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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JOHN PAIZ AGUILAR,

Defendant and Appellant.

B280504

(Los Angeles County
Super. Ct. No. BA440069)

APPEAL from judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed.

David L. Polsky, under appointments by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Thomas C. Hsieh, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Robert John Paiz Aguilar guilty of first degree murder (Pen. Code, § 187, subd. (a))¹ [count 5]), three counts of assault with a semiautomatic firearm (§ 245, subd. (b) [counts 1–3]) and shooting at an occupied motor vehicle (§ 246 [count 4]). As to the murder count, the jury found that defendant personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)). The jury found that the murder was committed to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)). As to counts 1–3, the jury found that defendant personally used a firearm (§ 12022.5, subd. (a)), and the crimes were committed to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(A)). As to count 4, the jury found that defendant personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and that the crime was committed to promote, further, and assist in criminal conduct by gang members (§ 186.22, subds. (b)(1)(C), (b)(4)).

Defendant was sentenced to a total of 65 years to life in state prison, as set forth in detail below in the discussion portion of this opinion.

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

Defendant's lone appellate contention is that the cause must be remanded to allow the trial court to consider exercising its discretion under section 1385 to strike the firearm use enhancement under recently enacted section 12022.53, subdivision (h). (Senate Bill No. 620 (2017–2018 Reg. Sess.).

We affirm the judgment.

FACTS

The Crimes

Shooting at an Occupied Vehicle

On Sunday, September 20, 2015, around 1:00 p.m., Francisco Rodriguez was driving his brother Juan Carlos Rodriguez, his mother-in-law Christina Diaz, and his three-year-old nephew to church when he noticed three males near a laundromat at the corner. Francisco and Juan Carlos recognized one of the men as Uswaldo Lopez, a member of the Clover criminal street gang.² Francisco had briefly dated Lopez's sister, but had broken off the relationship when he learned that her brother was a gang member. After the breakup, Lopez gave Francisco a hard time and threatened him.

As he was driving, Francisco saw Lopez point at his car. One of the other two males pulled a gun from his

² Lopez, a former co-defendant, is not a party to this appeal.

waistband and fired a single shot at the car. The car was not hit, and none of the people inside were injured.³

Murder

At about 2:00 p.m. on the same day, a witness saw defendant—who she recognized from the neighborhood—running down the street. She came outside and looked in the direction from which defendant had run. She saw a person on the ground and a man trying to assist the person.

Police arrived, and observed a man and a woman performing CPR on a man lying on the ground. The man who was assisting had numerous distinctive gang tattoos, including a clover. Police later determined that the man on the ground was Adrian Shije. He had been shot twice at close range, once in the back and once in the face. Shije died from his wounds at the hospital.

Investigation

Police recovered a spent casing and a live round at the scene of the vehicle shooting. Both items were .380 semiautomatic caliber.

A bullet recovered from Shije's body, although damaged, fit within the .38 caliber class, which includes .380

³ Defendant was charged with assault with a deadly weapon as to the three adults in the vehicle.

caliber rounds. Two .380 bullet casings were discovered at the scene of the murder.

Police interviewed Lopez and defendant. Defendant admitted to committing both shootings. Defendant explained that someone had shot at him the day before the murder and it was rumored that Shije had set him up. An older member of the Clover gang had directed him to shoot Shije in retaliation. He could not let the incident go unavenged or his own life would be in danger.

On the day of the murder, Lopez and his brother picked up defendant and Shije. Lopez was aware that the murder was going to take place and came along to ensure it was done. He gave defendant a gun. Lopez spotted Francisco's car and ordered defendant to shoot at it, which he did, firing one shot. He then "racked" the gun, causing it to eject a live round. The three men fled.

Later, as they were walking, Shije was ahead of defendant. Defendant shot at him three times and then ran away. He disposed of the gun.

A gang expert testified regarding the Clover criminal street gang, whose primary activities included robberies, assaults with deadly weapons, shootings, murders, vandalism, and narcotics sales. The murder was committed in Clover gang territory. Given a hypothetical with facts mirroring the instant case, the expert opined that the crimes were committed in association with, at the direction of, and for the benefit of the gang. Having gang tattoos signifies that the individual has put in work for the gang. In his

opinion, a younger shooter without tattoos would be committing the crimes to demonstrate loyalty to the gang. An older tattooed gang member would be present as a witness to this loyalty.

Defendant obtained gang tattoos after the commission of the charged crimes.

Sentencing

At the sentencing hearing, the victim impact statements of eight of Shije's family members were presented to the court. They emphasized the great impact that his death would have on the entire family. His mother stated:

"When I was told of my son's murder, I cried for three days straight. I couldn't get out of bed unless I was checked on by family and didn't eat unless food was brought to me.

"I was completely devastated. For three weeks after, my tears continued on and off until my eyes burned. I couldn't believe this nightmare was real.

"Never again will I see Adrian's big bright smile in the morning or hear him tell me, 'I love you, mommy, ever, ever.'

"There will be no more birthday parties, backyard gatherings, camming [sic] trips, Magic Mountain outings or holiday celebrations with my son. Adrian will never get his driver's license or graduate from high school or see his beautiful child grow up.

“His high school sweetheart [has been] made a single parent before Adrian’s baby was even born.

“Robert has broken my family and my heart beyond repair. The reality of this nightmare was hard to accept. The murder of my son Adrian has brought distrust and anguish to my remaining seven children and Adrian’s friends.

“My daughters have moved out of this state and back to their Indian reservation. My family is now divided. Never did we think Adrian would be murdered by a child he knew since elementary school from age twelve on up whom [sic] was welcome open heartedly into my home, daily, played games with him, watched T.V. with him whom I fed.”

Other family members spoke of Shije’s role as the eldest son who stood in his father’s stead after his death three years earlier, and of the hardship his murder would place on his girlfriend of four years, who he planned to support through high school and college as they raised their child together. After defendant’s betrayal, none of the family was able to trust, and many of Shije’s younger siblings found it difficult to make or maintain friendships. His mother had been diagnosed with post traumatic stress disorder and was not able to trust anyone other than the family to come into her house.

The court imposed a term of 25 years to life for the murder in count 5, plus 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d). In count 4, it imposed a consecutive life term with a

minimum parole eligibility date of 15 years. (§§ 246, 186.22, subd. (b)(4).) It stayed the remaining enhancements in count 4 (§§ 12022.53, subds. (b), (c), 186.22, subd. (b)(1)(C)) pursuant to section 654. The court stressed that it was “swayed by the victims’ impact statements” to modify its tentative sentences in counts 1–3. In each of those counts, it sentenced defendant to two years, plus one year four months for the section 12022.5, subdivision (a) firearm enhancements, plus one year for the gang enhancements under 186.22, subdivision (b)(1)(A) (one-third the midterm of the enhancements and the substantive offense) to run consecutively to the indeterminate term. The court was obligated to stay the sentences pursuant to section 654, however, because counts 1–3 involved the same set of operative facts as count 4.

After pronouncing the sentence, the court invited the parties to make a record of any applicable mitigating factors relating to defendant’s youth, for his eventual parole release hearing under section 3051. After defendant’s family friend expressed that he believed the violence was caused by external factors and that defendant confessed to God and could be rehabilitated, the prosecutor inquired, “[I]s your hope for the defendant’s rehabilitation affected at all by the fact that he’s gotten a new Clover gang tattoo on the back of his neck since he was convicted?” The friend responded that it was situational and “you have to do what you have to do to survive.” He added that defendant was “a follower in life versus somebody being a leader.” Defendant’s lawyer stated

that defendant was influenced by gang pressures, and that “during the trial, he was well behaved.”

The court observed the stark contrast between defendant’s appearance at trial and his appearance at sentencing: “His hair was intact. He had no visible tattoos, and today he does appear bald headed, tattooed, not just in one place, in many places, and the tattoos pertain to a gang.”

The court then addressed defendant:

“I have in my days seen individuals that have been sentenced to life terms and/or maybe a little less that have been paroled and come out with degrees, come out with a maturity that helps them become productive citizens.

“The majority of them, however, don’t. The majority of them decide to go and jump into their gang full force and do whatever is necessary as they are in prison.

“Those are your choices, Mr. Paiz Aguilar. You’ve already started off with a very poor choice, probably the poorest ever.

“It is a horrible day for this court. We lost the Shije’s family member, and now the Paiz Aguilar family will be losing their family member.

“You have to make choices, Mr. Paiz Aguilar. It is entirely up to you how you behave hereafter, but you are going to have a long time to think about it, an extremely long time to think about it.”

DISCUSSION

Defendant contends that the trial court now has discretion under recently enacted Senate Bill No. 620 to strike the section 12022.53, subdivision (d) firearm enhancement in his case. He argues the case should be remanded to allow the trial court to exercise its discretion to strike the firearm enhancement, because the court lacked the power to do so at the time of sentencing.

When defendant was charged, convicted and sentenced, section 12022.53 mandated that any person who, in the commission of an enumerated felony personally uses a firearm, personally and intentionally discharges a firearm, or personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, be sentenced to a term of 10 years, 20 years, or 25 years to life, respectively. (Former § 12022.53, subds. (b)–(d).) After defendant was convicted, but before the cause was final on appeal, the Governor signed Senate Bill No. 620, which amends former section 12022.53, subdivision (h), to permit the trial court to strike a firearm enhancement as follows: “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.” (Stats. 2017, ch. 682, § 1.)

We conclude that ameliorative effect of Senate Bill No. 620 applies to this case, because the judgment is not final. However, there is no need to remand the matter, because there is no reasonable possibility the trial court would exercise its discretion to dismiss the firearm use finding in count 5 upon remand.

After imposing sentence in counts 4 and 5, the court exercised its discretion to impose consecutive sentences in counts 1–3, in addition to the mandatory term of 25 years to life in count 5 pursuant to section 12022.53, subdivision (d). The court noted that it opted to modify its tentative sentence by imposing consecutive terms after considering the impact statements of numerous members of the victim’s family. The court’s decision is a clear indication that it intended to impose a maximum sentence without any exercise of discretionary leniency. The court did not view the 65 years to life sentence that it had already imposed sufficient punishment for defendant’s crimes.

After listening to the statements of defendant’s mother and a family friend regarding applicable mitigating factors tied to defendant’s youth, the court expressed its concern that defendant, who did not have any noticeable gang tattoos during trial, now had several. The court conveyed dismay at defendant’s choices in the wake of his conviction, emphasizing that defendant would have “a long time to think about it, an extremely long time to think about it.” There is no reason to believe the court’s attitude would be any different at this point. (See *People v. Almanza* (Apr. 9,

2018, B270903) __ Cal.App.4th __
<<http://www.courtinfo.ca.gov/opinions/>>; *People v. Gutierrez*
(1996) 48 Cal.App.4th 1894, 1896 [remand to allow trial
court to exercise its discretion to dismiss a conviction under
the three strikes law unnecessary where the trial court had
imposed the maximum sentence including the upper term on
one count and discretionary enhancements].)⁴

⁴ We note that although defendant has not challenged the firearm allegations the jury found true in counts 1–4, if he had, our analysis would apply equally to the enhancements imposed in those counts.

DISPOSITION

The judgment is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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