that she heard this or that she put her hands into the air.

The owner's sister-in-law testified that defendant entered the salon, approached the mother and pointed his gun at her. The owner pulled open a drawer at her station and told defendant to come and get the money. Defendant then ordered the owner and the sister-in-law to open all the drawers at their respective stations, which they did. Defendant came to the station of the sister-in-law, where he asked her to empty her pockets and he took $3 or $4 from her. He also opened a drawer at her station and took a camera that was in it. After that, he ordered the owner to give him her necklace. Then, he asked the mother for her purse. The sister-in-law testified that, at some point, defendant ordered everyone to put their hands up. After taking the mother's purse, defendant said do not report to the police, and left.

The jury was instructed that the crime of making criminal threats with which defendant was charged was making those threats against the daughter.
As to that charge, the jury was instructed that an element of the offense was that defendant had to "ma[ke] the threat orally[,]" that it had to be "so clear, immediate, unconditional and specific that it communicated to [the daughter] a serious intention and the immediate prospect that the threat would be carried out[,]" that whether the threat was such, the jury was to "consider the words themselves, as well as the surrounding circumstances" and that "[t]he threat actually caused [the daughter] to be in sustained fear for her own safety[.]"

During argument to the jury, the prosecutor said, in pertinent part, "Criminal threats is the other charge [besides attempted robbery] with respect to [the daughter], and

that is when you heard the testimony about killing, pointing the weapon, swinging the weapon, and[, ‘]I’m going to kill you,[’] those sorts of threats. Obviously, that’s what guns do is they can cause great bodily injury or kill.[3] [¶] So the first element is that the defendant willfully threatened to unlawfully kill or unlawfully cause . . . great bodily injury to [the daughter]; [¶] Number two, the defendant *made that threat orally*; [¶] Number three, the defendant intended that *this statement* be meant as a threat and intended that it be communicated to [the daughter] . . . .”[4]

Defendant here contends that his conviction for making criminal threats must be reversed because there was testimony that defendant made “multiple threatening statements during the incident” and the trial court failed to give a unanimity instruction, requiring the jury to agree on which of those statements constituted the basis for the conviction. However, there was no evidence that the daughter heard any except one threat—the one delivered at the end, when defendant was leaving the salon—the same

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[3] The jury had been instructed that defendant had to have threatened to kill or cause great bodily injury to the daughter.

[4] Without identifying it as such, defendant points to a statement the prosecutor made during her opening statement at the beginning of trial. She said, “ . . . [Defendant] comes in . . . and he points this gun at all of them, swings it around the . . . salon and tells them . . . [h]e wants all of their cash and belongings, and they better give it up or he’s going to kill them, and this is repeatedly made.” Unfortunately, as is the case sometimes, the prosecutor overstated her anticipated testimony in making this statement, as our recitation of the facts shows. Additionally, we have never seen the prosecutor’s *opening statement* used as a basis for claiming that a particular jury instruction should have been given—certainly, the prosecutor’s argument to the jury at the conclusion of trial if therein the prosecutor elects a particular act as the basis for a charge or makes a concession of fact, but *never* the prosecutor’s opening statement.

sole threat that the owner heard. Because the instructions given the jury impliedly required the daughter to *hear* the threat that defendant made, there was no reason for giving a unanimity instruction, as there was no evidence that the daughter heard more than the one threat defendant delivered as he left the salon.

2. *Section 12022.53, subdivision (b) Finding on Count 5*

The parties agree that the true finding that defendant used a handgun during count 5, i.e., making criminal threats towards the daughter, should be reversed because the enhancement is inapplicable to this offense. Therefore, we will reverse the true finding.

3. *Sentencing*

In a prior case, defendant had pled guilty to and stood convicted of 12 counts of robbery and 3 counts of attempted robbery. The Information in the instant case alleged that defendant had suffered two strike priors, for two of the robberies in the prior case, one prior conviction for a serious felony, based on the same case, and a conviction for robbery and attempted robbery in the same case which resulted in a prison sentence. The trial court here found that the allegations as to the prior strikes and the prior convictions for which defendant served a prison terms were true. In sentencing defendant, the court below imposed 25-years-to-life terms for the instant robberies and attempted robbery, four consecutive five year enhancements for the prior conviction for a serious felony and four consecutive one year enhancements for the prior convictions for which defendant served a prison term. Defendant here contends that the sentencing court may not enhance his sentence for both a prior serious felony conviction and for a prior conviction for

which defendant served a prison term "stemming from that offense." However given the fact that defendant suffered 12 prior convictions for robbery, which is a serious felony (§ 1192.7, subd. (c)(19)), and was sentenced to prison for all 12 convictions, along with three convictions of attempted robbery, the sentencing court did not have to rely on the same prior to impose an serious prior enhancement and a prison prior enhancement.

DISPOSITION

The true finding under section 12022.53, subdivision (b) as to count 5 (making criminal threats) is reversed and the trial court is directed to strike any reference to it in the minutes of the sentencing hearing and the abstract of judgment. The trial court is further directed to check box No. 8 on the Indeterminate Abstract of Judgment, indicating that sentence was imposed pursuant to section 667, subdivisions (b)-(i). In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.