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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ELGIAN DEMON BAILEY,
JR.,

Defendant and Appellant.

2d Crim. No. B269756
(Super. Ct. No. BA407477)
(Los Angeles County)

Elgian Demon Bailey, Jr., appeals judgment following conviction by jury of first degree murder. (Pen. Code, § 187, subd. (a).)¹ The jury concluded Bailey committed the murder for the benefit of a criminal street gang. Bailey contends the trial court erred in imposing and staying a 10-year sentence enhancement under section 186.22, subdivision (b)(1)(C).

We correct the abstract of judgment and the trial court's January 14, 2016 minute order, both of which incorrectly

¹ All further statutory references are to the Penal Code.

state that Bailey was sentenced under section 186.22, subdivision (b)(1)(C). We otherwise affirm the judgment.

BACKGROUND

The People charged Bailey and a codefendant with one count each of murder. (§ 12022.53, subd. (d).) The original information alleged that the murder was committed for the benefit of a criminal street gang, and sought a 10-year sentence enhancement under section 186.22, subdivision (b)(1)(C). The People amended the information before trial to allege that “the offense(s) charged in Count(s) 1 are punishable in the state prison for life and cause the sentencing to be pursuant to section 186.22[, subdivision] (b)(5).”

The jury convicted Bailey of first degree murder, and found firearm and gang allegations to be true. The trial court sentenced Bailey to 25 years to life on the murder charge, and 25 years to life based on a finding that he discharged a firearm causing great bodily injury. (§ 12022.53, subd. (d).) As to the gang finding, the trial court stated: “The sentence on the [section] 186.22[, subdivision] (b)(5), which was found to be true is stayed.”

Although the trial court did not refer to section 186.22, subdivision (b)(1)(C) in its oral pronouncement of sentence, the court’s January 14, 2016 minute order states, “Sentence as to the allegation pursuant to . . . Penal Code section(s) 186.22(b)(1)(C), 186.22(b)(5), is stayed.” The abstract of judgment also states that a sentence was imposed, and stayed, pursuant to subdivision (b)(1)(C) and (5).

DISCUSSION

Section 186.22, subdivision (b)(1)(C) provides a 10-year sentence enhancement for violent felonies committed for the

benefit of a criminal street gang. The enhancement does not apply, however, when the felony in question is punishable by life in state prison. (§ 186.22, subd. (b)(1) [“Except as provided in paragraphs (4) and (5) . . .”].) Such felonies are governed by subdivision (b)(5), which requires the court to impose a minimum term of 15 years before the defendant is eligible for parole. (§ 186.22, subd. (b)(5).) Our Supreme Court has held that subdivision (b)(5) governs convictions for first degree murder committed for the benefit of a criminal street gang. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007.)

Bailey contends, and the People agree, that subdivision (b)(5) controls this case because Bailey was convicted of first degree murder. Bailey contends that “[t]he trial court erred when it imposed (but stayed) the ten-year term for the gang finding . . .” under section 186.22, subdivision (b)(1)(C).

The record reflects that the trial did not impose sentence under subdivision (b)(1)(C). The court’s oral pronouncement of sentence references only subdivision (b)(5), and makes no mention of subdivision (b)(1)(C). Although the abstract of judgment and minute order refer to subdivision (b)(1)(C), the oral pronouncement of judgment controls to the extent it conflicts with those records. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070 [conflict with abstract of judgment]; *People v. Hartley* (2016) 248 Cal.App.4th 620, 637 [conflict with minute order].)

The reference to subdivision (b)(1)(C) in the abstract of judgment and the minute order appears to be a clerical error. We have authority to correct such errors. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) We therefore correct the abstract of judgment and minute order to reflect that the trial court

sentenced Bailey under subdivision (b)(5) only, and not under subdivision (b)(1)(C) of section 186.22.

DISPOSITION

The clerk of the superior court is directed to amend its February 29, 2016 abstract of judgment and January 14, 2016 minute order to delete the reference to Penal Code section 186.22, subdivision (b)(1)(C). The clerk is further directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

As modified, the judgment is affirmed.

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TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Charlaine F. Olmedo, Judge

Superior Court County of Los Angeles

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.