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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR ALBERT RIVERA,

Defendant and Appellant.

B230339

(Los Angeles County  
Super. Ct. No. NA086450)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Affirmed in part and reversed in part with directions.

Doreen B. Boxer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, and Alene M. Games, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant Oscar Albert Rivera appeals from the judgment entered following a jury trial in which he was convicted of assault with a firearm, discharging a firearm with gross negligence, and possession of a firearm by a felon, with gang, great bodily injury, and firearm enhancement findings. Defendant contends the trial court improperly instructed the jury upon, and allowed the jury to find true, an inapplicable Penal Code section 12022.53, subdivision (c) allegation as an enhancement to his assault with a firearm conviction. (Undesignated statutory references are to the Penal Code.) We agree and reverse the jury's finding on that enhancement. We also strike a section 667, subdivision (a)(1) enhancement imposed by the court because there was no proof of, finding upon, or admission of that enhancement allegation.

### **BACKGROUND**

About 1:30 a.m. on June 21, 2010, Christopher Garcia walked out of the Fantasy Gold Club located in Harbor City in Los Angeles County and was beaten by several men in the parking lot behind the club. He suffered a broken nose, a broken orbital bone, cuts, and bruises. At trial Garcia claimed to remember nothing, but soon after the crimes he told officers from the Los Angeles Police Department that his friend Crow came into the club and said that he had been confronted by several gang members in the parking lot. Garcia told Crow he would take care of the situation. Garcia and Crow went to the parking lot and approached three men Garcia described as gang members. One of the men took a gun from his waistband, put it against Garcia's stomach, then placed it next to Garcia's head and fired it into the air. The gunman shouted, "Harbor City," and someone struck the back of Garcia's head. The men hit and kicked Garcia. He lost consciousness, and when he came to, he could not find his wallet, but he testified that he later found it at home. Garcia told Officer Scott Coffee that the gunman had a huge "H.A." tattoo covering the top of his shaved head. Coffee obtained the recordings from Fantasy Gold Club's eight surveillance cameras for the night of June 20 and early morning of June 21, 2010. Portions of these recordings were played at defendant's trial. Garcia identified himself in the surveillance recordings.

Coffee had had three prior contacts with defendant, who was an admitted member of the Harbor City Boys gang. Coffee knew that defendant had “H.C.” tattooed on the top of his head and a large “Harbor City” tattoo on his back. Coffee recognized defendant in the segments of the surveillance recordings and tracked the movement of defendant and several companions, including another admitted Harbor City Boys gang member who was in a wheelchair, through the club and into the parking lot, where Garcia and another man approached them and an altercation occurred. Defendant’s head and back tattoos were visible in portions of the video. Following his arrest, Coffee showed defendant selected frames from the surveillance recordings, and defendant admitted they depicted him. Photographs of defendant displaying his tattoos while making a Harbor City Boys gang hand signal found on a camera in defendant’s home were also introduced.

The parties stipulated that defendant had a prior felony conviction for purposes of the firearm possession charge. Defendant presented no affirmative defense.

The jury acquitted defendant of robbery, but convicted him of assault with a firearm, discharging a firearm with gross negligence, and possession of a firearm by a felon. It found gang enhancement allegations true with respect to each count and found great bodily injury (§ 12022.7, subd. (a)), personal use of a firearm (§ 12022.5, subd. (a)), and personal and intentional discharge of a firearm (§ 12022.53, subd. (c)) allegations true with respect to the assault with a firearm count. Defendant admitted he had suffered one prior serious or violent felony conviction and served a prior prison term within the scope of section 667.5, subdivision (b). The court sentenced defendant to a second strike prison term of 28 years, which included a 10-year gang enhancement; a 4-year firearm enhancement under section 12022.5, subdivision (a); a 5-year prior serious felony enhancement under section 667, subdivision (a)(1); and a 1-year section 667.5, subdivision (b) enhancement. The trial court did not impose the section 12022.53, subdivision (c) enhancement.

## **DISCUSSION**

### **1. Section 12022.53, subdivision (c) finding**

The information alleged section 12022.53, subdivisions (b), (c), and (e) enhancement for the robbery and discharge of a firearm with gross negligence counts. During its discussion of instructions, the trial court, with the acquiescence of both counsel, concluded that the gang enhancement allegation made section 12022.53 enhancement applicable to assault with a firearm count, even though the crime charged (§ 245, subd. (a)(2)) was not among the offenses enumerated in section 12022.53, subdivision (a). Accordingly, the court directed the clerk to include a section 12022.53, subdivision (c) allegation on the verdict form for assault with a firearm, and the jury found the allegation true.

Defendant contends, and the Attorney General aptly concedes, that section 12022.53 is inapplicable to a violation of section 245, subdivision (a)(2) because that offense is not listed among the offenses to which section 12022.53 applies. (§ 12022.53, subd. (a).) The mere inclusion of a gang enhancement allegation did not make section 12022.53 applicable. In addition, the enhancement had not been pleaded. Accordingly, we reverse the jury's finding on the inapplicable enhancement.

### **2. Section 667, subdivision (a)(1) enhancement**

Defendant was apparently convicted of robbery in 2005. This prior conviction was the basis for the strike allegation; a section 667, subdivision (a)(1) prior serious felony enhancement allegation; and a section 667.5, subdivision (b) prior prison term enhancement allegation.

While the jury was deliberating, defendant admitted the strike and prior prison term enhancement allegation. He was not asked to admit, and did not admit, the section 667, subdivision (a)(1) enhancement allegation. The prosecutor described the strike allegation and the prior prison term allegation and asked if defendant admitted these two allegations, referring to them as “the allegation that you have this one strike prior, pursuant to 1170.12(a) through (d) and 667 (b) through (i)” and “the allegation that it also

qualifies as a prior pursuant to Penal Code section 667.5(b), in that you did not—that you served a term and did not remain free of prison custody for and did commit an offense resulting in a felony conviction during a period of five years subsequent to the conclusion of that term.” The prosecutor never mentioned the section 667, subdivision (a)(1) enhancement allegation. The prosecutor did not introduce any evidence to prove the section 667, subdivision (a)(1) enhancement allegation, and neither the jury nor the trial court made any finding with respect to that allegation. The trial court nonetheless imposed a five-year enhancement term pursuant to section 667, subdivision (a)(1) upon defendant. This was impermissible, as that allegation had not been admitted, proven, or found true. Accordingly, the enhancement must be stricken.

### **3. Correction of sentencing minute order and abstract of judgment**

The minute order for the sentencing hearing and the abstract of judgment omit the section 667.5, subdivision (b) enhancement and misstate the length of the prison term imposed by the court, which was 28 years, not 27 years. Upon remand, the clerk must correct these errors by issuing a nunc pro tunc minute order and an amended abstract of judgment that includes the section 667.5, subdivision (b) enhancement, but omits the improperly imposed section 667, subdivision (a)(1) enhancement. The correct sentence length is 23 years.

### **DISPOSITION**

The jury’s true finding on a Penal Code section 12022.53, subdivision (c) in count 1 is reversed. The five-year enhancement pursuant to Penal Code section 667, subdivision (a)(1) is stricken. The judgment is otherwise affirmed. The trial court is directed to issue an amended abstract of judgment omitting the Penal Code section 667, subdivision (a)(1) enhancement and including the one-year Penal Code section 667.5, subdivision (b) enhancement imposed by the court. The trial court is also directed to

correct its minute order for the sentencing hearing to include the one-year Penal Code section 667.5, subdivision (b) enhancement imposed by the court and reflect the actual sentence imposed by the court.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.