Filed 8/21/19

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN PAUL SULLIVAN, Defendant and Appellant.	B288894 (Los Angeles County Super. Ct. No. VA140883)

APPEAL from a judgment of the Superior Court of Los Angeles County, Olivia Rosales, Judge. Affirmed and remanded for resentencing.

Law Office of Corey Evan Parker and Corey Evan Parker, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy

Attorney General, William H. Shin, Deputy Attorney General, for Plaintiff and Respondent.

Jonathan Paul Sullivan appeals from the judgment entered after a jury convicted him of assault with a firearm on a peace officer and found true the special allegations Sullivan had personally used a firearm during the commission of the assault. Sullivan contends the trial court abused its discretion in denying his motion for a mistrial and improperly withdrew its recommendation he be placed in fire camp. We affirm the conviction and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Sullivan was charged in an information filed February 17, 2017 with one count of assault with a firearm on a peace officer (Pen. Code, § 245, subd. (d)(1)).[1] It was specially alleged Sullivan had personally used a firearm within the meaning of sections 12022.53, subdivision (b), and 12022.5, subdivisions (a) and (d).

2. *Evidence at Trial*

On the morning of December 27, 2015 a Los Angeles County Sheriff's deputy discovered his badge, credit card and loaded handgun had been stolen from his vehicle in La Habra. He notified the La Habra Police Department, which soon identified Sullivan as a suspect in the theft. That evening La Habra Police Officer Michael Costanzo was on patrol in a marked police car when he received a radio call from two detectives who had Sullivan under surveillance. The detectives

---

[1] Statutory references are to this code.

stated Sullivan was leaving his current location and they needed a patrol car to conduct a traffic stop on the vehicle Sullivan was driving. Costanzo proceeded to the provided location, identified Sullivan's vehicle and pulled into traffic behind it.

After following Sullivan for a few minutes, Costanzo activated the lights on his patrol car to facilitate the traffic stop. Rather than pull over immediately, Sullivan continued down the street and turned into a residential driveway. Costanzo stopped his patrol car behind Sullivan's vehicle. As Costanzo got out of his car, he saw Sullivan leave his car and noticed Sullivan had a gun in his hand. Sullivan immediately ran away from Costanzo toward the garage at the end of the driveway. Costanzo unholstered his weapon, ran after Sullivan and shouted at him to stop and get on the ground. Sullivan ran to an area next to the garage where Costanzo saw him attempt to climb over some debris. Sullivan lost his footing, stopped and pointed the gun at Costanzo in a "clear and deliberate" manner. Afraid Sullivan was going to shoot him, Costanzo fired his weapon at Sullivan, hitting him in the elbow. After being hit Sullivan threw his gun behind him. When Costanzo approached Sullivan, Sullivan said he was sorry and had "really messed up."

Sullivan testified in his own defense. He admitted to having received the stolen weapon from a friend on December 27, 2015 and said he intended to trade the gun for methamphetamine. Sullivan explained that, when he saw the patrol car turn on its lights behind him, he panicked. When he got out of his car, he intended to run behind the garage and throw the gun away. Sullivan denied pointing the gun at Costanzo, stating he would never point a gun "at any human

being ever." Instead, he insisted, he had lifted his arm to throw the gun behind him when Costanzo fired.

3. *The Motion for Mistrial*

During its case-in-chief the prosecution presented the testimony of the investigating officer, Detective Chad Hoeppner of the Whittier Police Department. The prosecutor showed Hoeppner a booking photograph of Sullivan to demonstrate the difference between Sullivan's appearance in 2015 and at the time of trial; Hoeppner testified Sullivan was thinner and less "well manicured" in 2015. When the photograph was marked for identification, defense counsel requested a sidebar. Defense counsel stated she had thought the prosecutor would be introducing a Department of Motor Vehicles photograph not a booking photograph; however, the prosecutor reminded defense counsel she had shown her both photographs earlier that day. Defense counsel withdrew any objection.

During her cross-examination of Detective Hoeppner defense counsel asked when the booking photograph was taken. Hoeppner replied, "This was taken in 2015. I believe it was in June or July when he was arrested for another charge." Defense counsel objected, and the trial court sustained the objection. The court told the jury, "[The answer] will be stricken as to the other arrest. And you are to disregard that." During a sidebar both the court and defense counsel expressed their prior understanding the photograph had been taken during Sullivan's booking for the December 27, 2015 incident. The prosecutor clarified it had been taken approximately six months earlier. Defense counsel argued Hoeppner's reference to a prior arrest was highly prejudicial and requested the court declare a mistrial.

The court declined, stating it believed any prejudice could be cured.

After the sidebar concluded, the trial court again admonished the jury, stating, "I just want to remind you again that the portion, the part about possible arrest, that language is stricken from the record. That means you cannot consider it in any way as evidence in this case."

4. *The Verdict and Sentence*

Sullivan was convicted of assault with a firearm on a peace officer, and the jury found true the special allegations that Sullivan had used a firearm during the assault within the meaning of sections 12022.53, subdivision (b), and 12022.5, subdivisions (a) and (d). The court sentenced Sullivan to the upper term of eight years for the assault and struck the firearm enhancement pursuant to section 12022.53, subdivision (b) (see §§ 1385, 12022.53, subd. (h)). The court did not address the section 12022.5 enhancement based on its belief that section 12022.5 did not apply in this case because use of a firearm was an element of the assault.[2]

---

[2] The court stated, "And I just wanted to clear up the gun allegation, the way it was pled and it was presented to the jury for verdict, they found the gun allegation to be true under 12022.53(b) as well as 12022.5 . . . (a) and (d). . . . And so I thought, well, maybe that was an exception for an assault on a peace officer with a firearm as it is for 53 because the use of the firearm is an element of the offense. But I think we are all in agreement that it was probably something that is the way the filing computer files it in the D.A.'s office and it wasn't corrected. And looking at the statute it does not apply . . . . I think the 53 which is a 10-year enhancement is the only one that applies in this case."

After the trial court pronounced the sentence, defense counsel requested the court recommend Sullivan be placed in fire camp. The court agreed. The court then advised Sullivan of his right to appeal; and Sullivan responded, "I will appeal it." The court replied, "That's nice to know that. I wish I had known that. I just instantly regretted my decision. So much for remorse."

The court proceeded to hear other matters but went back on the record later that day in this matter and stated, "Court modifies its sentencing and does not recommend fire camp."

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion in Denying the Motion for Mistrial*

A trial court should grant a mistrial "'if the court is apprised of prejudice that it judges incurable by admonition or instruction.'" (*People v. Collins* (2010) 49 Cal.4th 175, 198 (*Collins*).) "A witness's volunteered statement can, under some circumstances, provide the basis for a finding of incurable prejudice." (*People v. Ledesma* (2006) 39 Cal.4th 641, 683.) However, "'[j]uries often hear unsolicited and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment . . . .'" (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1428-1429.) "'It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions."'" (*Ibid.*) Thus, a motion for mistrial should be granted "only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.)

Whether particular evidence "'is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" (*Collins*, *supra*, 49 Cal.4th at p. 199.) Accordingly, we review the trial court's ruling denying a mistrial for abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 573; *People v. Bolden*, *supra*, 29 Cal.4th at p. 555.)

Sullivan contends Detective Hoeppner's testimony that Sullivan had been arrested prior to the current offense was incurably prejudicial. In support of his argument Sullivan relies on two decades-old court of appeal cases in which a witness's statement that the defendant had suffered a prior conviction and/or served time in prison was incurable by admonition. (See *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 [witness's reference to defendant as "ex-convict" was not curable by admonition]; *People v. Figuieredo* (1955) 130 Cal.App.2d 498, 506 [witness's statement he knew defendant from prison was ground for new trial].) Unlike the testimony in *Ozuna* and *Figuieredo*, however, Hoeppner's testimony mentioned only an arrest; the jury was not told whether Sullivan had been convicted of any offense, let alone charged. Nor was the jury told the nature of the incident leading to the arrest.

The Supreme Court has repeatedly—and more recently than the decisions Sullivan cites—found that any prejudice arising from brief and ambiguous references to a defendant's past criminality can be cured by appropriate admonition to the jury. For example, in *Collins, supra,* 49 Cal.4th 175, a witness testified the defendant "had been trying to call her 'ever since he was arrested'" and had called her from "'Susanville before he got out.'" (*Id.* at pp. 196-197.) The trial court denied the defendant's

motion for mistrial but offered to strike that portion of the testimony and give the jury a limiting instruction. Defense counsel declined the offer out of fear of highlighting the testimony further. On appeal the Court held, "[The witness's] remarks regarding defendant's phone calls were brief and ambiguous. The court did not abuse its discretion in concluding that any prejudicial effect could [be] cured by an admonition." (*Id.* at p. 199; see also *People v. Avila*, *supra*, 38 Cal.4th at pp. 572-574 [any prejudice arising from witness's statement defendant had "barely got[ten] out of prison" at the time of the offense was cured by admonition "'to disregard that testimony and treat it as though you had never heard it. You shall not consider it for any purpose. In your deliberations you may not discuss or consider it'"]; *People v. Valdez* (2004) 32 Cal.4th 73, 128 ["brief and isolated" statement by witness that he had interviewed defendant in jail did not warrant mistrial]; *People v. Franklin* (2016) 248 Cal.App.4th 938, 956 ["none of the three vague and fleeting references to appellant's criminal history resulted in incurable prejudice"].)

Here, the trial court struck the testimony and admonished the jury to disregard Detective Hoeppner's statement regarding a prior arrest, stating it could not be considered in any way as evidence. The trial court also instructed the jury pursuant to CALCRIM No. 222 that, "If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose." We agree with the trial court that, under the circumstances of this case, the instructions and admonishments were sufficient to cure any prejudice. (See *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 292 ["Here, the trial court struck Berber's testimony and properly admonished the

jury. Although Soliz asserts the admonitions were inadequate, we see no basis for the assertion and presume, as always, that the jury followed the court's instructions"]; see generally *People v. Yeoman* (2003) 31 Cal.4th 93, 139 ["the presumption that jurors understand and follow instructions [is] '[t]he crucial assumption underlying our constitutional system of trial by jury'"].)

2. *The Trial Court's Failure To Address the Section 12022.5 Firearm Enhancement Requires a Remand for Resentencing*

The trial court was correct that a firearm enhancement pursuant to section 12022.5 generally cannot be imposed if use of a firearm is an element of the underlying offense (see § 12022.5, subd. (a) ["any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense"]), but erred in concluding section 12022.5 did not apply in this case. Section 12022.5, subdivision (d), creates an exception for convictions of assault pursuant to section 245: "Notwithstanding the limitation in subdivision (a) relating to being an element of the offense, the additional term provided by this section shall be imposed for any violation of Section 245 if a firearm is used . . . ." Thus, Sullivan's conviction for assault with a firearm on a peace officer pursuant to section 245, subdivision (d), was subject to the section 12022.5 sentencing enhancement.

When, as here, more than one firearm enhancement has been found true, the court generally may not impose more than one additional term of imprisonment for each crime. (§ 12022.53, subd. (f) ["[a]n enhancement involving a firearm specified in

Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section"].) Thus, if a section 12022.53 enhancement is imposed, the trial court must impose and stay any other applicable firearm enhancement. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130 ["[w]e conclude section 12022.53 requires that, after a trial court imposes punishment for the section 12022.53 firearm enhancement with the longest term of imprisonment, the remaining section 12022.53 firearm enhancements and any section 12022.5 firearm enhancements that were found true for the same crime must be imposed and then stayed"].)

In the present case, rather than impose the section 12022.53 firearm enhancement, the trial court exercised its discretion to strike the enhancement in furtherance of justice. (See §§ 1385, 12022.53, subd. (h).) In the absence of an imposed sentence pursuant to section 12022.53, the prohibition on sentencing Sullivan pursuant to section 12022.5 does not apply. (See *People v. Morrison* (2019) 34 Cal.App.5th 217, 222 ["[i]n a case where the jury had also returned true findings of the lesser enhancements under section 12022.53, subdivisions (b) and (c), the striking of an enhancement under section 12022.53, subdivision (d) would leave intact the remaining findings, and an enhancement under the greatest of those provisions would be mandatory unless those findings were also stricken in the interests of justice"].) Accordingly, the court was required to either strike the section 12022.5 firearm enhancement in the interests of justice or to impose a sentence under the enhancement. We remand to give the trial court an opportunity to do so.

In light of our remand for resentencing, Sullivan's contention the trial court erred in withdrawing its fire camp recommendation is moot. However, we are concerned by the trial court's inference that Sullivan lacked remorse based solely on his intention to exercise his right to appeal. On remand the trial court is directed to consider all the circumstances of this case and Sullivan's background in determining whether fire camp is appropriate. We trust the court will do so without punishing Sullivan for exercising his appellate rights. (See generally *In re Bower* (1985) 38 Cal.3d 865, 873 [principles of due process protect a defendant from retaliation for exercising the right to appeal].)

DISPOSITION

The conviction is affirmed, and the matter remanded for resentencing in accordance with this opinion.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.