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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON TORRES QUINTANA,

Defendant and Appellant.

F071079

(Super. Ct. No. CRL011252)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. John D. Kiriwara, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Stephanie A. Mitchell and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Kane, J. and Smith, J.

Appellant Aaron Torres Quintana appeals various aspects of his sentence. Relevant to this appeal, appellant was convicted of assault to commit a felony during the commission of a first degree burglary (§ 220, subd. (b)¹/count 1), first degree burglary (§ 459/count 2), forcible oral copulation (§ 288a, subd. (c)(2)(A)/count 3) with the additional enhancement that the crime was committed during the commission of a burglary of the first degree with the intent to commit forcible oral copulation (§ 667.61, subd. (d)(4)), and elder or dependent adult abuse (§ 368, subd. (b)(1)/count 4). On each count, the jury also found true an alleged enhancement for committing a violent crime on the vulnerable (§ 667.9, subd. (a)).

Appellant contends he was improperly convicted of count 2 because first degree burglary is a lesser included offense of assault with intent to commit a felony in the course of a burglary of the first degree. Appellant further contends the enhancements found true under section 667.9 cannot stand with respect to counts 1 and 4. Finally, appellant contends his abstract of judgment contains clerical errors requiring correction. For the reasons set forth below, we will modify the judgment and remand with instructions to correct the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On March 8, 2014, appellant entered into the home of an 86-year-old woman and sexually assaulted her. The victim was able to call 911 prior to the assault and the police responded in time to hear her telling him to stop and to get out. When the police arrived, appellant attempted to flee. But he was quickly apprehended outside of the victim's home.

Appellant was charged with the four counts noted above, as well as possession of a controlled substance and obstructing a peace officer. Appellant was tried before a jury and convicted on all counts, with each charged enhancement found true.

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

Appellant was sentenced to 25 years to life on count 3, which was determined to be the principal term. Appellant was further sentenced to life with the possibility of parole on count 1, three years on count 4, and four years on count 2, all of which were stayed. A one-year enhancement was also included, but stayed, as to each count. Appellant also received a six-month concurrent sentence on the possession charge and a six-month consecutive sentence on the obstruction charge.

A minute order was entered and this appeal timely followed. The abstract of judgment was entered shortly after the notice of appeal.

DISCUSSION

Appellant identifies four alleged errors relating to his sentence. The People have conceded three of those allegations. As discussed below, we find those concessions appropriate. The People do not concede, however, that a one-year enhancement for committing burglary of the first degree against a person who is 65 years or older (§ 667.9) cannot be triggered by a conviction for assault with intent to commit a felony during the commission of a first degree burglary (§ 220, subd. (b)). Appellant contends that a plain reading of the statute requires the enhancement be struck.

Standard of Review and Applicable Law

Any person who commits one of an enumerated set of crimes against a person who is 65 years of age or older “shall receive a one-year enhancement for each violation.” (§ 667.9, subd. (a).) Relevant to this case, one of those enumerated crimes is burglary of the first degree. (§ 667.9, subd. (c)(11).)

Appellant’s argument requires us to consider whether a conviction under section 220, subdivision (b) legally supports an enhanced sentence pursuant to section 667.9. “Because the legality of defendant’s sentence is a purely legal matter, we review its propriety de novo.” (*People v. Rosbury* (1997) 15 Cal.4th 206, 209.)

The Enhancement Was Properly Applied

Appellant argues the enhancement must be struck because section 220 is not specifically identified in the list of enumerated crimes under section 667.9, subdivision (c), for which the enhancement may be imposed. We are not persuaded.

Appellant's conviction under section 220 is for committing assault with intent to commit a felony *during the commission of a first degree burglary*. As appellant separately argues, and the People have conceded, burglary in the first degree is a lesser included offense of assault with intent to commit a felony during the commission of a first degree burglary. (*People v. Dyser* (2012) 202 Cal.App.4th 1015, 1020 (*Dyser*)). Under the statutory elements test, "a lesser offense is necessarily included in a greater offense if the statutory elements of the greater offense 'include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.'" (Ibid.)

Under section 667.9, "[a]ny person who *commits* one or more of the crimes specified in subdivision (c)" shall receive a one-year enhancement for each violation. (§ 667.9, subd. (a), italics added.) "Burglary of the first degree, as defined in Section 460, in violation of Section 459," is specifically identified as a triggering crime. (§ 667.9, subd. (c)(11).) Because appellant necessarily committed burglary in the first degree in order to be convicted of assault with intent to commit a felony during the commission of a first degree burglary, he satisfies the plain language of the statute.

Appellant argues that the Legislature would have specifically identified section 220 as an enumerated crime if it had intended conviction under that statute to trigger the enhancement. We disagree. The Legislature is presumed to be aware of existing laws and judicial doctrines in effect when legislation is enacted. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052.) The current version of section 667.9 came into effect January 1, 2000. By that time, the statutory elements test, and its determination that a lesser included offense is one that is necessarily committed, was well settled. (See *People v.*

Birks (1998) 19 Cal.4th 108, 117 [“The definition of a lesser necessarily included offense is technical and relatively clear.”].) The Legislature had no reason to specifically add section 220 as an enumerated crime, as its choice to enhance a sentence when one commits a violation of section 459 would necessarily include an instance where one commits a violation of section 459 in the course of violating section 220.

Because there was no error in imposing the enhancement with respect to count 1, we need not consider appellant’s argument that his counsel was ineffective in failing to object.

Appellant’s Remaining Allegations of Error

Appellant’s three remaining allegations of error have been conceded by the People. We find those concessions proper.

Appellant’s conviction of first degree burglary in count 2 cannot stand, as first degree burglary is a lesser included offense of count 1, assault with intent to commit a felony during the commission of a first degree burglary. (*Dyser, supra*, 202 Cal.App.4th at p. 1020.)

The one-year enhancement imposed under count 4, for elder abuse, cannot stand either. Elder abuse is not an enumerated crime under section 667.9, nor does its violation necessarily result in the commission of an enumerated crime. (§ 667.9, subd. (c).) Because the enhancement could not be lawfully imposed under the facts of this case, it was unauthorized and we may correct it despite the lack of objection at sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

Finally, in entering the abstract of judgment in this case, the clerk noted the section 667.9 enhancements in the boxes reserved for enhancements imposed for prior convictions or prison terms, as opposed to the boxes for enhancements tied to specific counts. Upon remand, the clerk shall correct this clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The conviction in count 2 is reversed. The trial court is ordered to strike count 2, strike the enhancement relating to count 4, and to make the appropriate corrections to the abstract of judgment. The trial court is further ordered to correct the abstract of judgment to identify the remaining enhancements in the boxes reserved for enhancements tied to specific counts. In all other respects the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and forward a certified copy to California's Department of Corrections and Rehabilitation.