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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD FISO, Defendant and Appellant.	F077421 (Super. Ct. No. VCF285583) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. H. N. Papadakis, Judge. (Retired Judge of the Fresno Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jamie A. Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P. J., Smith, J. and Meehan, J.

The domestic violence related crimes in this case were committed by defendant Richard Fiso against his girlfriend, S.M.[1] Following resentencing in accordance with our opinion in *People v. Fiso* (Dec. 5, 2016, F068658) [2016 Cal.App.Unpub. Lexis 8594] [nonpub. opn.] (*Fiso I*), defendant claims the trial court erred when it issued an indefinite protective order barring him from contact with the victims under Penal Code sections 136.2, subdivision (i)(1), and 273.5, subdivision (j), which authorize the issuance of a protective order valid for up to 10 years.[2, 3] Defendant requests we modify the order to reflect it expires upon order of the court or 10 years, whichever occurs first. The People concede it was error to issue an indefinite protective order and agree with defendant's request to modify the order to reflect a 10-year term.

We accept the concession of error and modify the order to reflect it is valid for a period of 10 years. On our own motion, we also order the trial court to correct the abstract of judgment to reflect imposition of the sentence enhancements for personal infliction of great bodily injury (GBI) and personal use of a deadly or dangerous weapon on count 2 (carjacking) only.

BACKGROUND

Defendant was convicted by jury of the following four offenses: attempted murder (§§ 664/187) (count 1); carjacking (§ 215, subd. (a)) (count 2); assault with a deadly weapon (§ 245, subd. (a)(1)) (count 3); and domestic battery (§ 273.5, subd. (a))

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1 Because the facts underlying defendant's convictions are not relevant to resolution of the issue he raises on appeal, we do not further summarize them.

2 Further statutory references are to the Penal Code unless otherwise noted.

3 The victims in this case include S.M.'s children, J.V. and M.J. (*People v. Race* (2017) 18 Cal.App.5th 211, 219 ["[T]he term 'victim' pursuant to section 136.2 criminal protective orders must be construed broadly to include any individual against whom there is 'some evidence' from which the court could find the defendant had committed or attempted to commit some harm within the household."].)

(count 4).[4] The jury found true the sentence enhancements for personal use of a deadly or dangerous weapon (§ 12022, subd. (b)(1)) and personal infliction of GBI involving domestic violence (§ 12022.7, subd. (e)). In a bifurcated proceeding, the trial court found true that defendant suffered a prior conviction for second degree robbery in the State of Washington and that the conviction qualified under California law as a serious and/or violent felony under the "Three Strikes" law. (§§ 667, subds. (b)–(i) & 1170.12, subds. (a)–(d).)

On count 1, the trial court sentenced defendant to 18 years (upper term, doubled for the prior strike conviction), plus five years for the prior serious felony conviction enhancement and five years for the GBI enhancement. On count 2, the court sentenced defendant to three years four months (one-third of the middle term, doubled for the prior strike conviction), plus three years for the deadly weapon enhancement, for a total determinate term of 34 years 4 months. On counts 3 and 4, the court imposed sentences, including on the enhancements, and stayed the sentences under section 654.

On appeal, defendant argued there was insufficient evidence supporting the trial court's finding that his prior Washington State robbery conviction qualifies as a strike and a serious felony under California law. He also argued the trial court erred in sentencing him to the full upper term on the deadly weapon enhancement to count 2; erred in imposing and staying the prior serious felony conviction enhancement under section 667, subdivision (a)(1), as to counts 2, 3, and 4; and erred in issuing an indefinite protective order. Finally, defendant argued the trial court abused its discretion by failing to conduct a "proper hearing" pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 when he complained his trial counsel was ineffective.

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4 The procedural facts relating to defendant's convictions are taken from our opinion in *Fiso I*.

We found that the trial court erred in finding that defendant's prior Washington State robbery conviction qualified as a strike and a serious felony under California law, reversed the finding and remanded for a new proceeding and/or resentencing; and that as to count 2, the court erred in failing to sentence defendant to one-third of the middle term, or one year, for the deadly weapon enhancement. Given these conclusions, we dismissed defendant's appeal of the trial court's order imposing and staying multiple prior felony conviction enhancements under section 667, subdivision (a), and we dismissed his appeal of the protective order, which had been terminated by the trial court, as moot. We otherwise affirmed the judgment.

During resentencing, the trial court found the out-of-state prior felony conviction allegation not proven, in accordance with the California Supreme Court's then recently issued decision in *People v. Gallardo* (2017) 4 Cal.5th 120, 124–125. On count 2 (carjacking), the court sentenced defendant to the upper term of nine years, plus an additional five years for the GBI enhancement and an additional three years for the deadly or dangerous weapon enhancement; and on count 1 (attempted murder), the court sentenced defendant to two years four months (one-third of the middle term), for a total determine term of 19 years 4 months in prison. On count 3 (assault) and count 4 (domestic battery), the court imposed the aggravated terms of four years, and stayed the sentences under section 654.

DISCUSSION

I. Issuance of Indefinite Protective Order

The offenses in this case arise from an incident of domestic violence defendant committed against his girlfriend and defendant was convicted, in relevant part, of domestic battery under section 273.5, subdivision (a). (*Fiso I*, *supra* , F068658 [2016 Cal.App.Unpub. Lexis 8594, *1–3].) Subdivision (j) of that statute provides: "Upon conviction under subdivision (a), the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, *which may be valid for up to*

10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. This protective order may be issued by the court whether the defendant is sentenced to state prison or county jail, or if imposition of sentence is suspended and the defendant is placed on probation." (Italics added.)

Further, section 136.2, subdivision (i)(1), provides: "In all cases in which a criminal defendant has been convicted of a crime involving domestic violence as defined in Section 13700 or in Section 6211 of the Family Code, a violation of subdivision (a) of Section 236.1, Section 261, 261.5, 262, subdivision (a) of Section 266h, or subdivision (a) of Section 266i, a violation of Section 186.22, or a crime that requires the defendant to register pursuant to subdivision (c) of Section 290, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with a victim of the crime. *The order may be valid for up to 10 years, as determined by the court*. This protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison or a county jail or subject to mandatory supervision, or whether imposition of sentence is suspended and the defendant is placed on probation. It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of a victim and his or her immediate family."[5] (Italics added.)

The parties agree the trial court properly issued a protective order pursuant to these statutes, but erred in making the order indefinite. As the court exceeded its

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[5] Section 136.2 was amended after defendant was sentenced in 2018, but that amendment is not relevant to the issue raised on appeal. (Stats. 2018, ch. 805, § 1.)

statutory authority by issuing an indefinite order, we will modify the order to reflect it is valid for 10 years from the date of its issuance, which was April 10, 2018.

II. Error in Abstract of Judgment

Additionally, we note an error in the abstract of judgment. A trial court's oral pronouncement is the judgment of conviction. (*People v. Jones* (2012) 54 Cal.4th 1, 89.) The court's oral judgment controls and "[w]hen an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties." (*Ibid.*)

The abstract of judgment in this case correctly reflects imposition of the deadly or dangerous weapon enhancement and the GBI enhancement on count 2 (carjacking), but it incorrectly reflects the imposition and stay of those enhancements on the remaining three counts. As the trial court did not impose the enhancements on counts 1, 3 and 4, on our own motion we order the abstract of judgment corrected to reflect the court's judgment.

DISPOSITION

The trial court's protective order is modified to reflect that it is valid for 10 years from April 10, 2018. Further, the trial court is directed to amend the abstract of judgment so that it correctly reflects the imposition of the enhancements under sections 12022.7, subdivision (e), and 12022, subdivision (b), as to count 2 only and to forward the amended abstract of judgment to the appropriate authorities. Except as modified, the judgment is affirmed.