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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE VASQUEZ FLORES,

Defendant and Appellant.

B250021

(Los Angeles County
Super. Ct. No. GA084113)

APPEAL from a judgment of the Superior Court of Los Angeles County, Suzette Clover, Judge. Modified and, as modified, affirmed.

Meredith J. Watts, 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, Assistant Attorney General, Blythe J. Leszkay and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Jose Vasquez Flores contends that the trial court imposed an incorrect sentence on gang allegations, found true by a jury. The People agree that defendant's sentence must be modified. We modify the judgment, and affirm it as modified.

BACKGROUND¹

After defendant stabbed Benjamin Cortez, injuring but not killing Cortez, an amended information was filed on May 14, 2013 alleging these counts: count 1, attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a), 664)² and a gang allegation (§ 186.22, subd. (b)(1)(C)); and count 2, assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)) and a gang allegation (§ 186.22, subd. (b)(1)(B)).³ The information also alleged, as to both counts, personal use of a deadly and dangerous weapon (§ 12022, subd. (b)(1)) and personal infliction of great bodily injury (§ 12022.7, subd. (a)).

On May 21, 2013, a jury found defendant guilty as charged, except that the jury found the gang allegations true under section 186.22, subdivision (b)(1)(C)), as to counts 1 *and* 2.

On July 16, 2013, the trial court sentenced defendant, on count 1, to 15 years to life, plus 3 years for the great bodily injury enhancement. The court imposed but stayed a one-year sentence for the weapon enhancement. On count 2, the court imposed but stayed a concurrent sentence of three years, plus five years for the great bodily injury enhancement, plus one year for the weapon enhancement. The court explained it did not “add the additional 10-year enhancement for the gang allegation because that

¹ Because the appeal concerns a discrete sentencing issue, we omit a detailed statement of facts.

² All undesignated statutory references are to the Penal Code.

³ The information also alleged that sentencing on count 1 should be pursuant to section 186.22, subdivision (b)(5).

enhancement is only to be applied . . . when the conviction is of a violent offense for which a determinate term is proscribed. And since the term in this case was indeterminate, the gang enhancement does not add additional time” Defendant’s total sentence therefore was 18 years in prison.

DISCUSSION

The trial court imposed an incorrect sentence on the gang enhancements. Section 186.22, subdivision (b), in relevant part, provides:

“(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶]

“(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

“(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years. [¶] . . . [¶]

“(5) Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.”

Defendant was found guilty in count 1 of willful, deliberate and premeditated attempted murder. The sentence for that crime is life in prison with the possibility of parole. (§ 664, subd. (a).) Where, as here, a jury finds true a section 186.22, subdivision (b)(1), gang allegation, sentencing is under subdivision (b)(5), not under subdivision (b)(1)(C). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1404-1405.) Under subdivision (b)(5), defendant must serve at least 15 years of his life term before becoming eligible for parole. (*Arauz*, at pp. 1404-1405.) The sentence on count 1 therefore is life with a minimum 15-year parole eligibility period, plus 3 years for the great bodily injury enhancement.

As to count 2, the gang enhancement was alleged in the information under section 186.22, subdivision (b)(1)(B), providing a five-year term. The jury, however, found the gang allegation true under subdivision (b)(1)(C), providing a 10-year term. Although the gang allegation was found true under a subdivision different than the one alleged in the information, defendant nonetheless may be sentenced under the subdivision found true by the jury, namely, subdivision (b)(1)(C). The information alleged that the “offense was 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.” The information therefore apprised defendant of the potential for an enhanced penalty under section 186.22, subdivision (b)(1). (See generally *People v. Thomas* (1987) 43 Cal.3d 818, 826, 829; *People v. Neal* (1984) 159 Cal.App.3d 69, 72-73 [citation in information to wrong enhancement provision did not deprive defendant of due process rights where he had notice the prosecution was seeking enhanced punishment and of the facts supporting enhancement]; *People v. Sok* (2010) 181 Cal.App.4th 88, 96, fn. 8 [information’s citation to section 186.22, subdivision (b)(4)(B), did not preclude imposition of greater minimum term under section 186.22, subdivision (b)(4)(A), because defendant “was plainly on notice an alternate penalty or enhancement would be sought . . . as well as the factual basis for that special allegation”].) Defendant cannot claim lack of notice or prejudice by the imposition of the 10-year term under subdivision (b)(1)(C), rather than the five-year term in subdivision (b)(1)(B).⁴ The trial court should have imposed and stayed a 10-year term under section 186.22, subdivision (b)(1)(C).

⁴ Because the jury found true the great bodily injury allegation under section 12022.7, defendant’s crime is “violent.” (§ 667.5, subd. (c)(8).)

DISPOSITION

The judgment is corrected to reflect that principal term on count 1 is life with a minimum 15-year parole eligibility period under section 186.22, subdivision (b)(5), plus a three-year term under section 12022.7, subdivision (a). On count 2, a 10-year term under section 186.22, subdivision (b)(1)(C), is imposed and stayed. The judgment is otherwise affirmed. The clerk of the superior court is directed to prepare and to forward a corrected abstract of judgment to the Department of Corrections.

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ALDRICH, J.

We concur:

EDMON, P. J.

KITCHING, J.