Filed 2/23/12 P. v. Ghazalian CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ARVIN GHAZALIAN, Defendant and Appellant.	B229412 (Los Angeles County Super. Ct. No. BA342808)

APPEAL from the judgment of the Superior Court of Los Angeles County. William R. Pounders, Judge. Affirmed in part, reversed in part and remanded.

Eric R. Larson, 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, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Arvin Ghazalian was charged with two counts of first degree attempted murder, one count of assault with a firearm, and one count of vandalism, plus numerous special allegations. The charges were severed and tried before two separate juries. In the first trial, defendant was convicted of attempted first degree murder and vandalism, and all special allegations were found true. In the second trial, defendant was convicted of attempted second degree murder and assault with a firearm, with a mistrial declared on the special allegations pled in connection with the attempted murder count. Defendant was sentenced to an aggregate state prison term of 17 years 4 months, plus 65 years to life.

Defendant claims error occurred in both trials. Defendant contends the trial court committed prejudicial error in the first trial in violation of *People v. Ortiz* (1978) 22 Cal.3d 38 (*Ortiz*) and Penal Code section 1098[1] by joining the trial of two charges with the trial of separate charges pending against another defendant. In the second trial, defendant contends the court committed reversible error by failing to instruct on lesser included offenses. Defendant also argues sentencing error with respect to the assault with a firearm count. Respondent concedes that resentencing on the assault conviction is warranted. We conclude that remand for purposes of resentencing is necessary, but otherwise find no prejudicial error and affirm.

FACTS

1. Summary of Evidence from Trial 1 (June 2008 Incidents)

Garo K. and his brother, Joe K.,[2] own and operate two related businesses, an auto body shop and tow truck business, both located in the City of Los Angeles. Around noon on June 25, 2008, Enrique M., an employee at the body shop, saw a young man scrawling graffiti on an exterior wall of the shop. Another young man was standing nearby, next to

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[1] All further undesignated section references are to the Penal Code.

[2] We use the victims' and witnesses' first names and/or nicknames identified in the record for ease of reference and privacy reasons only and mean no disrespect by the informality.

a car with one of the doors open. Enrique went inside and told Garo and Joe what was going on.

By the time Joe went out to look at the graffiti, the two men had fled. The graffiti contained the letters "APX3." Joe decided to see if the vandalism was recorded on the videotape from the body shop security cameras. The videotape showed a Toyota Camry pulling up, two males getting out, and one of them starting to spray paint on the wall. Joe called the police to report the incident. The videotape of the vandalism was played for the jury.

Shortly thereafter, Joe noticed the same Camry from the video driving down Hollywood Boulevard in front of the body shop. He went outside onto the street and wrote down the license plate number. He called the police back with the additional information. The Camry was later traced to defendant's residence in the City of Tujunga. Defendant's father was the registered owner. Defendant's father told detectives that defendant had been driving his car on June 25, 2008.

Garo and Joe's nephew, Jack S., worked at the body shop. Like his uncles, Jack's native language is Armenian. Sometime in the middle of the day on June 25, he noticed two teenage males, who appeared to be Armenian, enter the lot. One was shorter than the other, and the taller one was wearing a Chicago Bulls jersey. Jack identified defendant as the "shorter one" and codefendant Edward Davtyan as the one wearing the jersey.

Jack went outside to ask them what they wanted, speaking to them in Armenian. Edward Davtyan asked Jack who at the body shop had been writing down license plate numbers. Jack did not understand as he did not know his Uncle Joe had written down the Camry license plate number a little while earlier and apparently had been seen doing so. Davtyan then said he was from "AP" and asked Jack if he had a problem with them "tagging" on the walls. Jack understood AP to mean the gang "Armenian Power" and responded by asking if they would like it if he went to write on the walls of their houses. Both defendant and Davtyan became more aggressive, raising their voices, stepping closer to Jack and acting like they wanted to fight. Davtyan repeated the question, and Jack said they did not want anyone tagging on the walls of the body shop.

Joe, who was inside getting ready to eat his lunch, heard loud voices speaking Armenian. He saw Jack talking to several people out in the lot. He and Garo walked outside to find out what was going on. There were approximately four males confronting Jack, perhaps more. Joe identified defendant and codefendant Edward Davtyan as two of those individuals. Both he and Garo asked them what was going on. Edward Davtyan said, "This is my f------ turf." Garo responded by pushing Davtyan and saying, "Get out of here." At that point, defendant, who was standing next to Davtyan, pulled a handgun from the front of his pants, perhaps his pocket, and shot Garo in the stomach.

Joe heard one gunshot. Jack heard one shot but also saw defendant continuing to point the gun at Garo, with the gun making a clicking sound like the trigger was being pulled but the gun was jammed. Garo also saw defendant continuing to point the gun at him after the first shot. The body shop security cameras captured the shooting incident, and the videotape of the shooting was played for the jury. Garo, Joe and Jack identified defendant as the shooter.

As defendant and the others fled, Joe and Jack took Garo inside the body shop and called 911. Garo had to have emergency surgery as a result of the gunshot wound inflicted by defendant and was hospitalized for several days.

Three days later, in the early morning hours of June 28, 2008, Jose G., an employee of Garo and Joe's nearby tow truck business, was robbed at gunpoint at the tow yard. Jose was at the door of his tow truck when three individuals approached and one of them pointed a gun at his head. They took approximately $400 in cash, as well as a pocket knife he had in his pants pocket. The robbers spoke primarily in Armenian, with intermittent comments in English to Jose. One of them told Jose this was "their street" or "their block" and that he better tell his boss to "back off." They spray-painted "APX3" across the front gate and told Jose to "read the letters." Jose saw similar graffiti scrawled in different locations in the tow yard in the days after Garo was shot.

The three robbers then fled in a dark-colored BMW sedan with an Armenian flag sticker on the back of the car. Jose called 911 to report the incident. Jose also reported to Joe that the robbers had made the threat about telling his boss to "back off." Joe told

Garo about what had happened at their tow yard. Garo, still recovering from the gunshot wound, did not take the threat seriously. Jose subsequently received in his mailbox a photograph which had been taken of him in the courthouse hallway when he testified at the preliminary hearing. On the back of the photograph was written, "We know where you live rat bitch."

Detective Nikita Orloff of the Glendale Police Department testified to the history of the criminal street gang known as Armenian Power, that it has approximately 300 documented members, and that its primary activities included murder and other violent crimes, burglary, vandalism, witness intimidation, identity theft and credit card fraud. He explained that Garo and Joe's body shop and tow yard were located in areas claimed by Armenian Power and that the graffiti spray-painted at both locations contained common Armenian Power symbols, including the letters "APX3." He opined that defendant had multiple tattoos typical of Armenian Power gang members and that defendant was a documented member with the gang moniker of "Spider." Detective Orloff also stated his opinions about general gang behavior of intimidating the community through violence in order to gain "respect," and that the related incidents at the body shop on June 25 and at the tow yard on June 28 were committed for the benefit of Armenian Power.

2. Summary of Evidence from Trial 2 (April 2008 Incident)

Just before 7:00 in the evening on April 5, 2008, Martin S. was with some friends inside Arnie's Café at the corner of Marcus Avenue and Foothill Boulevard in the City of Tujunga. It was dusk and not yet completely dark outside, given the time of year. Martin heard a "pop" and looked out the window, his gaze drawn diagonally across the intersection. Martin saw a man leaning against the post of the street sign at the corner, and another man, arm outstretched, pointing and firing a gun directly at the man against the post. The shooter was approximately six to eight feet from the other man. Martin identified defendant as the shooter.

After the initial pop that caught Martin's attention, he heard an additional three, perhaps four, popping sounds. The man slumping against the post did not appear to have

any weapon, and Martin never saw him touch defendant. Martin also noticed a third male who appeared to be with defendant. He was standing somewhat behind defendant on the sidewalk. A dark-colored sedan was parked at the curb. After defendant stopped shooting, he turned and ran west down Foothill Boulevard along the sidewalk. Martin could not recall whether defendant's accomplice ran with him or got into the car. Martin and his friends told the café owner to call 911.

During this same time, Frank F. was in his car, waiting at the stoplight, facing westbound on Foothill Boulevard at the intersection with Marcus Avenue. While waiting for the light to turn green, he saw two males approach a man standing by the street sign at the northwest corner of the intersection. The man near the sign was "just standing there" and the two other men, one tall and one short, approached him "fast." Frank did not see the man at the sign do anything to the two approaching men. The shorter of the two approaching men pulled a gun from under his shirt and fired two to three shots at the man by the sign, who dropped to the ground. The two men then turned and ran west down Foothill Boulevard. Frank identified defendant as the shooter.

Frank called 911 and followed the two fleeing men in his car. He saw them run into a strip mall farther down Foothill Boulevard at the intersection with Pinewood Avenue. He parked his car and waited for the police to arrive to speak with them about what he had witnessed.

Guillermo V. was the man standing near the sign observed by both Martin and Frank. Earlier in the evening Guillermo had walked to the 98 Cent Plus store in the strip mall located at Foothill Boulevard and Pinewood Avenue. He was tired and somewhat drunk, having had several beers since getting off work from his construction job that day. On his way into the store, Guillermo passed by a group of young men standing outside the 98 Cent Plus store. Guillermo identified defendant as one of the men in the group.

As Guillermo passed by defendant, defendant pointed at the tattoos on his lower arm and said something to Guillermo. He was not sure what the entire comment was because he only understands a limited amount of English; he was certain only that defendant purposely pointed out his tattoo to him. Guillermo called defendant a

"chavala," which basically means "little girl" in Spanish. Defendant asked who was a "chavala," and Guillermo said that he meant defendant. Defendant then pulled a gun from his waistband, struck Guillermo in the shoulder with the gun, and also hit him with his hand. Defendant then ran off down Foothill Boulevard with one of the other males.

Guillermo was upset by defendant's conduct, believing defendant had intended to shoot him and had stopped only because the store owner said something. Guillermo admitted defendant ran off after assaulting him with the gun, but Guillermo was angry and decided to go after defendant, with the intent to grab him, and call the police. He ran around the block and came out farther down Foothill Boulevard, ahead of where he thought defendant might have gone. Guillermo came upon defendant and his accomplice at the corner of Foothill Boulevard and Marcus Avenue. Guillermo did not say anything to defendant and never got closer to defendant than about five feet away because defendant pulled his gun and shot him in the stomach. Guillermo may have had a pocket knife in his pants pocket, but he was not holding it at the time.

Guillermo could not recall much of what happened next. He regained consciousness lying on the ground in front of his residence, but did not know how he got there. He only remembered being treated by paramedics. Guillermo was paralyzed as a result of the gunshot wound inflicted by defendant.

PROCEDURAL BACKGROUND

Defendant was charged by information with four counts. Counts 1 and 2 arose from the incident that occurred on June 25, 2008, at the body shop. Defendant and codefendant, Edward Davtyan, were jointly charged with attempted first degree murder (§§ 187, 664) and vandalism (§ 594, subd. (a)). Counts 3 and 4 arose from the incident in April 2008 in the City of Tujunga. Defendant was charged with attempted first degree murder (§§ 187, 664) and assault with a firearm (§ 245, subd. (a)(2)). Multiple special allegations were also pled: As to both attempted murder counts, it was alleged that defendant personally used and discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) and that both offenses were committed willfully, deliberately and with premeditation (§ 664, subd. (a)). It was also specially alleged that defendant

personally used a firearm in the commission of the assault (§ 12022.5). As to all four counts, it was alleged they were committed for the benefit of, at the direction of, or in association with a criminal street gang (Armenian Power) within the meaning of section 186.22, subdivisions (b) and (d).

Oganes Davtyan, brother of codefendant Edward Davtyan, was arrested and charged in a separate information with robbery and witness intimidation arising from the incident on June 28, 2008, at the tow yard involving Garo's employee Jose.

After the filing of the original information against defendant and Edward Davtyan, the prosecutor filed a motion for joinder, seeking an order allowing for the two separate charges against Oganes Davtyan to be joined for all purposes with the charges then-pending against defendant and Edward Davtyan. The court found the June 25 and June 28, 2008 incidents to be related crimes and part of one continuous transaction and granted the prosecution's motion, over defense opposition. An amended information was filed, with the two charges against Oganes Davtyan labeled counts 5 and 6.

Defendant then moved to sever counts 3 and 4 regarding the assault and attempted murder of Guillermo in April 2008 as unrelated to the June 25, 2008 incident at the body shop, as well as to sever counts 5 and 6 against defendant Oganes Davtyan, reiterating arguments made in opposition to the prosecution's joinder motion. The court granted defendant's motion in part, severing counts 3 and 4 for a separate jury trial. The motion was denied as to the request to sever counts 5 and 6, the court reaffirming its ruling that counts 1, 2, 5 and 6 were a series of related crimes.

Trial by jury proceeded on counts 1, 2, 5 and 6 in November 2009. The jury found defendant guilty on counts 1 and 2, the attempted murder of victim Garo K. and vandalism at his body shop. The jury also found true the special allegations that the attempted murder was willful, deliberate and premeditated, that defendant personally used a firearm causing great bodily injury in the commission of the offense, and that the attempted murder and vandalism were undertaken for the benefit of, at the direction of, or in association with the criminal street gang known as Armenian Power. The jury found codefendant Edward Davtyan guilty of vandalism, but not guilty on the attempted murder

charge. Oganes Davtyan was found not guilty on counts 5 and 6. Codefendants Edward and Oganes Davtyan are not parties to this appeal.

Trial on the severed counts, 3 and 4, regarding the April 2008 incident proceeded in August 2010. The jury found defendant guilty of attempted second degree murder and assault with a firearm on victim Guillermo V. The jury found true the special allegation that defendant personally used a firearm in the commission of the assault, and that the assault was gang related within the meaning of section 186.22, subdivision (b). The jury also found true the special allegations that defendant personally used a firearm causing great bodily injury in the commission of the attempted murder. The jury was unable to reach a verdict as to the gang allegation and the willful, deliberate and premeditated allegation pled in connection with the attempted murder charge. The court ordered a mistrial on those special allegations.

DISCUSSION

1. The Joinder of Charges (Trial 1 -- Counts 1, 2, 5 and 6)

Defendant contends it was error for the court to join the charges against Oganes Davtyan (counts 5 and 6) stemming from the June 28 incident at the tow yard with the separate charges against him arising from the June 25 incident at the body shop (counts 1 and 2). Defendant cites *Ortiz* for the proposition there must be at least one count in the information where the defendants are jointly charged in order for joinder to be proper under section 1098. (*Ortiz*, *supra*, 22 Cal.3d at p. 43.)

Defendant correctly notes the general rule expressed in *Ortiz*. "[A] defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one count of the accusatory pleading with all other defendants with whom he is tried." (*Ortiz*, *supra*, 22 Cal.3d at p. 43.) "Section 1098 expresses a legislative preference for joint trials. The statute provides in pertinent part: 'When two or more defendants *are jointly charged with any public offense*, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials.' [Citations.] Joint trials are favored because they 'promote [economy and] efficiency' and '"serve the interests of justice by avoiding the scandal and

inequity of inconsistent verdicts."' [Citation.] *When defendants are charged with having committed 'common crimes involving common events and victims,' . . . the court is presented with a '"classic case"' for a joint trial*." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40, italics added.)

Here, defendant was *not* jointly charged with Oganes Davtyan on any count, so the facts of this case did not fit within the general rule of *Ortiz*. However, joinder of defendants is also permitted where the separately charged offenses are *part of a single transaction*. (See, e.g., *People v. Hernandez* (1983) 143 Cal.App.3d 936 (*Hernandez*) [joinder proper against codefendants charged with separate sex-based crimes against same victim arising from a "gang rape"]; *People v. Wickliffe* (1986) 183 Cal.App.3d 37 [joinder proper against codefendants engaged in "joint operation"].) *Hernandez* explained the "evil sought to be avoided by *Ortiz* was the prejudicial impact of irrelevant evidence." (*Hernandez*, *supra*, at p. 940.) Cross-admissibility of the evidence of the separately charged crimes ordinarily dispels any unfair prejudice arising from joinder.

In granting the motion for joinder, the trial court aptly explained its reasoning: "[E]ven though it's separated by three days, this is a single transaction. It's a part of a continuing attempt to intimidate this individual, this business owner in this community, with the fact that these Armenian gang members are actually running the neighborhood." The court stated the evidence would be cross-admissible, at a minimum, on the special gang allegations and that joinder was therefore appropriate given the lack of unfair prejudice.

We agree with the trial court's assessment. The initial crime committed by defendant against Garo and his business was the vandalism on the afternoon of June 25, 2008. After scrawling graffiti on the wall of the premises, defendant returned later that afternoon with fellow Armenian Power gang members to confront Garo and his employees for having taken down their license plate number. Their confrontation escalated into a shooting when Garo rejected their attempts to intimidate him. After the shooting, similar vandalism occurred, including at Garo's nearby tow yard, where another employee was robbed at gunpoint and was told to tell his boss to "back off." The graffiti

at both business locations consisted of similar "tags" asserting Armenian Power's name and claiming the neighborhood as its territory. All three defendants were members of Armenian Power and Oganes and Edward Davtyan were brothers.

The evidence concerning the robbery and witness intimidation on June 28 was relevant to proving the gang-related nature of all the crimes, particularly the shooting of Garo, for having dared to stand up to the gang during the initial confrontation on June 25. The evidence supporting the four charges showed a pattern of gang-related crimes and escalating threats, all directed at a single victim and his employees to dissuade them from testifying in the attempted murder trial or otherwise reporting their gang's crimes to the police. The evidence regarding the shooting at the body shop was also clearly relevant to explain the motive for the witness intimidation incident on June 28. The evidence of the four charges would plainly have been cross-admissible at separate trials. We therefore conclude the court did not err in ordering the joinder of counts 1, 2, 5 and 6.

Even assuming the joinder here constituted error, improper trial joinder does not require automatic reversal. (*Ortiz*, *supra*, 22 Cal.3d at p. 46.) Orders of improper joinder are subject to harmless error analysis. As explained by the Supreme Court in *Ortiz*, a reviewing court must assess "whether a separate trial would have been significantly less prejudicial to defendant than the joint trial, and whether there was clear evidence of defendant's guilt. [Citation.] [R]eversal would follow only upon a showing 'of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial.' [Citation.]" (*Ibid*.; accord, *Hernandez*, *supra*, 143 Cal.App.3d at p. 941; *People v. Magana* (1979) 95 Cal.App.3d 453, 468-469.)

There was overwhelming evidence of defendant's guilt of both the vandalism at the body shop and the intentional, premeditated shooting of Garo, including the security videotape showing defendant engaging in both crimes, and the eyewitness testimony of Enrique, Jack, Joe and Garo. That evidence was further bolstered by the expert gang testimony of Detective Orloff as to the significance of the overall pattern of gang activity and intimidation of Garo and his employees by Armenian Power gang members.

Moreover, the joined charges against Oganes Davtyan were less inflammatory than the attempted murder charge against defendant and, therefore, less likely to cause unfair prejudice to defendant. Indeed, the jury's verdict as to all three defendants, which included an acquittal of Oganes Davtyan, indicates the jury was reflective and deliberative, relying on the evidence and the law, and not unduly influenced against the three defendants in light of the joinder of charges. And, as noted above, the evidence concerning the incident at the tow yard would have been admissible in a separate trial on counts 1 and 2 with respect to the gang allegations. In sum, defendant has not shown it was reasonably probable he would have obtained a more favorable verdict in a separate trial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. The Jury Instructions (Trial 2 -- Counts 3 and 4)

Defendant next contends the court failed to discharge its sua sponte duty to instruct on lesser included offenses supported by substantial evidence with respect to count 3, the attempted murder of victim Guillermo V. Specifically, defendant argues the court was required to instruct the jury with the lesser included offense of attempted voluntary manslaughter, based on both sudden quarrel/heat of passion and imperfect self-defense.

Respondent contends any instructional error was invited by defendant, thus foreclosing defendant's argument on appeal. During a discussion of the jury instructions, defense counsel stated lesser included instructions might be appropriate on the attempted murder charge, but the court stated its tentative decision to refuse to include them due to lack of evidence. The court told counsel that any additional argument in support of instructing on a lesser included offense should be made to the court by the following morning. The next morning, defense counsel notified the court that no lesser included instructions were being requested. We agree with respondent that defense counsel should have again requested an instruction on attempted voluntary manslaughter in order to preserve any claim of error on appeal. It appears that defense counsel acquiesced in the instructions and therefore may not claim the trial court erred in not giving an instruction

on attempted voluntary manslaughter. (See *People v. Beames* (2007) 40 Cal.4th 907, 926-928.) Nonetheless, we will briefly address the claimed error, which we reject.

Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824-825.) An attempted murder may be reduced to attempted voluntary manslaughter where the evidence shows an attempted intentional killing without malice. Absence of malice may be shown either by evidence the defendant acted in a sudden quarrel or heat of passion, or in the unreasonable but good faith belief of having to act in self-defense. (See *People v. Barton* (1995) 12 Cal.4th 186, 199 (*Barton*).)

An instruction on sudden quarrel/heat of passion is warranted where there is substantial evidence the defendant was "'disturbed by passion to such an extent as would cause the *ordinarily reasonable person of average disposition to act rashly* and without deliberation and reflection. . . .' [Citations.]" (*Barton, supra,* 12 Cal.4th at p. 201, italics added.) An instruction on imperfect self-defense is warranted where there is substantial evidence the defendant acted with an honest, "but unreasonable, belief in the need to resort to self-defense to protect oneself from imminent peril." (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178.)

Defendant's argument on appeal rests on the premise that the victim, Guillermo, sought revenge against defendant for the assault at the 98 Cent Plus store, ran through the streets looking for defendant, and "attacked" defendant on Foothill Boulevard. However, there is no substantial evidence in the record that Guillermo engaged in any such behavior, let alone any use of force amounting to legal provocation, that would (1) cause an ordinary person of average disposition to act rashly, or (2) cause defendant to entertain an honest fear his life was in imminent peril. The evidence was uncontradicted that Guillermo never even got closer to defendant than some five feet away. The eyewitnesses to the shooting, Martin and Frank, both testified consistently that Guillermo was just standing at the corner, with no visible weapon, when defendant and his accomplice approached Guillermo quickly, with defendant then firing multiple shots at

Guillermo, and continuing to shoot after Guillermo started to slump to the ground. The court did not err in refusing to instruct on attempted voluntary manslaughter.

3. The Sentence for Assault with a Firearm (Trial 2 -- Count 4)

Defendant contends his sentence on count 4 is improper. Respondent concedes the error. We find the sentence imposed for count 4 violates section 1170.1, subdivision (f) and therefore remand for resentencing.

Defendant was found guilty of assault with a firearm (§ 245, subd. (a)(2)), and the jury found true the special allegations that defendant personally used a firearm in the commission of the assault (§ 12022.5, subd. (a)), and that the assault was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). The court imposed the following sentence on count 4, a subordinate felony: a consecutive term of 1 year for the substantive offense (one-third the midterm of 3 years); plus 3 years 4 months for the firearm enhancement (one-third the upper term of 10 years); plus 3 years 4 months for the gang enhancement (one-third of 10 years, the penalty for a violent felony). (§ 1170.1, subd. (a).) The total determinate term for count 4 was 7 years 8 months.

In *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*), the Supreme Court reversed a sentence involving the same sentencing statutes. The court held the imposition of the enhancements under *both* section 12022.5, subdivision (a) and section 186.22, subdivision (b)(1)(C) in connection with a conviction on a substantive offense under section 245 violates section 1170.1, subdivision (f) of California's determinate sentencing law. Section 1170.1, subdivision (f) "prohibits the imposition of additional punishment under more than one enhancement provision for 'using . . . a firearm in the commission of a single offense.'" (*Rodriguez*, *supra*, at p. 504.)

The enhancement imposed pursuant to section 12022.5, subdivision (a) was, by definition, for the personal use of a firearm. The additional enhancement pursuant to section 186.22, subdivision (b)(1)(C) was also predicated on defendant's use of a firearm, because the 10-year sentence enhancement applies to a gang-related violent felony as

defined in subdivision (c) of section 667.5, including a felony in which the defendant used a firearm.

Following *Rodriguez*, we find the sentence on count 4 was in error because both of the enhancements on count 4 were imposed as punishment for defendant's use of a firearm and, as such, section 1170.1, subdivision (f) mandated that "only the greatest of those enhancements shall be imposed for that offense" but *not both*. (*Rodriguez*, *supra*, 47 Cal.4th at pp. 508-509.)

While sentencing error has been affirmatively shown only as to count 4, we remand for resentencing on all counts to allow the trial court to exercise its sentencing discretion in accordance with applicable law. (*People v. Navarro* (2007) 40 Cal.4th 668, 681 [following reversal of sentencing on one subordinate count, remand for full resentencing as to all counts is nonetheless appropriate, so trial court can exercise sentencing discretion in light of changed circumstances]; accord, *Rodriguez*, *supra*, 47 Cal.4th at p. 509.)

DISPOSITION

The judgment is reversed in the following respects: the sentence is vacated and proceedings remanded to the trial court for resentencing on all counts. Following resentencing, the trial court is directed to prepare a modified abstract of judgment and to transmit a certified copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

RUBIN, ACTING P. J. FLIER, J.