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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARGARITO JOSEPH GONZALEZ,

Defendant and Appellant.

B286586

(Los Angeles County
Super. Ct. No. PA078797)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

This is defendant Margarito Gonzalez’s second appeal after a jury found him guilty of home invasion robbery, first degree residential robbery, first degree residential burglary, and four counts of assault. In his first appeal, we vacated the first degree residential robbery conviction, struck several enhancements, and remanded the matter for resentencing. In this appeal, Gonzalez’s appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We affirm. However, we order the abstract of judgment corrected.

FACTUAL AND PROCEDURAL BACKGROUND¹

In 2013, Gonzalez and three other men, one of whom had a gun, forced their way into an apartment and assaulted the four people inside.² Gonzalez and two of the men were members of the Langdon Street gang. The men indicated they were seeking revenge on someone who had previously “fuck[ed] with” Gonzalez, but that person was not in the apartment. Before leaving, the man with the gun took a hearing aid from one of the victims.

A jury found Gonzalez guilty of home invasion robbery (Pen. Code,³ § 211; count 1); first degree residential robbery (§ 211; count 2); first degree residential burglary (§ 459; count 3);

¹ By order dated February 5, 2018, we granted Gonzalez’s request for judicial notice of the entire record on appeal in his prior appeal before this court.

² For an extended discussion of the facts surrounding the convictions, please see our previous opinion at *People v. Gonzalez* (Mar. 27, 2017, B267319) [nonpub. opn.].

³ All further undesignated section references are to the Penal Code.

and four counts of assault with a firearm (§ 245, subd. (a)(2); counts 4–7). As to count 1, the jury found true the allegation that the offense was committed in concert with two or more individuals within the meaning of section 213, subdivision (a)(1)(A). As to count 3, the jury found true the allegation that during the commission of the offense, there was a person present other than an accomplice in the inhabited dwelling. As to all counts, the jury found true gang enhancements under section 186.22, subdivision (b). The jury further found true the allegation that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1) as to counts 1 through 3, and that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1) as to counts 4 through 7. Gonzalez admitted suffering a prior strike conviction, and he was sentenced to a total prison term of 55 years to life.

In Gonzalez’s first appeal, we vacated the first degree robbery conviction (count 2) because it is a lesser included offense of home invasion robbery while acting in concert (count 1). We further struck the section 12022, subdivision (a) firearm enhancements imposed as to counts 4 through 7 because use of a firearm was an element of the offenses charged in those counts. Finally, we struck the section 12022.53, subdivisions (b) and (e)(1) enhancement imposed on count 3 because the enhancement cannot be applied to a conviction under section 459. We remanded for a new sentencing hearing.⁴

⁴ We also found substantial evidence to support the robbery convictions, rejected Gonzalez’s assertion that section 1157 mandates a reduction of the first degree robbery and burglary convictions to second degree offenses, and rejected Gonzalez’s

On remand, the trial court dismissed count 2. It then imposed the same sentence it previously imposed, but without the section 12022, subdivision (a) firearm enhancements on counts 4 through 7, and the section 12022.53, subdivisions (b) and (e)(1) enhancement on count 3. Gonzalez was sentenced to a total prison term of 54 years to life.⁵ The court awarded Gonzalez 1,555 days of total presentence credit. It also ordered that all previous fines, fees, and conditions remain in effect.

Gonzalez filed a timely notice of appeal, and we appointed counsel to represent him on appeal. Appointed counsel filed an opening brief on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, requesting independent review of the record on appeal for any arguable issues. We notified Gonzalez by letter that he could submit any argument or issues that he wished our court to review. Gonzalez has not filed any claims or arguments.

assertion that the sentence on count 6 should have been stayed under section 654 because it involved the robbery victim.

⁵ The sentence was computed as follows: on count 1, 15 years to life pursuant to the section 186.22, subdivision (b)(4) gang enhancement, doubled because of the prior strike; on count 3, the upper term of six years, doubled because of the prior strike, plus 10 years for the gang enhancement, which the court imposed and then stayed under section 654; on count 4, the upper term of four years, doubled because of the prior strike, plus five years for the gang enhancement; on each of counts 5 through 7, one-third the midterm of three years, doubled because of the prior strike, plus one year eight months for the gang enhancement.

DISCUSSION

We have independently reviewed the record on appeal. We find appointed counsel has fulfilled his duty and that no arguable issues exist. (*Wende, supra*, 25 Cal.3d 436; *People v. Kelly* (2006) 40 Cal.4th 106.)

However, there are two clerical errors in the abstract of judgment that must be corrected. At the original sentencing, the court imposed a \$10 crime prevention fine (§ 1202.5, subd. (a)), and \$29 penalty assessment (§§ 1464, 1465.7; Gov. Code, §§ 76000, 70372, 76000.5, 76104.6, 76104.7). At resentencing, the court ordered all previous fines and fees to remain in effect. The current abstract of judgment, however, reflects a \$30 crime prevention fine and an \$87 penalty assessment.⁶ “Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.” (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) Accordingly, the abstract of judgment must be corrected to properly reflect that the court imposed a \$10 crime prevention fine and \$29 penalty assessment.

⁶ Section 1202.5, subdivision (a), provides that the court shall order the defendant to pay a \$10 fine “[i]n any case in which a defendant is convicted of any of the offenses enumerated in Section 211, 215, 459, 470, 484, 487, subdivision (a) of Section 487a, or Section 488, or 594” A \$10 crime prevention fine may only be imposed once in any case. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) Here, it appears whoever completed the abstract of judgment may have erroneously included three \$10 crime prevention fines based on Gonzalez’s three convictions under sections 211 and 459.

DISPOSITION

The judgment is affirmed.

Upon issuance of remittitur, the trial court shall amend the abstract of judgment to reflect that the court imposed a \$10, rather than \$30, crime prevention fine, and a \$29, rather than \$87, penalty assessment. The trial court is directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

BIGELOW, P.J.

We concur:

RUBIN, J.

ROGAN, J. *

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.