Filed 2/21/18 P. v. Saldana CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JESUS SALDANA, Defendant and Appellant.	B280748 (Los Angeles County Super. Ct. No. VA135326)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph R. Porras, Judge. Affirmed in part, vacated in part, and remanded with directions.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Defendant Anthony Jesus Saldana appeals from the judgment after his convictions for assault with a firearm, shooting at an inhabited dwelling, two counts of possession of a firearm by a felon, and violation of a criminal street gang injunction. We hold that the gang enhancement applied to the second count of possession of a firearm is not supported by substantial evidence and must be vacated. We otherwise affirm the judgment of conviction. In light of recent statutory amendments granting courts discretion to strike or dismiss firearm enhancements under Penal Code sections 12022.5 and 12022.53,[1] however, we vacate the sentence and remand for resentencing. We also direct the trial court on remand to correct several other errors in sentencing and the abstract of judgment.

FACTUAL BACKGROUND

1. Prosecution case

In May 2014 Jaime J.[2] lived in an apartment complex in Whittier with his wife, daughter, and sons Christian T. and Julian T. A third son, Garrett J., was not living with Jaime[3] at the time. As a teenager Garrett had joined a gang, Whittier Varios Locos (WVL), and approximately a year later was sent to prison. He was released in early 2014 after serving three years, at which point Garrett stopped associating with WVL.

Defendant was a senior member of WVL, with a high degree of respect and status. In May 2014 he was staying intermittently at

---

1 All further statutory references are to the Penal Code.

2 Jaime J. is also referred to in the record as "James" and "Jamie." We use the spelling he used at trial.

3 To avoid confusion, we refer to members of Jaime's family by their first names.

the apartment of Angelique C., which was in a building across from Jaime's building in the same complex.

a. May 18 incident

On May 18, 2014, Jaime was smoking in the alley next to his building. Defendant approached him holding a revolver down by his side. Defendant placed the gun on the trunk of Jaime's car and began speaking to him. At trial, Jaime testified that defendant asked for a gun he claimed was in Jaime's house or garage. When Jaime said he did not know of any gun, defendant threatened him, saying they could "just go toe to toe." Jaime again said there was no gun and that he did not want any problems with defendant. Defendant became frustrated and let Jaime go.

Whittier Police Officer Mark Biley took a statement from Jaime on May 21, 2014, and testified that Jaime told him that defendant had said he was looking for Garrett, and something bad would happen to Jaime if he did not tell defendant where Garrett was. At trial, Jaime said he did not remember saying this to Biley.

b. May 21 incident

On May 21, 2014, Jaime's son Christian and his friend David E. were in back of the apartment complex drinking beer. Defendant approached looking "very hostile" and muttering something that Christian could not make out. Defendant took a small black revolver from his pocket and struck Christian in the back of the head with it. Christian fell to the ground. Defendant backed away, waving the gun back and forth, still talking although Christian could not tell what he was saying. Defendant then left.

Christian went upstairs to his apartment and found Jaime. He told Jaime that defendant had pistol-whipped him and that they should pack up and leave or call the police. Jaime went outside and saw defendant running up the exterior stairs to the building across

from Jaime's. Jaime asked defendant what he had done, and defendant told him to be quiet. Defendant looked angry. Jaime went back inside.

Ten seconds later, three or four gunshots went off in a row. Jaime dropped to the floor. No one in the apartment was hit, but Jaime found a bullet hole in one of the windows. Jaime and Christian both testified that immediately prior to the shooting they had not seen anyone with defendant or standing on the walkway below.[4]

Whittier Police Corporal Brian Corletto interviewed Angelique C., the woman with whom defendant was staying, on May 21. According to Corletto, Angelique C. told him that defendant had a problem with Garrett's brothers, although she did not explain why. She said defendant had left her apartment earlier that day very upset and walked towards the alley. She heard yelling from the alley. Defendant returned, saying "[s]omething to the effect of, [']Look what you made me do. I pistol whipped that punk.['] " Angelique C. told defendant to leave, which he did. After Angelique C. had closed the door, she heard two male voices yelling, one which she identified as Jaime's voice. She then heard footsteps running towards her apartment followed by banging on her door; she believed it was defendant. She ran to her closet and dialed 911.

---

[4] Christian's testimony differed slightly from his father's. He said Jaime and defendant were standing on opposite balconies as they argued, and defendant was smirking and laughing. Christian was in the living room of the apartment when he heard the gunshots, which he described as "snaps."

She heard gunshots, one by itself followed by three in rapid succession.[5]

Defendant was arrested the next day, May 22, in Paramount. He was carrying a small canvas case containing a loaded .25-caliber semiautomatic handgun.

c. Testimony of gang expert

Testifying as a gang expert, Corletto opined that defendant was a member of WVL based on his tattoos, his association with other members of WVL, and conversations Corletto had had with other members of WVL. Defendant was also named in an injunction against WVL. Corletto said the May 18 and May 21 incidents had taken place in the heart of WVL's territory.

The prosecution presented a hypothetical scenario to Corletto in which a senior gang member threatens the family of a younger member who has ceased to associate with the gang, demands they reveal the younger member's location, and later pistol-whips one of the family members. The prosecution asked if, in Corletto's opinion, the pistol-whipping was "committed for the benefit of, at the direction of, or in association with a criminal street gang." Corletto said yes, opining that a senior member of a gang would consider it disrespectful for a younger member to leave the gang so soon after joining without having "earn[ed his] keep."

The prosecution then presented a hypothetical scenario in which the same senior gang member goes to a different city while in possession of a gun. The prosecution asked whether "[t]he simple act" of possessing the gun would "be a crime committed for the

---

[5] Angelique C. testified at trial and denied much of what Corletto claimed she had told him. Corletto testified that at the time of the interview Angelique C. had said she was scared to talk to him and feared reprisal from defendant and his gang.

benefit of, at the direction of, or in association with a criminal street gang." Corletto said yes, stating that as a gang member outside of his territory, the senior member would need to "be prepared to be challenged by a [gang] member of that neighborhood."

2. Defense case

Defendant testified that on May 21 he was drinking beer and smoking marijuana with Christian and David E. in the alley next to the apartment complex. They asked him for more marijuana and methamphetamine for which they would pay him later. Defendant declined. Someone then struck defendant on the back of the head. He turned around and hit Christian, who was closest to him. Christian fell down. Defendant returned to Angelique C.'s apartment, asked to borrow her car, and left. Defendant denied pistol-whipping Christian or shooting at Jaime's apartment.

Defendant said he had been a member of WVL, but had walked away from the gang. He was addicted to drugs, however, which kept getting him into trouble. Defendant admitted he had a pistol with him when he was arrested on May 22.

PROCEDURE

Defendant was charged with assaulting Christian and David E. with a firearm (§ 245, subd. (a)(2)) (counts 1 and 2), shooting at an inhabited dwelling (§ 246) (count 3), two counts of possession of a firearm by a felon, once on May 21 and once on May 22 (§ 29800, subd. (a)(1)) (counts 4 and 5), and one count of violating a criminal street gang injunction (§ 166, former subd. (a)(10)). It was alleged that counts 1 through 5 were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(A), (C).) It was alleged that defendant personally used a firearm in committing

counts 1 and 2 (§ 12022.5) and personally discharged a firearm in committing count 3 (§ 12022.53, subd. (c)). It was alleged that defendant had been previously convicted for two serious and/or violent felonies and was therefore subject to California's "Three Strikes" law. (§§ 667, subds. (a)-(j), 1170.12; see *People v. Acosta* (2002) 29 Cal.4th 105, 108.)

The jury found defendant guilty of all counts except the assault on David E., of which he was acquitted. As to the counts of which defendant was found guilty, the jury found all gang and firearm allegations to be true. The allegations regarding prior convictions were tried separately by the court and found true.

For count 1, assault with a firearm, defendant was sentenced to 25 years to life with a 10-year firearm enhancement, two 5-year enhancements for the prior convictions, and a 10-year gang enhancement. For count 3, shooting at an inhabited dwelling, defendant was sentenced to 25 years to life with a 20-year firearm enhancement, two 5-year enhancements for the prior convictions, and a 10-year gang enhancement. For counts 4 and 5, possession of a firearm by a felon, defendant was sentenced to two terms of 25 years to life, each with a four-year gang enhancement. For count 6, the gang injunction violation, defendant was sentenced to 180 days. The court stayed the gang enhancements as to counts 1, 3, 4, and 5. The court ordered that the sentences for counts 1, 3, and 5 be served consecutively, and the sentences for counts 4 and 6 be served concurrently with the other counts. The total aggregate consecutive term therefore was 50 years determinate plus 75 years to life. The court awarded credits and imposed fines and fees.

Defendant timely appealed.

DISCUSSION

1. Sufficiency of evidence

Defendant argues the evidence was insufficient to support either his conviction for shooting at an inhabited dwelling or the true findings on the gang enhancements.

In considering a challenge to the sufficiency of the evidence to support a conviction or an enhancement, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66; see *People v. Franklin* (2016) 248 Cal.App.4th 938, 947 (*Franklin*) [standard of review for determining sufficiency of evidence is identical for convictions and enhancements].) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).)

a. Shooting at an inhabited dwelling

We disagree with defendant that there was insufficient evidence presented at trial that he fired a gun at the apartment. There was evidence showing a gun had been fired at the apartment: multiple witnesses testified to hearing gunshots, and Jaime found a bullet hole in one of the apartment windows. There was evidence showing that defendant was extremely hostile towards Jaime and his family: defendant had threatened Jaime with a gun three days earlier, and minutes prior to the shooting had pistol-whipped

Christian. Angelique C.'s statement to the police corroborated that defendant had a problem with Garrett's brothers. The pistol-whipping also established that defendant was armed and therefore capable of carrying out the shooting. Just seconds before the shooting Jaime and defendant had exchanged angry words over the pistol-whipping, and Jaime stated that defendant looked "mad." The shooting took place as soon as Jaime had broken off the confrontation and gone back inside his apartment. On this evidence, it would be extremely unlikely that someone other than defendant fired at the apartment, especially given that Jaime and Christian both testified that immediately prior to the shooting they saw no one else in the vicinity, much less someone who might also have a reason to fire at the apartment.

Defendant concedes there was substantial evidence that someone fired a weapon in close proximity to the apartment but argues it was mere speculation that defendant was the perpetrator. It is true, as defendant argues, that a verdict cannot be sustained on speculation and suspicion. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 1002.) But here the jury's inferences were not speculative but " 'drawn from evidence' " (*ibid.*), specifically evidence that shots were fired just seconds after Jaime had turned away from an angry and armed individual who minutes earlier had pistol-whipped his son, with no other possible suspects in the vicinity.

Defendant points to evidence he argues undercuts the jury's conclusion, such as a shotgun (as opposed to a handgun) reportedly recovered from the scene and the fact that no broken glass was found in the apartment (which defendant argues indicates the bullet hole was created by a gun fired from inside). But the defense made no arguments to the jury based on this evidence; although

defense counsel contemplated arguing that someone had fired a shotgun at defendant and defendant had fired back, he abandoned the argument after defendant denied having a gun or being present during the shooting. It is therefore unsurprising that the jury was not swayed by that evidence. Regardless, we cannot reweigh evidence on appeal: "[I]t is the jury, not the reviewing court, that resolves conflicts in the evidence." (*People v. Solomon* (2010) 49 Cal.4th 792, 818.) On this record, we conclude there was substantial evidence to support the jury's verdict on the charge of shooting at an inhabited dwelling.

b. Gang enhancements

Defendant argues that the evidence was insufficient to support the gang enhancements. We hold there was sufficient evidence to support the gang enhancements as to the offenses committed on May 21—the assault, the shooting at the apartment, and the firearm possession—but not as to the firearm possession charge on May 22.

To prove the gang enhancement under section 186.22, subdivision (b)(1), the prosecution must establish two "prongs." (*Franklin, supra*, 248 Cal.App.4th at p. 948.) "The first prong requires proof that the underlying felony was 'gang-related,' that is, the defendant committed the charged offense 'for the benefit of, at the direction of, or in association with any criminal street gang.' [Citations.] The second prong 'requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members." ' "[6] (*Ibid.*) The

---

[6] There are a number of other elements that must be proven to establish the gang enhancement (see *People v. Rios* (2013) 222 Cal.App.4th 542, 564, fn. 10 (*Rios*)), but defendant has not challenged the jury's findings as to those elements.

prosecution may present expert testimony to prove the elements of the enhancement, and this testimony " 'can be sufficient to support [a] gang enhancement.' " (*Id.* at pp. 948-949.) The expert's opinion, however, " 'may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors." ' " (*Id.* at p. 949.) To the extent the expert "render[s] an opinion assuming the truth of facts set forth in a hypothetical question, the 'hypothetical question must be rooted in facts shown by the evidence.' " (*Ibid.*)

i. May 21 offenses

As to the May 21 offenses, the prosecution presented a hypothetical scenario to gang expert Corletto that was properly " 'rooted in facts shown by the evidence.' " (*Franklin, supra*, 248 Cal.App.4th at p. 949.) There was evidence establishing that defendant and Garrett were both members of WVL, that Garrett had recently left or was trying to leave the gang, that defendant had threatened Garrett's father in an attempt to find Garrett, and that three days later defendant, without provocation, attacked Garrett's brother. There was also evidence that defendant was a senior member of WVL and that the offenses were committed in the heart of WVL's territory. Presented with a hypothetical scenario mirroring these facts, Corletto surmised that the pistol-whipping was motivated by the senior gang member seeking to locate and, presumably, punish the younger gang member for leaving the gang before "earning [his] keep." This, Corletto opined, was for the benefit of, at the direction of, or in association with WVL. By implication, the attacker would also have the specific intent to promote, further, or assist in criminal conduct by the gang, namely retribution against Garrett once he was found. This expert opinion,

grounded in facts established by the evidence, was sufficient to support the gang enhancement for the assault charge.

Although Corletto was not asked to opine whether the two other May 21 offenses were gang-related, the jury could reasonably infer that they were. Because the evidence was sufficient to establish the pistol-whipping was gang-related, possession of the firearm to carry out that assault was necessarily gang-related as well. And the jury could conclude that defendant's motive for shooting at the apartment was the same as his motive for pistol-whipping Christian moments earlier, namely to further terrorize Garrett's family members until they revealed his whereabouts.

Defendant concedes that the evidence established that "Garrett's departure triggered the aggression against his family" and that defendant "tried to intimidate family members and cause them to reveal Garrett's whereabouts by committing offenses against them." But he argues that "it is pure speculation that [defendant] was acting on behalf of the gang" as opposed to being motivated by personal animus. It is true that the record does not show that defendant in committing these offenses ever referred to his gang or explained why he was looking for Garrett. But as courts have recognized, " '[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.' " (*Rios, supra*, 222 Cal.App.4th at pp. 567-568.) Such circumstantial evidence " 'is as sufficient as direct evidence to support a conviction.' " (*Id.* at p. 568.) The fact that defendant, a senior gang member, was threatening and attacking Garrett's family because Garrett had recently decided to leave the gang was circumstantial evidence that defendant's motives were gang-related, as Corletto opined. While it is conceivable defendant had other motives, the jury was entitled to draw its own conclusions

so long as there was evidence in the record to support them. (See *Albillar, supra*, 51 Cal.4th at pp. 62-63 [upholding jury's finding that rape was gang-related despite possibility that gang members committed the crime " 'on a frolic and detour unrelated to the gang' "].)

Defendant cites cases in which courts found the evidence insufficient to sustain gang enhancements, but they are distinguishable. In *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*), the court held that evidence that gang members were in possession of firearms and a stolen vehicle while in gang territory was not enough to establish they were acting to promote a criminal gang. (*Id.* at p. 853.) The court acknowledged it was "possible the two were acting for the benefit of the gang, [but] a mere possibility is nothing more than speculation." (*Id.* at p. 851.)

Similarly, in *People v. Ochoa* (2009) 179 Cal.App.4th 650 (*Ochoa*), the court reversed gang enhancements when the only evidence a carjacking was gang-related was the fact that the perpetrator was a gang member and that he had committed a crime similar to the "signature" crime of his gang, car theft. (*Id.* at pp. 661-664.) There was no evidence that the defendant presented himself as a gang member or committed the crime in his or a rival's territory. (*Id.* at p. 662.) No other gang members were involved in the crime, and there was no indication the victim was affiliated with a gang. (*Ibid.*)

In *In re Daniel C.* (2011) 195 Cal.App.4th 1350 (*Daniel C.*), a shoplifting attempt turned violent when the defendant struck a store employee who was trying to stop him. (*Id.* at pp. 1353-1355.) Although the defendant was accompanied at the time by individuals affiliated with a gang, the court held that the evidence was insufficient to support the gang expert's opinion that the attack had

been "planned or executed . . . in concert in order to enhance [the gang members'] respect in the community, or to instill fear." (*Id.* at pp. 1363-1364.) The court also rejected the expert's theory that stealing a bottle of liquor for gang members constitutes " 'putting in work' " for the gang or otherwise promotes, furthers, or assists criminal conduct by gang members. (*Id.* at p. 1364.)

These cases broadly stand for the proposition that the mere fact that a crime was committed by or in the company of gang members is insufficient to support an expert's opinion that the crime was gang-related. (See *Albillar, supra*, 51 Cal.4th at p. 60 ["Not every crime committed by gang members is related to a gang."].) In all three cases the crimes could just as well have been committed for the personal benefit of the defendants—the only basis for concluding otherwise was the defendants' gang affiliation.

Here, in contrast, there was more to support the gang expert's opinion than defendant's gang affiliation alone. Defendant in this case did not commit a crime against a random victim, as was the case in *Ochoa* and *Daniel C.*, but specifically targeted the family of a more junior gang member who had recently declared his intentions to leave the gang. Moreover, as defendant concedes, the evidence showed he targeted the family for the purpose of forcing them to reveal Garrett's location. Corletto drew a reasoned inference that defendant's offenses were gang-related based on the fact that defendant's aggression towards Garrett's family coincided with Garrett's decision to leave the gang. The jury was entitled to accept this opinion over other possible theories of defendant's motives.

ii. May 22 offense

In presenting a hypothetical scenario mirroring the facts of the May 22 firearm-possession charge, the prosecution asked

Corletto to assume that a gang member "goes outside of his neighborhood into a different city where there are gangs, and he has a gun when he does that." Based on those assumed facts, Corletto opined that such an act would be for the benefit of the gang because the gang member had to be prepared to address a challenge from a rival gang member.

The evidence that defendant was a gang member illegally in possession of a firearm was insufficient to support the gang enhancement. (See *Rios, supra*, 222 Cal.App.4th at p. 574.) In *Rios*, a defendant challenged a gang enhancement applied to his sentence for carrying a loaded firearm in a vehicle. (*Id.* at p. 545.) The prosecution presented no facts to the gang expert other than that defendant was a gang member in possession of a firearm. (*Id.* at p. 574.) The expert opined that having the gun promoted, furthered, or assisted felonious conduct by gang members, because gang members use guns to boost their reputation, instill fear, defend territory, and commit other crimes. (*Ibid.*) The court held that this opinion was not supported by evidence at trial, as there was no evidence the defendant used the weapon for any of the stated purposes. (*Id.* at pp. 573-574.) "[I]n a case such as this, where the defendant acts alone, the combination of the charged offense and gang membership alone is insufficient to support an inference on the specific intent prong of the gang enhancement. Otherwise, the gang enhancement would be used merely to punish gang membership." (*Ibid.*; see *Ramon, supra*, 175 Cal.App.4th at p. 853 [declining to hold "as a matter of law that two gang members in possession of illegal or stolen property [including a firearm] in gang territory are acting to promote a criminal street gang"].)

The relevant facts of *Rios* are indistinguishable from the case here. The only evidence considered by the gang expert was

defendant's gang membership and his possession of a weapon outside his gang's territory. Although the prosecution's hypothetical scenario assumed the defendant was in an area with other gangs, no evidence was introduced at trial to prove this. Regardless, even if there were other gangs in the area, as in *Rios* there was no evidence that defendant had used or intended to use the weapon against them or for any other gang-related purpose. Defendant testified he carried the gun for personal protection; when the prosecution intimated his main concern was danger from rival gang members, he stated, "It could be anybody." As in *Rios*, this evidence could not support the true finding on the gang allegation.

2. Firearm enhancements

Defendant argues that recent amendments to the Penal Code sections governing firearm enhancements require remand for resentencing. Under the circumstances of this case we agree.

At the time of defendant's sentencing, the enhancements under sections 12022.5 and 12022.53 were mandatory and could not be stricken. (See §§ 12022.5, former subd. (c), 12022.53, former subd. (h).) Effective January 1, 2018, however, both sections were amended to allow the trial court to strike or dismiss an enhancement "in the interest of justice," either at the time of sentencing or during "any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.) The parties agree that these amendments apply retroactively to defendant because his judgment is not yet final. (See *People v. Brown* (2012) 54 Cal.4th 314, 323 [amendments reducing punishment are presumed to apply retroactively to defendants whose judgments are not yet final], citing *In re Estrada* (1965) 63 Cal.2d 740, 742-748; *People v. Francis* (1969) 71 Cal.2d 66, 75-76 [rule from *Estrada* applies when

amendment "vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty"].)

The Attorney General argues that remand for resentencing is unwarranted because the record makes clear that the court would not have lessened defendant's sentence even if it had the discretion to do so. In support, the Attorney General cites *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*). In *Gutierrez*, the defendant sought remand for resentencing in light of a Supreme Court decision determining that courts had discretion to strike prior convictions for purposes of the Three Strikes law. (*Id.* at p. 1896.) The Court of Appeal declined to remand. (*Ibid.*) The trial court had "stated that imposing the maximum sentence was appropriate" and had increased the sentence "beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements." (*Ibid.*) On these facts, the appellate court concluded that the trial court would not exercise its discretion to lessen the sentence, and therefore "no purpose would be served in remanding for reconsideration." (*Ibid.*)

Here, the Attorney General argues that "[n]othing in the record indicates that the trial court was inclined to reduce [defendant's] sentence" and "nothing in the record would justify such leniency here." The Attorney General contends that the crimes at issue were "particularly egregious," committed by a senior gang member "to intimidate the family of a junior member who had disassociated."

Unlike in *Gutierrez*, here the trial court made no statements as to whether the maximum sentence was appropriate, and in fact exercised its discretion to stay the four gang enhancements. Under these circumstances, we cannot be confident the trial court would

not exercise its discretion to strike one or both firearm enhancements if given the opportunity. We therefore remand for resentencing.

3. Sentencing

The Attorney General has identified a sentencing error that must be corrected on remand, and defendant has raised no objection. Although substantial evidence supported gang enhancements to counts 1 and 3, the trial court erred in imposing and staying two 10-year enhancements under section 186.22, subdivision (b)(1)(C). Appellant was sentenced to 25 years to life on both counts 1 and 3 under the Three Strikes law.[7] Because he was sentenced for crimes punishable by life imprisonment, he is not subject to a 10-year sentence enhancement under section 186.22, subdivision (b)(1)(C)—instead, he is subject to a 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5).[8]

---

[7] Defendant asserts, albeit in a different context, that the court imposed the indeterminate sentence for count 3 under section 186.22, subdivision (b)(4)(B), which is a gang enhancement specific to the crime of shooting at an inhabited dwelling. But in imposing sentence the court never cited that provision, instead referencing defendant's two prior strikes. Moreover, the applicable sentence under section 186.22, subdivision (b)(4)(B) is 15 years to life, whereas the court imposed a sentence of 25 years to life, in line with the Three Strikes law (§ 1170.12, subd. (c)(2)(A)(ii)).

[8] We note that defendant's sentences for counts 1 and 3 fix a parole eligibility date greater than 15 years, and therefore the 15-year minimum term set by section 186.22, subdivision (b)(5) has no direct effect on his parole eligibility date. (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1008-1009.) Nevertheless, "[t]he true finding under section 186.22(b)(5) . . . 'is a factor that may be

(*People v. Williams* (2014) 227 Cal.App.4th 733, 744 [sentences of 25 years to life imposed under Three Strikes law "constitute life sentences within the meaning of section 186.22, subdivision (b)(5)"].)

Moreover, as the parties have addressed in supplemental briefing requested by the court, gang enhancements must be imposed or stricken; they cannot be stayed. (*People v. Flores* (2005) 129 Cal.App.4th 174, 187.) On remand, the court should determine whether to impose or strike the gang enhancements on counts 1, 3, and 4.

4. Errors in abstract of judgment

The abstract of judgment does not conform to the trial court's oral pronouncement of sentence.[9] (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385 ["Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls."].) After resentencing, to the extent the abstract of judgment matches the current abstract of judgment, the following corrections should be made. The abstract does not list the gang enhancements for counts 1 and 3; enhancements under section 186.22, subdivision (b)(5) should be added to each in conformance with part 3 of this opinion. The abstract lists an enhancement to count 4 under section 186.22, subdivision (a), but this should instead be under section 186.22, subdivision (b). The abstract also should indicate that defendant

---

considered by the [Board of Parole Hearings] when determining a defendant's release date, even if it does not extend the minimum parole date per se.' " (*Id.* at p. 1009, quoting *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1238.)

[9] The parties provided supplemental briefing on this subject at the request of the court.

was sentenced pursuant to sections 667, subdivisions (b) through (i), and 1170.12.

DISPOSITION

The judgment is modified to vacate the four-year gang enhancement applied to count 5 under section 186.22, subdivision (b)(1)(A). As modified, the judgment of conviction is affirmed. The sentence is vacated and the matter is remanded for resentencing consistent with this opinion.

HALL, J.*

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

---

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