Filed 1/31/18 P. v. Simmons CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL ALONZO SIMMONS, Defendant and Appellant.	B276082 (Los Angeles County Super. Ct. No. TA139578)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Affirmed as modified.

Janet Gusdorff, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Samuel Alonzo Simmons (defendant) appeals from his conviction of assault with a firearm. He contends that the gang enhancement must be reversed because the gang expert's opinion was based on hearsay in violation of state law and the confrontation clause of the Sixth Amendment to the United States Constitution. Defendant also contends that reversal and remand for sentencing is required because the trial court imposed unauthorized firearm and recidivist sentence enhancements, and the court should be allowed to exercise its discretion under the recent amendment to the firearm enhancement statutes. Defendant also requests the correction of clerical errors in the minutes and abstract of judgment. We find no hearsay error or confrontation violation, and no error in imposing a recidivist enhancement. We conclude that though the firearm enhancement was properly imposed, it must be stayed, but no reversal or remand for sentencing is required. We order the correction of the minutes and abstract of judgment, and modify the judgment to stay the firearm enhancement, but otherwise affirm.

BACKGROUND

Defendant was charged with assault with a firearm, in violation of Penal Code section 245, subdivision (a)(2).[1] The information also alleged that defendant personally used a firearm in the commission of the offense, within the meaning of former section 12022.5, subdivision (a); and pursuant to section 186.22, subdivision (b)(1)(C), 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. It was further

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

alleged for purposes of sentencing under the "Three Strikes" law (§§ 1170.12, subd. (b) & 667, subd. (b)-(j)), and for purposes of the recidivist enhancement under section 667, subdivision (a)(1), that defendant had suffered a prior serious or violent felony. In addition, the information alleged four prior convictions for which defendant served prison terms, within the meaning of section 667.5, subdivision (b).

A jury convicted defendant of assault with a firearm as charged, and found true the firearm and a gang allegations. Following defendant's waiver of his right to a jury trial on the prior convictions, the trial court found them true, but struck the prior strike conviction and the enhanced punishment for the four prior prison terms pursuant to section 1385. The trial court sentenced defendant to 23 years in prison, comprised of the upper term of four years for the charged offense, plus four years for the firearm enhancement, 10 years for the gang enhancement, and five years for the recidivist enhancement. The court also ordered defendant to pay mandatory fines and fees, and awarded a combined total of 160 days of custody credit.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Fourteen-year-old Isaiah C. was walking along Compton Boulevard on February 24, 2016, when he passed an African-American man who asked him, "What's up?" Isaiah interpreted this as a gang challenge, and formed the hand sign of his own gang in reply. Defendant, who was in the vicinity, was informed of the exchange and told "That's him, cuz. Get him. Get him." Defendant rode his bicycle to within five to ten feet of Isaiah and said, "So you want to be throwing up gangs, huh?" Defendant then pointed the pistol he had been holding at his side and fired four or five shots in Isaiah's direction.

Los Angeles County Sheriff's Detective Scott Lawler testified as the prosecution's gang expert, and in particular, as an expert on the Palmer Blocc Compton Crip criminal street gang (Palmer Blocc gang), its culture, territory, primary activities, history, and about some of its 75 to 100 members. The shooting in this case was on the 300 block of Magnolia Street near Acacia Avenue, close to the Palmer Blocc gang's territory. Detective Lawler testified that gangs need to protect their boundaries so not to be vulnerable to challenges by rival gangs. He explained that gangs enforce their boundaries with fear and intimidation, concepts which played a significant role in gang culture. Gang members gain respect by causing rival gangs, residents of their own communities, and fellow gang members to fear them. The fear of retaliation further serves to discourage cooperation with law enforcement, which enables the gang to operate with impunity.

Detective Lawler described the common signs and symbols used by the Palmer Blocc gang, as most often the letter P formed with the hands, the index finger touching the thumb, with the three remaining fingers pointing downward. Crip gang members preferred to wear blue, and could be seen wearing athletic team gear with a P or B on them. Members of the Palmer Blocc gang often refer to the gang with such abbreviations as PBCC or the number 900, their block number.

The primary activities of Palmer Blocc, an African-American gang, ranged from street level narcotic sales to gun possession, shootings, and vehicle theft. In Detective Lawler's opinion, Palmer Blocc was a criminal street gang. He based that opinion on his 10 years at the Compton Station on patrol or as a detective, arresting Palmer Blocc members, serving search warrants on their residences, and speaking to their families and victims. The gang's rivals included several Crip gangs and all

area Hispanic gangs. In general, African-American gangs did not get along with Hispanic gangs, and in the course of his work, Detective Lawler had seen a great deal of violence between them.

Detective Lawler presented certified minute orders of cases involving crimes committed by Palmer Blocc members. Davonte Darnell Rainy (Rainy), a Palmer Blocc member, was convicted in March 2014 of possession of a firearm by felon, in violation of section 29800, subdivision (a)(1), which he committed on December 7, 2013. Detective Lawler was acquainted with Rainy, and was present when Rainy, during an interview after his arrest for that offense, admitted that he was a member of Palmer Blocc gang. Rodney Eric Dafney (Dafney) was convicted of illegal possession of a firearm, in violation of section 29805, committed in July 2013 while a member of the Palmer Blocc gang. Detective Lawler was also acquainted with Dafney, and was the investigating officer in Dafney's case who interviewed him at the time of his arrest. Dafney admitted his membership in Palmer Blocc. Detective Lawler knew both men's monikers, "J" (Rainy) and "E Rock" (Dafney).

Detective Lawler was also acquainted with defendant, and was of the opinion defendant was a member of Palmer Blocc. He based his opinion on his review of materials relating to this and previous cases, as well as his observation of defendant's gang-related tattoos on his chest, back, and arms, shown in photographs taken by Detective Lawler. The tattoos were: "Palmer Blocc Crips"; "Compton"; "PBCC"; "9"; and two zeros. Prior to this case, Detective Lawler had been in contact with defendant and had documented the contact on a field identification card where he noted the location of the stop,

defendant's tattoos and gang affiliation. Defendant admitted to Detective Lawler that he was a Palmer Blocc member.[2]

Given a hypothetical question mirroring the facts in evidence, Detective Lawler gave his opinion that the crime was committed for the benefit of the gang. His opinion was based on the fact that the crime was likely to increase fear of the gang, as it was heinous and committed at a time when many people would see it, in broad daylight on a major boulevard which leads to a freeway, and thus packed with traffic and people. Further, the crime was committed in Compton, a community where word travels, and people would hear that when Palmer Blocc members were challenged and disrespected, they retaliated, causing people to fear and respect the gang more, making it easier for the gang to conduct its criminal enterprises. Witnesses to a crime like this often hesitate to come forward when they have seen or heard about what the gang has done. They know what the gang is capable of and fear for the safety of their families. Sometimes they have to be relocated.

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[2] In addition to the convictions of Rainy and Dafney, defendant's conviction in this case provided evidence of a pattern of criminal gang activity. (See *People v. Loeun* (1997) 17 Cal.4th 1, 10-11.) Defendant does not challenge the evidence proving him to be the person who shot at Isaiah, and the evidence of his guilt was overwhelming. Defendant was apprehended the same day, and Isaiah quickly identified him, his gun, his bicycle, and his clothing, an African-style shirt identified by other witnesses, all of which were recovered near defendant after he ran from Sheriff's deputies. A gunshot residue test of defendant was positive, an indication that defendant fired a weapon that day. Defendant's Palmer Blocc membership was established by both his admission to Detective Lawler and by Detective Lawler's opinion, based upon that admission and the detective's personal observations of defendant's gang-related tattoos.

Detective Lawler explained the great importance of respect in gang culture. Gang members are driven by the need to be respected and feared. A disrespected gang member must exact revenge or he will lose status within the gang. Detective Lawler testified that he had seen cases in which disrespect was punished by murder. Here, it was disrespectful for a 14-year-old boy to respond with his gang sign when he was asked "What's up?" The fact that the shooting occurred just outside the gang's territory did not change the detective's opinion, as it was very close to a Palmer Blocc boundary.

DISCUSSION

I. Hearsay and confrontation clause

Defendant contends that the gang enhancement must be reversed due to the erroneous admission of hearsay in violation of both state law and the confrontation clause of the Sixth Amendment.

The gang expert opined that the shooting was committed for the benefit of a criminal street gang. A criminal street gang is one whose "members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) To prove a pattern of criminal gang activity, there must be evidence of two or more "predicate offenses" enumerated in section 186.22, subdivision (e), not necessarily gang related, but committed on separate occasions, the last of which occurred within three years after a prior offense. (*People v. Gardeley* (1996) 14 Cal.4th 605, 610, 622-624 (*Gardeley*), disapproved on another point in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*); § 186.22, subd. (e).)

Defendant challenges Detective Lawler's testimony that the perpetrators of the two predicate crimes, Rainey and Dafney, had both admitted to him that they were members of the Palmer Blocc gang. He argues that the admissions were inadmissible

testimonial hearsay under the principles stated in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), and in *Sanchez*, *supra*, 63 Cal.4th 665.[3]

"Hearsay, defined as 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated,' is inadmissible unless it falls under an exception. (Evid. Code, § 1200, subd. (b).) A statement 'offered for some purpose other than to prove the fact stated,' however, is not hearsay.' [Citation.]" (*People v. Roa* (2017) 11 Cal.App.5th 428, 442.) And "[t]he confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' (*Crawford, supra,* 541 U.S. at p. 59, fn. 9.)" (*Sanchez, supra*, 63 Cal.4th at p. 674.)

California law permits expert witnesses to give an opinion based upon the expert's special knowledge, skill, experience, training, and education, and upon reliable matters perceived by, personally known to, or made known to the expert at or before the hearing, whether or not admissible, unless precluded by law. (Evid. Code, §§ 801, subd. (b), 802; see *Sanchez, supra*, 63 Cal.4th at pp. 675-676.) An expert may express an opinion on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, *even though that information may have been derived from conversations with others*, lectures, study

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[3] Respondent contends that these issues have been forfeited as they were not raised below. As defendant's trial occurred before the publication of *Sanchez*, we will consider defendant's contentions to the extent that they relate to the reasoning of that decision.

of learned treatises, etc." (*Sanchez*, *supra*, at p. 675, italics added.) "Knowledge in a specialized area is what differentiates the expert from a lay witness, and makes his testimony uniquely valuable to the jury in explaining matters 'beyond the common experience of an ordinary juror.' [Citations.] As such, an expert's testimony concerning his general knowledge, *even if technically hearsay*, has not been subject to exclusion on hearsay grounds." (*Id*. at p. 676, italics added.)[4]

An expert is prohibited from relating "*case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at pp. 676, 686.) The *Sanchez* "decision [did] not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and . . . testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, [the] decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise." (*Id*. at p. 685.)

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[4] Immediately after Detective Lawler testified regarding Palmer Blocc's primary activities, and before he presented the evidence of predicate crimes, the trial court read CALCRIM No. 332 to the jury, telling the jurors among other things that although they must consider the expert's opinions, they were not required to accept them as true or correct, and could disregard any opinion that they found unbelievable, unreasonable, or unsupported by the evidence.

In sum, *case-specific* out-of-court statements which are treated as true and accurate to support the expert's opinion are hearsay under state law, and if the statements were testimonial, they may violate the Sixth Amendment's confrontation clause. (*Sanchez, supra*, 63 Cal.4th at p. 686.) However, when such statements are not case-specific, that is, not "relating to the particular events and participants alleged to have been involved in the case being tried," an expert may render an opinion based upon matter "'perceived by or personally known to [him] or made known to him . . . before the hearing, *whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion*'" within his expertise. (*Sanchez, supra*, at pp. 678-679, 686; Evid. Code, § 801, subd. (b).) Thus, a gang expert may rely on and relate facts, based on information learned through his experience and education regarding a gang's operations, primary activities, and pattern of criminal activities; and may give an opinion regarding predicate crimes and the membership status of the perpetrators, even if some of the information may be testimonial hearsay, so long as the perpetrators are not also participants in the current crime, and the information does not relate to the particular events of the defendant's case. (See *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1174-1175, review granted Mar. 22, 2017, S239442; but see *People v. Ochoa* (2017) 7 Cal.App.5th 575, 589 [admissions by defendant's associates are case-specific].)

Detective Lawler was the investigating officer in the case involving Dafney, and was personally acquainted with both Rainy and Dafney, who both admitted their gang membership in the presence of the detective. He testified that he knew the two men, he interviewed them after their arrest, and they each admitted their gang membership to him. As defendant did not object on foundational grounds or seek to elicit any facts regarding the

time and place of the admissions, we cannot assume that Detective Lawler did not testify from personal knowledge gained from his experience investigating the Palmer Blocc gang. (See *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1248.)

We thus agree with respondent that Detective Lawler's testimony was admissible as part of an expert's general knowledge about the gang's history, membership, and pattern of criminal activity, unrelated to the "particular events and participants alleged to have been involved in the case being tried," and that there was no confrontation violation.

II. Imposition of both gang and firearm enhancements

Defendant contends the trial court erred in imposing both the four-year sentence enhancement pursuant to former section 12022.5, subdivision (a), and the 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C).[5]

The enhancement of former section 12022.5, subdivision (a), was imposed for defendant's personal use of a firearm in the commission of the offense. Section 186.22, subdivision (b)(1)(C), calls for a 10-year enhancement for the commission of a violent felony for the benefit of a criminal street gang. A felony becomes a violent felony when the defendant uses a firearm, and the use has been charged and proved as provided in section 12022.5. (§ 667.5, subd. (c)(8).) Subdivision (f) of section 1170.1 provides: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm

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[5] Defendant points out an error in the court's minutes and the abstract of judgment, which refer to section 12022.53, the wrong firearm enhancement statute. The firearm enhancement was alleged, found true, and orally imposed by the court under section 12022.5, not section 12022.53. Respondent agrees that the notation of section 12022.53 was clerical error and should be corrected.

in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury."

In accordance with section 1170.1, subdivision (f), when a crime qualifies as a violent felony solely because the defendant personally used a firearm in the commission of that felony, the personal use finding will support either a firearm enhancement or a violent felony gang enhancement, but not both. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 508-509 (*Rodriguez*).) As it was the use of a firearm that made defendant's crime a violent felony for purposes of section 186.22, subdivision (b)(1)(C), the gang enhancement was imposed for the same firearm use which called for the firearm enhancement of section 12022.5. Under such circumstances, defendant's sentence should have been enhanced only by the greater of the two enhancements. (*People v. Le* (2015) 61 Cal.4th 416, 419-420, 423-425 (*Le*); *Rodriguez*, *supra*, 47 Cal.4th at p. 509; § 1170.1.)

Respondent agrees that it was error to increase defendant's sentence with both enhancements. Both defendant and respondent contend that the appropriate remedy is to reverse and remand for resentencing, as was done in *Rodriguez*. However, *Rodriguez* does not mandate resentencing in all cases. (See *Le*, *supra*, 61 Cal.4th at p. 428.) Because the trial court had imposed the middle term for three underlying felonies in *Rodriguez*, reversal and remand for resentencing was appropriate, as it provided the trial court with "the opportunity . . . to restructure its sentence by imposing the *upper* terms for the base felonies, if it was inclined to compensate for the loss of one of the enhancements." (*Le* at p. 428.) Here, on the other hand, as defendant was convicted of a single underlying felony for which

he received the upper term, there is no need to remand. It is appropriate for this court to modify the sentence on appeal. (See § 1260; *People v. Rogers* (2009) 46 Cal.4th 1136, 1174.) We do so by affirming the imposition of both enhancements but order the firearm enhancement stayed. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1128-1129 & fn. 7; *People v. Francis* (2017) 16 Cal.App.5th 876, 887-888; cf. *Le*, *supra*, 61 Cal.4th at pp. 421-422, 429.)

III. Recent amendment to section 12022.5

In supplemental briefing, defendant has requested remand to the trial court for resentencing under the recent amendment of section 12022.5, which gives the trial court the discretion to strike the firearm enhancement in the interests of justice. Both the former and the amended section 12022.5, subdivision (a) provides for a consecutive additional prison term of three, four, or 10 years, for the use of a firearm in the commission or attempted commission of a felony. Defendant was sentenced when the firearm enhancement was mandatory. At that time, former subdivision (c) of section 12022.5 provided: "Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." Effective January 1, 2018, section 12022.5, the amended subdivision (c) reads: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Respondent concedes that the amendment applies retroactively to judgments which are not final on January 1, 2018, under the reasoning of *In re Estrada* (1965) 63 Cal.2d 740, as the amendment gave the trial courts new sentencing

discretion to lessen punishment. (See *People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) Respondent has also conceded that the trial court erred in imposing the firearm enhancement of section 12022.5, while also sentencing defendant under section 186.22, subdivision (b)(1)(C), as discussed in part II of this opinion. Respondent further suggests that this issue would be moot if we strike the firearm enhancement instead of remanding for resentencing as was suggested in the original brief. Since we have rejected the suggestion to remand for resentencing, the issue is not moot.

Nevertheless, remand is unnecessary. Remand is not required when it would be an "idle act" because "'the record shows the that trial court would not have exercised its discretion even if it believed it could do so.'" (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901; see also *Romero*, *supra*, 13 Cal.4th at p. 530, fn. 13.) Here, the trial court sentenced defendant to the upper term of four years for the charged offense, plus the middle term of four years for the firearm enhancement, 10 years for the gang enhancement, and five years for the recidivist enhancement. Had the court wished to impose a shorter sentence, it could have imposed three years less than it did, with a low term of two years as to the charged offense and a low firearm enhancement of two years. The court expressly recognized that section 12022.5, subdivision (a), provided for a range, and thus knew that it could have chosen the low term in that range. The court found multiple aggravating factors, and no factor in mitigation.[6] There is no reasonable probability that the

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[6] In selecting the high term, the trial court found that the victim was particularly vulnerable due to his young age, that defendant's prior adult convictions were numerous and of increasing seriousness, with several prior prison terms and unsatisfactory performance on probation or parole.

trial court would now chose to strike the stayed four-year firearm enhancement, when it chose not to impose a sentence at the time of sentencing which would have been three years shorter. Remand is thus not required.

IV. Imposition of both gang and recidivist enhancements

Defendant would have us apply the reasoning of *Rodriguez* and *Le*, to bar the imposition of the five-year recidivist enhancement under 667, subdivision (a)(1) in addition to the violent felony gang enhancement under section 186.22, subdivision (b)(1)(C).

Defendant has cited no authority directly addressing this issue, but argues that both enhancements were based on the use of a firearm, and thus come within the purview of the relevant statutes. Section 667, subdivision (a)(1), provides that "any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year [consecutive] enhancement for each such prior conviction on charges brought and tried separately." Defendant points out that the firearm use made the assault charge a serious felony as well as a violent felony. (See § 667.5, subd. (c)(8) [violent]; 1192.7, subd. (c)(23), (c)(31) [serious].) We understand defendant's reasoning to be that because a current serious felony conviction is a prerequisite to imposing the recidivist enhancement, and the current conviction is a serious felony due to the gun use, it may not be imposed along with the gang enhancement, which was also dependent upon a finding of gun use.

Defendant's position ignores the significance of the prior conviction requirement of section 667, subdivision (a)(1). We agree with respondent that the reasoning of *People v. Wilson* (2016) 5 Cal.App.5th 561 (*Wilson*) is applicable here, although the defendant in that case sought to apply the reasoning of *Rodriguez*

to subdivision (g) of section 1170.1, not subdivision (f).[7] Rejecting the defendant's analogy, the court held that "a 'section 667, subdivision (a) enhancement is for a prior conviction, not the present one . . . and is not attached to any specific conduct aggravating the present offense . . . .'" (*Wilson*, *supra*, at pp. 565-566.) The court explained: "It is well established that '[s]ection 1170.1 refers to two kinds of enhancements: (1) those which go to the nature of the offender and (2) those which go to the nature of the offense. Enhancements for prior convictions -- authorized by sections 667.5, 667.6 and 12022.1 -- are of the first sort. The second kind of enhancements -- those which arise from the circumstances of the crime -- are typified by sections 12022.5 and 12022.7: was a firearm used or was great bodily injury inflicted?' [Citations.]" (*Wilson*, at p. 566.) Distinguishing *Rodriguez*, the *Wilson* court observed that "[u]nlike section 667, subdivision (a)(1), section 186.22, subdivision (b)(1)(C) imposes an additional punishment on a defendant for his or her conduct in the present offense. Section 186.22, subdivision (b)(1) is a conduct enhancement, not a status enhancement. A section 186.22, subdivision (b)(1) enhancement does not require the defendant to have the status of a gang member. [Citation.] Consequently, the gang enhancement was not based on the defendant's status as a gang member, but on his conduct of using a gun in committing a felony to benefit a gang." (*Wilson*, *supra*, at pp. 567-568.)

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[7] Subdivision (g) provides: "When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm."

Defendant acknowledges that the California Supreme Court considers the recidivist enhancement to be status based not offense based. (See *People v. Sasser* (2015) 61 Cal.4th 1, 14-16.) He would nevertheless have us redefine the section 667, subdivision (a)(1) recidivist enhancement as a hybrid status/conduct enhancement because the circumstances of the current offense are a factor in determining whether the current offense is a serious felony. We decline to do so, as we agree with the reasoning of *Wilson*, and conclude that as both enhancements were authorized reversal is unwarranted.

DISPOSITION

The four-year enhancement imposed under former section 12022.5, subdivision (a), is stayed. The abstract and the minutes should be modified to note that the firearm enhancement was imposed under section 12022.5, not section 12022.53. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting this change, and to forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT