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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.

ALEJANDRO JIMENEZ,

Defendant and Appellant.

2d Crim. No. B282774
(Super. Ct. No. 2013009594)
(Ventura County)

Alejandro Jimenez appeals from a judgment after the trial court found him guilty of second degree murder (Pen. Code,¹ §§ 187, subd. (a), 189), and found true allegations that he committed murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and personally used and intentionally discharged a firearm (§§ 12022.5, subd. (a), 12022.53, subds. (b) & (c)). The court sentenced him to 45 years to life in prison: 15 years to life on the murder (§ 190, subd. (a)), a consecutive 20 years on the firearm enhancement (§ 12022.53, subd. (c)), and a

¹ All further statutory references are to the Penal Code.

consecutive 10 years on the gang enhancement (§ 186.22, subd. (b)(1)(C)). Jimenez contends: (1) he did not knowingly and intelligently waive his right to a jury trial, (2) admission of a gang expert's testimony violated *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), (3) the case should be remanded to permit the court to exercise its discretion to strike the firearm enhancements, and (4) the court imposed the wrong gang enhancement. We vacate Jimenez's sentence, remand for a new sentencing hearing, and otherwise affirm.

FACTUAL AND PROCEDURAL HISTORY

Several members of the Lemonwood Chiques gang were together in Oxnard when they learned of a party on El Dorado Avenue. A fellow gang member had been killed on the same avenue by a member of Lemonwood's rival gang, the Colonia Chiques. Colonia gang members were at the party. Lemonwood gang members, including Jimenez, armed themselves with guns and knives and went to the party. When they arrived at the party, a fight broke out. Jimenez shot his gun in the air. Two men were stabbed. Jimenez and other Lemonwood members fled.

One of the men stabbed during the fight died. The prosecution charged Jimenez and other Lemonwood members with his murder. Three of those charged agreed to cooperate with the prosecution.

Jimenez waived his right to a jury trial. Detective Cody Collett, a gang expert, testified at trial. Detective Collett testified about the Lemonwood Chiques gang, its primary activities, and its rivalry with the Colonia Chiques. He named several current and former Lemonwood gang members, and testified about crimes they had committed for the benefit of the

gang.² He opined that Jimenez is a Lemonwood gang member based on his tattoos and evidence police found while executing a search warrant at his house: symbols found on a mirror, a memorial card for a fallen gang member, a Detroit Lions hat, and photographs showing him flashing Lemonwood gang signs. The detective opined that a hypothetical murder similar to the one here was committed for the benefit of the Lemonwood Chiques.

DISCUSSION

Jury trial waiver

Jimenez contends he did not knowingly and intelligently waive his right to a jury trial. We disagree.

A criminal defendant has the constitutional right to a jury trial. (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 166 (*Sivongxxay*); see U.S. Const., amend. VI; Cal. Const., art. I, § 16.) The defendant may waive this right, provided the waiver is knowing and intelligent. (*Sivongxxay*, at p. 166.) A waiver is knowing and intelligent if it is “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) We independently examine the entire record to determine whether a waiver was knowing and intelligent under the totality of the circumstances. (*People v. Daniels* (2017) 3 Cal.5th 961, 1018 (*Daniels*) [conc. & dis. opn. of Corrigan, J.])

The totality of the circumstances demonstrates that Jimenez knowingly and intelligently waived his right to a jury trial. First, the prosecutor explained the primary differences between a jury trial and a bench trial: He told Jimenez that he

² The trial court also admitted certified records of conviction of the gang members’ crimes.

was giving up the right to have 12 people from the community decide the facts of the case. He told Jimenez that all 12 of those jurors must agree unanimously to each charge and allegation. And he told Jimenez that, by waiving a jury trial, the court would make all factual and legal findings in the case. Jimenez confirmed he understood all of those rights. Our Supreme Court has upheld a jury trial waiver as knowing and intelligent on nearly identical facts. (*People v. Weaver* (2012) 53 Cal.4th 1056, 1070-1071, 1076 (*Weaver*).)

Second, Jimenez asked no questions during his colloquy with the prosecutor, and expressed no uncertainty about the rights he was waiving. That weighs in favor of a knowing and intelligent waiver. (*People v. Gordon* (2009) 177 Cal.App.4th 1550, 1556.)

Finally, Jimenez was no stranger to the criminal justice system. Between 2002 and his trial in this case, he was convicted in no fewer than 15 felony cases. Three of those convictions followed jury trials. The remainder resulted from guilty pleas that required Jimenez to sign waivers detailing the jury trial rights he was giving up. Such experience weighs heavily in favor of a knowing and voluntary waiver. (*Daniels, supra*, 3 Cal.5th at p. 1023 [conc. & dis. opn. of Corrigan, J.]; *Sivongxxay, supra*, 3 Cal.5th at pp. 167-168.)

Jimenez counters that the prosecutor neglected to advise him he was giving up the right to participate in jury selection, one of the four primary attributes of a jury trial the *Sivongxxay* court recommended trial courts explain in a waiver colloquy. (*Sivongxxay, supra*, 3 Cal.5th at p. 169.) But our Supreme Court has never required that specific advisement. (*Weaver, supra*, 53 Cal.4th at pp. 1072-1073.) In fact, the

Sivongxxay court specifically “eschewed any rigid formula or particular form of words that a trial court must use in taking a jury waiver.” (*Sivongxxay*, at p. 169.)

Jimenez also argues the prosecutor “confused the issue” by discussing rights that may be exercised both in bench and jury trials: the right to cross-examination, the privilege against self-incrimination, and the right to have every charge proven beyond a reasonable doubt. But waivers that included descriptions of the similarities between jury and bench trials have been upheld as knowing and voluntary. (*People v. Doyle* (2016) 19 Cal.App.5th 946, 951-952.)

Finally, Jimenez faults the prosecutor for failing to ask if counsel explained the differences between a bench trial and a jury trial. But Jimenez said—twice—that he had discussed his right to a jury trial with counsel and that he understood the rights he was waiving. No more was required. (*Sivongxxay*, *supra*, 3 Cal.5th at pp. 169-170.)

Sanchez error/ineffective assistance of counsel

Jimenez contends much of Detective Collett’s testimony was inadmissible under *Sanchez*. But Jimenez forfeited his contention because he did not object to the detective’s testimony at trial even though our Supreme Court decided *Sanchez* nine months earlier. (*People v. Redd* (2010) 48 Cal.4th 691, 730 [forfeiture of alleged confrontation clause error]; *People v. Espinoza* (2018) 23 Cal.App.5th 317, 320 [forfeiture of alleged hearsay error].)

Alternatively, Jimenez contends counsel provided ineffective assistance when he did not object to Detective Collett’s testimony. We disagree.

To establish his ineffective assistance of counsel claim, Jimenez must show that counsel's performance was deficient and resulted in prejudice. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Counsel's performance was deficient if the record reveals no conceivable reason for his actions. (*Cunningham*, at p. 1003.) Jimenez was prejudiced if there is a "reasonable probability" he would have obtained a more favorable result absent counsel's alleged errors. (*Ibid.*) We independently review whether Jimenez has demonstrated ineffective assistance of counsel. (*In re Alvernaz* (1992) 2 Cal.4th 924, 944-945.)

He has not. Jimenez does not show deficient performance here because all of the *Sanchez* objections he alleges counsel should have made would have been meritless. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463.) Detective Collett's testimony about the Lemonwood Chiques gang, its primary activities, and its rivalry with the Colonia Chiques was admissible as non-case-specific background information. (*Sanchez, supra*, 63 Cal.4th at p. 685; see, e.g., *People v. Blessett* (2018) 22 Cal.App.5th 903, 943-945; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411.) His testimony that several men were Lemonwood Chiques members was proper because a former Lemonwood member testified, without objection, to the men's gang memberships earlier during trial. (*Sanchez*, at p. 686; see *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 510.) His testimony about Lemonwood's predicate crimes was proper because the trial court admitted independently admissible documentary evidence of those crimes. (*People v. Martinez* (2000) 22 Cal.4th 106, 116; see § 969b [exception to the hearsay rule]; *People v. Taulton* (2005) 129 Cal.App.4th 1218,

1225 [§ 969b records are beyond the scope of the confrontation clause].)

The detective's opinion that Jimenez was a Lemonwood gang member was proper because it was based on his personal observations of Jimenez's tattoos and the independently admissible evidence police seized from his house while executing a search warrant. (*Sanchez, supra*, 63 Cal.4th at p. 677.) His opinion that a murder similar to the one here was committed for the benefit of the Lemonwood Chiques was properly admitted because the facts on which the hypothetical question was based were admissible. (*Id.* at p. 685.) Accordingly, Jimenez has not established ineffective assistance of counsel.

Firearm enhancements

At the time of trial, section 12022.53, subdivision (c), required the trial court to impose a 20-year sentence enhancement on a defendant who personally and intentionally discharged a firearm during the commission of an enumerated felony. Effective January 1, 2018, the court has discretion to strike that enhancement. (§ 12022.53, subd. (h).) Section 12022.53, subdivision (h), applies to all cases not yet final as of its effective date. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712 (*Chavez*).) Jimenez contends his case must be remanded to permit the court below to exercise its discretion to strike the firearm enhancement. We agree.

A trial court must exercise "informed discretion" when sentencing a defendant. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*).) If the court proceeds on the assumption that it lacks discretion, remand for resentencing is required unless the record "clearly indicates" that the court

would have reached the same conclusion had it been aware of its discretionary powers. (*Ibid.*)

Remand is required here because the record does not clearly indicate that the trial court would have imposed the 20-year sentence enhancement had it had the discretion to strike it. At sentencing, the court stated that Jimenez committed a serious crime that involved great bodily injury, a “high degree of callousness,” and the use of a weapon. The victim was “particularly vulnerable” and could not have anticipated the attack. Jimenez has a lengthy criminal record, was a member of a criminal street gang, and “even fled the country” after the murder. He did not perform satisfactorily during previous probation attempts. He was a “serious danger to society.”

But the trial court did not “express an intention to impose the maximum possible sentence.” (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 (*Billingsley*).) Nor did it state that it would have imposed the enhancement if it had the discretion to strike it. (*Chavez, supra*, 22 Cal.App.5th at p. 713.) Instead, the court stated that it was sentencing Jimenez to “the term that must be imposed as a matter of law.”

This case is unlike *People v. Gutierrez* (1996) 48 Cal.App.4th 1894. There, the trial court exercised its discretion to impose the maximum sentence permitted, stating that it wanted to “keep [the defendant] off the street as long as possible.” (*Id.* at p. 1896.) The trial court here, in contrast, had no discretion over the sentence imposed. And it “did not state that [Jimenez] should be ‘[kept] off the street as long as possible’ or make any other statement clearly indicating that it would not have exercised discretion to strike . . . the section 12022.53, subdivision (h), enhancement.” (*Chavez, supra*, 22 Cal.App.5th at

p. 714.) Absent that clear indication, remand is required. (*Gutierrez, supra*, 58 Cal.4th at p. 1391.)

Our review of the record reveals another sentencing error related to the firearm enhancements.³ In addition to finding true the discharge allegation under section 12022.53, subdivision (c), the trial court found true allegations that Jimenez personally used a firearm during the commission of his crime (§§ 12022.5, subd. (a), 12022.53, subd. (b)). But the court did not impose and stay sentence enhancements on the use allegations, as required. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1122-1123.) On remand, the court must exercise its discretion and determine whether to strike the enhancements on all three of the allegations found true at trial. (*Billingsley, supra*, 22 Cal.App.5th at p. 1082; see §§ 12022.5, subd. (c), 12022.53, subd. (h).) If it declines to strike more than one of the enhancements, it must impose sentences on those not stricken and then stay execution of the lesser sentence(s). (*Gonzalez*, at pp. 1122-1123; see § 12022.53, subd. (f).)

Gang enhancement

Finally, Jimenez contends, and the Attorney General concedes, that the trial court erred when it imposed a 10-year sentence enhancement under section 186.22, subdivision (b)(1)(C). We agree. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1010-1011.) Because the court sentenced Jimenez to 15 years to life in prison on his murder conviction, it should have set his minimum parole eligibility term at 15 years instead of imposing the 10-year sentence enhancement. (See § 186.22, subd. (b)(5).)

³ Though the parties did not raise this issue in their briefs, an unauthorized sentence may be corrected at any time. (*People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13.)

DISPOSITION

Jimenez's sentence is vacated, and the matter is remanded to the trial court with directions to: (1) strike the 10-year gang enhancement it imposed pursuant to section 186.22, subdivision (b)(1)(C); (2) impose a 15-year minimum parole eligibility requirement pursuant to section 186.22, subdivision (b)(5); (3) hold a sentencing hearing to consider whether to strike the sections 12022.5 and 12022.53 firearm enhancements; and, if the court declines to strike one or more of the enhancements, (4) impose the sentence on the enhancement with the longest term of imprisonment; and (5) impose and stay the sentences on any remaining enhancements pursuant to section 12022.53, subdivision (f). After resentencing, the court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jeffrey G. Bennett, Judge
Superior Court County of Ventura

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