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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD SIMPSON,

Defendant and Appellant.

B271460

(Los Angeles County
Super. Ct. No. TA127755)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Remanded for resentencing.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, and Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Donald Simpson of first degree felony murder, burglary, several counts of robbery, committing a lewd act on a child and being a felon in possession of a firearm and ammunition. The jury also found true multiple firearm and gang enhancement allegations and a special circumstance allegation the murder occurred during the commission of a robbery. On appeal Simpson contends insufficient evidence supported the jury's gang enhancement findings, and the court erred in imposing a parole revocation fine. We affirm the convictions but remand for resentencing in light of multiple sentencing errors.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information

Simpson was charged in a 12-count information filed July 24, 2013 with murder (Pen. Code, § 187) (count 1),¹ second degree robbery (§ 211) (count 2), commission of a lewd act upon a child 14 or 15 years old by an individual more than 10 years older than the child (§ 288, subd. (c)(1)) (count 3), four counts of first degree robbery (§ 211) (counts 4, 5, 6 & 7), first degree burglary (§ 459) (count 8), possession of a firearm by a felon (§ 29800, subd. (a)(1)) (count 9), possession of ammunition by one prohibited by law from possessing a firearm (§ 30305, subd. (a)(1)) (count 10) and two counts of second degree robbery (§ 211) (counts 11 and 12). It was specially alleged as to count 1 that the murder was committed while Simpson was engaged in the commission of a robbery (§ 190.2, subd. (a)(17)(A)) and the offenses in counts 1, 2, 11 and 12 were committed to benefit a

¹ Statutory references are to the Penal Code unless otherwise stated.

criminal street gang (§ 186.22, subd. (b)(1)(C)).² The information also specially alleged Simpson had personally used a firearm in connection with counts 1, 2, 4, 5, 6, 7, 8, 11 and 12 (§ 12022.53, subd. (b)). Simpson pleaded not guilty and denied the special allegations.³

2. *The Crime Spree*

a. *The second degree robberies at the Torrance market (counts 11 and 12)*

On November 18, 2012 Simpson, 14-year-old Cindy J., Davion Woodspage and Jermaine Stanley entered a neighborhood market in Torrance to commit a robbery. Simpson pointed a firearm at the cashier and took \$7,000 from the cash register. A

² For simplicity on occasion this opinion uses the phrase “to benefit a criminal street gang” to refer to crimes that, in the statutory language, are 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.” (§ 186.22, subd. (b); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2.)

³ When filed, the information also specially alleged Simpson was a principal in the offenses in counts 1, 2, 11 and 12 within the meaning of section 12022.53, subdivision (e)(1); had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), and a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)); and had served a prior prison term for a violent felony and a prior prison term for a felony within the meaning of section 667.5, subdivisions (a), and (b), respectively. The People voluntarily dismissed each of those allegations before the jury returned its verdict.

second store employee who had been stocking shelves when Simpson entered hid when he saw Simpson with the gun.

b. *The murder and second degree robbery (counts 1 and 2)*

On November 20, 2012 Simpson, Woodspage and Cindy entered a local meat market with a plan to rob the store. Woodspage and Simpson both carried firearms. Simpson entered through the side door and encountered Jose Garcia, a store employee. Garcia batted away Simpson's arm, causing Simpson's firearm to discharge. The shot missed Garcia, but Garcia then felt a hard blow to his head from a blunt instrument. He ran from the store bleeding and hid under a truck. Woodspage entered the market through a rear door and encountered Louis Valadez, who was working near the cash register. Valadez struggled with Woodspage for control of Woodspage's firearm. During the scuffle Woodspage fired four shots, one of which struck Valadez in the chest, killing him.

c. *Lewd act on a minor (count 3)*

Cindy and Simpson had sexual intercourse in Simpson's car in November 2012. Cindy was 14 years old; Simpson was 35 years old.

d. *Robbery, burglary, unlawful possession of a firearm and ammunition (counts 4 through 10)*

On December 7, 2012 Simpson, armed with a firearm, entered a motel room occupied by four adults and three young children in order to rob the occupants. Simpson pointed his weapon, searched the pockets of the motel room's adult residents and took their cash and jewelry. As police arrived, Simpson fled. He left behind his loaded firearm containing six live rounds of ammunition.

3. Expert Testimony

Los Angeles Police Officer Francis Coughlin testified as an expert on criminal street gangs and the Project Crips gang, in particular. Coughlin explained Simpson's and Woodspage's numerous tattoos were associated with membership in the Project Crips: The letters "P" "J" and "W" tattooed on Simpson's chest and the letters "P" and "J" on the back of his leg referred to the Project Crips criminal street gang; other tattoos, including "W" "Watts" and "114th Street," referred to the geographic area claimed by the gang. Similarly, Woodspage's numerous tattoos, acquired after his arrest in this case, showed Woodspage to be a proud member of the Project Crips.

Cindy knew Simpson by the moniker (nickname) "Don Juan" and Woodspage by the moniker "Nu Nu." Officer Coughlin explained gang members are given monikers by the other members when they join the gang.

Officer Coughlin personally knew Stanley (a coparticipant in the November 18, 2012 robberies) to be a Project Crips gang member through his investigations of gangs.

Based on two sets of hypothetical facts resembling the robberies on November 18, 2012 and the murder and robbery on November 20, 2012, Officer Coughlin opined the crimes were committed to benefit the gang. He explained each of the crimes described in the hypothetical would enhance the gang members' status in the gang and generate fear of the gang in the community. The money obtained from robberies is typically shared with the gang, thus benefitting the gang as a whole.

4. The Parties' Theories at Trial, Verdict and Sentence

The People's theory at trial was that Simpson was guilty of first degree felony murder as either a perpetrator of the robbery

or as an aider and abettor. Although he did not shoot Valadez, because he was a major participant in the robbery that resulted in Valadez's death and had acted with reckless indifference to human life, the special circumstance allegation against Simpson was proved. The People also argued Simpson was an active gang member and had committed the murder and the market robberies charged in counts 1, 2, 11 and 12 with other gang members to benefit the gang.

Simpson, who represented himself at trial, insisted he was not involved in any of the robberies with which he was charged and argued that this was a case of mistaken identity. He also claimed Cindy had lied when she said the two of them had had a sexual relationship.

The jury convicted Simpson on all counts and found each of the special allegations true.⁴ Prior to sentencing, Simpson relinquished his right to self-representation; and the court appointed an attorney to represent him. Simpson was sentenced to an aggregate state prison term of life without the possibility of parole plus 44 years four months.

DISCUSSION

1. *Standard of Review*

A challenge to the sufficiency of the evidence to support a gang enhancement is reviewed under the substantial evidence standard: “[W]e review the entire record in the light most favorable to the judgment to determine whether it contains

⁴ Simpson was tried together with Woodspage. The jury convicted Woodspage on all charges against him. We affirmed that judgment. (See *People v. Woodspage* (Apr. 30, 2015, B255772) [nonpub. opn.].)

substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] “A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.”” (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170; accord, *People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).) Reversal for insufficient evidence is warranted only when it appears that under no hypothesis whatsoever is there sufficient evidence to support the jury’s verdict. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; *People v. Miranda* (2016) 2 Cal.App.5th 829, 833-834.)

2. Substantial Evidence Supports the Jury’s Gang Enhancement Findings

Section 186.22, subdivision (b)(1), provides for a sentence enhancement for any person convicted of a felony that was 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. (*People v. Livingston, supra*, 53 Cal.4th at p. 1170; see *Albillar, supra*, 51 Cal.4th at p. 60 [“the Legislature included the requirement that the crime to be enhanced be committed for the benefit of, at the direction of, or in association with a criminal street gang to make it ‘clear that a criminal offense is subject to increased punishment under the [gang enhancement statute] only if the crime is “gang related””].)

Simpson concedes Officer Coughlin’s testimony about his and his confederates’ gang membership provided substantial evidence he committed the November 18 and November 20, 2012 offenses in association with other members of the Project Crips. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1044, 1048 [culture and habits of a criminal street gang are proper subjects for expert testimony].)⁵ However, he contends there is insufficient evidence to support Officer Coughlin’s opinion the crimes were committed with the specific intent to promote, further or assist in criminal conduct by gang members. He argues Coughlin’s opinion was based primarily on the status of the participants as gang members and emphasizes there was no evidence that the gang actually benefitted directly by sharing the proceeds from the robberies or indirectly through generating fear of the gang in the community.

Simpson’s contention there was no evidence he committed crimes to promote the gang in general relies on a mistaken interpretation of the elements required to prove the gang enhancement. The prosecution need not establish “that the defendant act[ed] with the specific intent to promote, further or assist a *gang*; the statute requires only the specific intent to

⁵ Officer Coughlin testified he knew Simpson, Woodspage and Stanley were gang members based on his personal knowledge and experience with investigating criminal street gangs and not on any hearsay information he had acquired. (Cf. *People v. Sanchez* (2016) 63 Cal.4th 665, 675 [gang expert may relate information acquired through his or her training and experience but may not testify to case-specific out-of-court statements to support the opinion].)

promote, further, or assist criminal conduct by *gang members*.” (*Albillar, supra*, 51 Cal.4th at p. 67; accord, *People v. Garcia* (2017) 9 Cal.App.5th 364, 379-380; *People v. Gonzales* (2015) 232 Cal.App.4th 1449, 1464-1465.) “[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*Albillar*, at p. 68; accord, *People v. Livingston, supra*, 53 Cal.4th at p. 1171.) There is ample evidence in this record that Simpson was a member of the Project Crips and committed the crimes on November 18 and November 20, 2012 jointly with other gang members. That evidence alone is sufficient to support the verdict.

3. *Multiple Sentencing Errors Compel Remand for Resentencing*

Relying substantially on the recommendations made in the People’s sentencing memorandum, the trial court committed numerous sentencing errors resulting in an unauthorized sentence. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045 [appellate court has obligation to correct unauthorized sentence whenever the error comes to its attention, whether or not the error was raised on appeal]; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6; see generally *People v. Scott* (1994) 9 Cal.4th 331, 354 [a sentence is “unauthorized” when it “could not lawfully be imposed under any circumstance in the particular case”].)⁶

⁶ Simpson was sentenced to life without the possibility of parole for special circumstance felony murder (count 1). The court stayed the firearm enhancement the jury found true on that

- a. *The court erred in staying the section 12022.53, subdivision (b), enhancement in connection with the special circumstance felony murder (count 1)*

The trial court sentenced Simpson to an indeterminate term of life without the possibility of parole (LWOP) for the special circumstance, first degree felony murder (count 1) and stayed the enhancement for personal use of a firearm (§ 12022.53, subd. (b)) associated with that count, purportedly under section 654, based on the People's explanation that Simpson had not been the shooter. The People argued a stay was necessary because they had dismissed the allegation under section 12022.53, subdivision (e)(1), that would have provided for Simpson's vicarious liability for a principal's use of a firearm. The People's reasoning and the court's sentence are flawed.

count and imposed the 15-year minimum parole eligibility alternate penalty for the gang enhancement under section 186.22, subdivision (b)(5). For the robbery charged in count 2, the court imposed a consecutive principal determinate term of five years (the upper term), plus 10 years for the personal use of a firearm and, inexplicably, the alternate penalty under subdivision (b)(5) of section 186.22 for the gang enhancement on that count. In addition, the court imposed consecutive subordinate terms of eight months for the lewd conduct offense (count 3); four 16-month terms for first degree residential robbery (counts 4, 5, 6, and 7) plus four 40-month terms for the firearm enhancement related to each of those counts; two eight-month terms for the felon-in-possession of a firearm and ammunition (counts 9 and 10); and two one-year terms for second degree robbery (counts 11 and 12) along with two 40-month terms for personal use of a firearm in connection with those robbery counts. The court stayed imposition of sentence on the burglary (count 8) pursuant to section 654.

Simpson was tried as a perpetrator of the robbery of Valadez or, alternatively, as an aider or abettor of that robbery. Valadez's death during the robbery was first degree felony murder. Although Simpson did not shoot Valadez, the jury found Simpson had personally used a firearm while committing felony murder—a finding supported by evidence he hit Garcia on the head with his firearm thus facilitating the robbery of the market. (See § 1203.06, subd. (b)(2) [use of firearm means “to display a firearm in a menacing manner, to intentionally fire it, [or] to intentionally strike or hit a human being with it”]; CALCRIM No. 3146 [incorporating definition of personal use from section 1203.06 for purposes of section 12022.53, subdivision (b)]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319.) Accordingly, the section 12022.53, subdivision (b), firearm use enhancement should have been imposed.⁷

b. *The court failed to impose gang enhancements on the murder (count 1) and robberies (counts 2, 11 and 12)*

The court also erred in failing to impose the 10-year gang enhancement for the felony murder and second degree robberies (counts 1, 2, 11 and 12) under section 186.22, subdivision (b)(1)(C), or to strike the additional punishment for the enhancement after making the findings specified in

⁷ The People's rationale for staying the firearm enhancement found true by the jury simply makes no sense. Either the jury's finding Simpson personally used a firearm was supported by substantial evidence (as it plainly was here) or not. If the finding is not supported, the trial court should not impose the enhancement at all, not impose and stay its execution, as occurred here.

section 186.22, subdivision (g).⁸ As to count 1, the court found the alternate penalty in section 186.22, subdivision (b)(5), which imposes a minimum parole eligibility of 15 years on the commission of a felony punishable by a life sentence, applied to Simpson’s LWOP sentence instead of the 10-year enhancement in section 186.22, subdivision (b)(1)(C). This was error. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1010 [the alternate penalty in section 186.22, subdivision (b)(5), applies to all life sentences except LWOP]; *People v. Montes* (2003) 31 Cal.4th 350, 357.)

The court also mistakenly believed the alternative penalty in section 186.22, subdivision (b)(5), applied to Simpson’s sentence for the second degree robbery charged in count 2. However, Simpson was sentenced to an upper, determinate term of five years on that count, not an indeterminate life term—the prerequisite for use of the alternate sentence provision in subdivision (b)(5). Accordingly, Simpson should have been sentenced to an additional 10 years on both counts 1 and 2 pursuant to section 186.22, subdivision (b)(1)(C).

The trial court also failed to impose the gang enhancements the jury found true as to the second degree robberies charged in counts 11 and 12. Neither the People nor the court proffered a reason for omitting those enhancements, and we find no support

⁸ The court did not make any explicit findings the interests of justice would not be served by imposing the gang enhancement as to any of the counts. (See § 186.22, subd. (g) [“[n]otwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section . . . if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would be best served by that disposition”].)

for that decision in the record. To be sure, had the jury not found that Simpson personally used a firearm in committing the offenses charged in those counts, it would have been error to impose both a vicarious gun enhancement and the gang enhancement. (See § 12022.53, subd. (e)(2) [an enhancement for participation in a criminal street gang “shall not be imposed . . . in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense”].) But the jury found Simpson had personally used a gun in committing the robberies in counts 11 and 12, and both enhancements should have been imposed.

c. Remand for resentencing is necessary

In many instances we will modify a sentence to impose firearm or gang enhancements that were improperly stayed or omitted. However, when, as here, a sentence is composed of multiple elements as to which the trial court had some discretion (see, e.g., §§ 669 [vesting court with discretion to choose between concurrent and consecutive sentences]; 1170, subd. (b) [affording discretion to trial court to select among three statutorily authorized terms of imprisonment]), the more appropriate remedy is to remand to permit the trial court to reconsider all the components of the sentence. (See *People v. Salvador* (2017) 11 Cal.App.5th 584, 586-587 [court’s erroneous imposition of sentencing enhancement on multiple counts favored remand for resentencing rather than modification]; *People v. Bradley* (1998) 64 Cal.App.4th 386, 400-402 [remand for resentencing is

appropriate when sentencing choice within trial court's discretion].)⁹

DISPOSITION

The judgment of conviction is affirmed; the sentence is vacated, and the matter remanded for the limited purpose of allowing the trial court to resentence Simpson in accordance with the principles expressed in this opinion.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.

⁹ Simpson also contends the trial court erred in imposing a parole revocation fine in light of his LWOP sentence. Because this issue, though moot in light of our remand, is likely to be raised at resentencing, we note imposition of the parole revocation fine is proper when a defendant's aggregate sentence also includes determinate terms or indeterminate life terms with the possibility of parole. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075 [parole revocation fine proper when defendant, in addition to being sentenced to death, was also sentenced to an unstayed separate determinate prison term]; cf. *People v. McWhorter* (2009) 47 Cal.4th 318, 380 [parole revocation fine improper when defendant sentenced to death and no determinate term].)