Filed 2/14/17 P. v. Russell CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND JOHN RUSSELL,

Defendant and Appellant.

2d Crim. No. B258669
(Super. Ct. No. BA395919)
(Los Angeles County)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed with directions.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Scott A. Taryle, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Raymond John Russell appeals from the judgment entered after a jury convicted him of first degree murder (count 1) and two counts of attempted first degree murder (counts 2 and 3). (Penal Code, §§ 187, subd. (a), 189, 664, subd. (a).)[1] As to all counts, the jury found true allegations that the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).) As to the first degree murder count and one of the attempted first degree murder counts (count 2), the jury found true allegations that a principal had discharged a firearm causing great bodily injury or death. (§ 12022.53, subds. (d), (e)(1).) As to the other attempted first degree murder count (count 3), the jury found true an allegation that a principal had discharged a firearm. (§ 12022.53, subds. (c), (e)(1).) Appellant was sentenced to prison for an indeterminate term of 105 years to life plus a determinate term of 20 years.

Appellant contends that the trial court (1) erroneously denied his *Wheeler-Batson* motions; (2) admitted a gang expert's opinions that were based on testimonial, case-specific hearsay statements in violation of his confrontation rights; and (3) erroneously imposed a 10-year term for each of the gang enhancements. Finally, appellant argues that the prosecutor committed misconduct during closing rebuttal argument. We strike the following unauthorized sentences: 10-year enhancements imposed and stayed and 15-year minimum parole eligibility periods imposed pursuant to section 186.22, subdivisions (b)(1)(C) and (b)(5). In all other respects we affirm.

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[1] All statutory references are to the Penal Code unless otherwise stated.

Facts

At about 1:15 a.m. on October 16, 2011, Kevin Peary, Jonathan Rambo, and Keshawn Corbin (the victims) were standing outside an apartment building in a Crips neighborhood. A vehicle stopped in the middle of the street in front of the building. Three men got out of the vehicle. They had "hoodies over their head[s]." One of the men said, "What's up, Blood, where you all from." Peary replied, "I don't bang," which meant that he was not a gang member. The three men pointed guns at the victims and started shooting. One of the men said, "Fuck Naps." "Naps" is a derogatory term for members of Neighborhood Crips criminal street gangs. Corbin was a member of the gang.

Corbin died from multiple gunshot wounds. Rambo was shot twice in the right leg and survived. Peary miraculously was not shot. He testified at trial but did not identify appellant.

After the shooting, the three men entered their vehicle and drove away. In the street at the crime scene, the police found a cell phone that belonged to appellant.

Peary described the vehicle used in the shootings. He said it was a dark green Chevrolet Tahoe with 24-inch rims. Before the shooting appellant received traffic citations showing that he had been driving a 2002 green Chevrolet Tahoe. The owner of the vehicle was Vickie Knox, whom the police believed to be appellant's mother. The police obtained a photograph of the vehicle. It "shows the Chevy Tahoe, dark colored, dark green with some large rims on the vehicle." The rims were either 22 or 24 inches in diameter.

After appellant was arrested, the police placed an informant in his jail cell. A recorded conversation between appellant and the informant was played for the jury. The

informant was a former member of the Rolling 60's Neighborhood Crips. But he told appellant that he was a Hoover gang member. Appellant declared that he was a member of the Five-Nine Hoover criminal street gang and that his moniker was "Tiny H-Mack." Appellant said that the police were investigating him for a murder. Using street vernacular, appellant made statements that the informant interpreted as meaning that he "and his homeboy went and put some work in" for the gang by "shoot[ing] at people." Appellant said that "he had his own firearm and that his boy . . . had a firearm as well."

The informant asked, "[T]he thing ain't floating on the streets, is it? Can't nobody else get caught with it?" By "thing," the informant was "talking about the murder weapon." Appellant replied, "It's gone. It's put up." The informant asked if the weapon was similar to a nine-millimeter revolver "where you could break the barrel and separate" it from the rest of the gun. Appellant replied that it was. The informant concluded that appellant had "broke[n] the gun down by dismantling the barrel." At the crime scene, the police recovered one cartridge casing from a nine-millimeter firearm.

Detective Nicholas Hartman, a gang expert, testified that at the time of the shooting appellant was an active member of the Five-Nine Hoover criminal street gang. The Rolling 60's Neighborhood Crips "are mortal enemies with the Hoovers." The prosecutor posed a hypothetical question to Hartman incorporating the facts of the shootings. She asked whether, based on these facts, the shootings were committed for the benefit of a criminal street gang. Hartman replied that they were.

Wheeler-Batson Motions

Appellant contends that the trial court erroneously denied his *Wheeler-Batson* motions. (*People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*).) The motions were based on the prosecutor's use of peremptory challenges to strike two prospective jurors - no. 34 and no. 10 - because of their African-American race.

"The applicable law is well settled. '[Under *Wheeler*,] [a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article 1, section 16 of the state Constitution. [Citations.] [Under *Batson*,] [s]uch a practice also violates the defendant's right to equal protection under the Fourteenth Amendment. [Citations.]['] " (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1104, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"When a defendant claims a prosecutor has challenged a prospective juror based on an impermissible ground, the following procedures apply: 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then

decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'" [Citation.]" (*People v. Hensley* (2014) 59 Cal.4th 788, 802.)

Standard of Review

The trial court expressly found that appellant had made a prima facie showing of purposeful discrimination as to juror no. 34. It did not expressly so find as to juror no. 10. Because the court asked the prosecutor to give her reasons for excusing juror no. 10, we assume that it impliedly found that appellant had made the requisite prima facie showing as to this juror. "When [as here] a trial court solicits an explanation of the strike [of a juror] without first declaring its views on the first [prima facie] stage, we infer an 'implied prima facie finding' of discrimination and proceed directly to review of the ultimate question of purposeful discrimination. [Citation.]" (*People v. Scott* (2015) 61 Cal.4th 363, 387, fn. 1.)

"'"'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.'"' [Citation.] 'When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings.' [Citation.]" (*People v. Hensley*, *supra*, 59 Cal.4th at pp. 802-803.) We will uphold the trial court's ruling if "[s]ubstantial evidence

supports [its] determination that the prosecutor's reasons for challenging [the prospective jurors] were honestly stated and race neutral." (*Id.*, at p. 805.)

Juror No. 34

Juror no. 34 was an African-American woman. The prosecutor said that juror no. 34 was the only juror who had "not made eye contact with me." The prosecutor continued, "I just feel that she's not engaged to me; whereas, other jurors are, even of African-American descent." One morning the prosecutor saw juror no. 34 "sleeping out in the hallway." The trial court ruled, "I believe what [the prosecutor] is saying is a neutral explanation for her . . . peremptory challenge . . . . I will accept it."

"Substantial evidence supports the trial court's determination that the prosecutor's reasons for challenging [juror no. 34] were honestly stated and race neutral." (*People v. Hensley*, *supra*, 59 Cal.4th at p. 805.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) "'Obviously, we cannot, on the cold record, verify the prosecutor's . . . stated reason for challenging [juror no. 34]. This is, of course, one reason why appellate courts in this area of law generally give great deference to the trial court, which saw and heard the entire voir dire proceedings.' [Citation.]" (*People v. Reynoso* (2003) 31 Cal.4th 903, 917-918, fn. omitted.)

Juror No. 10

Juror No. 10, a man, was a full-time student at an "art center." Upon graduation, he intended to work in "interaction design." He did not explain the meaning of "interaction design."

After appellant had made his *Wheeler-Batson* motion, the prosecutor protested that she "had him [juror no. 10] down as being white." The prosecutor explained: "I'm bi-racial and I have trouble discerning when people have mixed race. He's probably of mixed race, but . . . in my opinion, he was Caucasian." The prosecutor said she had excused juror no. 10 because "he's a full-time student in art, which I feel is pretty liberal, interaction design." Furthermore, when the juror "was seated in the jury box, he . . . refused to look at me."

The trial court expressed uncertainty as to juror no. 10's race: "I quite frankly was unable to determine if juror number 10 was African-American or Caucasian." "I could not tell you one way or another what his ethnicity is." The court found that "there is a racially-neutral basis for excluding juror number 10." It noted, "He [juror no. 10], as well as some other jurors, gives off that particular air that he does not want to be present which causes me some concern about his ability to focus and provide a fair trial to both of you."

"Substantial evidence supports the trial court's determination that the prosecutor's reasons for challenging [juror no. 10] were honestly stated and race neutral." (*People v. Hensley*, *supra*, 59 Cal.4th at p. 805.) The court could have reasonably credited the prosecutor's statement that she believed juror no. 10 was white. (See *People v. Barber* (1988) 200 Cal.App.3d 378, 394 ["[A] bona fide showing by the prosecutor, reasonably accepted by the trial court, that he or she did not believe or recognize a prospective juror as being a member of a particular cognizable class, i.e., Black, Hispanic, Oriental, etc., effectively resolves the issue in favor of the prosecution"].)

Moreover, the prosecutor could reasonably infer that juror no. 10 would have liberal leanings because he was a full-time student at an art center. (See *People v. Barber*, *supra*, 200 Cal.App.3d at p. 394 [prosecutor justifiably "relied on her past experience that teachers tend to be 'liberal' and 'less prosecution oriented'"].)

Finally, the prosecutor had a race-neutral reason for excusing juror no. 10 because he had refused to look at her while he was in the jury box. (See *People v. Lenix*, *supra*, 44 Cal.4th at p. 613.)

Gang Expert's Testimony

In his opening brief, appellant claims that his confrontation rights were violated when the trial court admitted a gang expert's opinions that were based on testimonial hearsay. "'Hearsay evidence' is 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. . . . [¶] Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subds. (a), (b).)

The controlling authority is our Supreme Court's recent decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). The Supreme Court held: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. . . . If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.*, at p. 686, fn. omitted.) The court noted: "Any

expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. . . . [¶] What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*., at pp. 685-686.) "If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay." (*Id*., at p. 684.)

Sanchez was decided after the instant appeal had been fully briefed. At our request, the parties submitted supplemental briefs discussing the impact of *Sanchez* on this case.

Appellant Did Not Forfeit the Confrontation Clause Issue

The People maintain that appellant forfeited the confrontation clause issue because he failed to object on that ground in the trial court. Appellant's failure to object is excused because an objection would have been futile. (*People v. Welch* (1993) 5 Cal.4th 228, 237-238 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile"].) In *Sanchez* our Supreme Court disapproved its prior decisions to the extent they had concluded "that an expert's basis testimony is not offered for its truth" or had suggested that "an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.) One of the disapproved decisions is *People v. Gardeley* (1997) 14 Cal.4th 605 (*Gardeley*). (*Ibid*.) We cannot fault defense counsel for relying on these prior decisions and not anticipating the holding in *Sanchez*.

No Reversible Violation of Appellant's Confrontation Rights

Appellant asserts: "Detective Hartman testified to two distinct sets of case specific facts: [1] appellant's gang membership and [2] the motive and reasons for the attempted murders and murder in this case. These case specific facts were offered for their truth, but were inadmissible hearsay without an exception. Moreover, the case specific testimony was not proven by other competent evidence. Given the out of court statements were testimonial in nature, the admission of the statements for their truth violated appellant's right to confrontation."

Gang Membership

To prove his gang membership, appellant claims that Hartman relied on hearsay evidence in the form of "text messages in gang lingo" that were stored on appellant's cell phone. The messages "were out-of-court statements made by unknown individuals offered for the tru[th] of the matter asserted, namely that the symbols were intended to disrespect rival gang members and were gang code."

Appellant does not identify a single text message that stated a matter capable of being true and that was offered to prove the truth of the matter stated. The text messages were offered for a nonhearsay purpose: to show that appellant and other persons communicated with each other in lingo used by Hoover gang members. For example, Hartman testified that the word "okilla" in a text message is "used by Hoover gang members [and] shows the extreme hatred for Neighborhood Crips." Another message contained the term, "Sup Groove," which is "a salutation used among Hoover gang members." A third message contained "O's" that had been crossed out with "X's." Hartman explained that "the Neighborhood Crips [are] also known as O's."

To show "disrespect" to the Neighborhood Crips, "any time [Hoover gang members] write an 'O,' they will either write the 'O' and then cross it out or they will not write the 'O' at all and just put an 'X' instead." A fourth message contained the words "'groovin,' 'groov,' 'u groovin,'" which are "indicative of Hoover gang membership."

Appellant contends that, in concluding that appellant was a gang member, Hartman relied upon an out-of-court statement made to him by Tralane Clayton, appellant's brother-in-law and former member of the Five-Nine Hoover gang. Hartman testified that he had asked Clayton if appellant is "from 59" [Five-Nine Hoover gang]. Clayton replied, "I guess." Appellant objected on hearsay grounds. In overruling the objection, the trial court stated: "He's entitled to rely upon hearsay in formulating his opinions and conclusions as an expert. I also believe this may be impeachment to Mr. Clayton."

The court did not abuse its discretion in concluding that Clayton's statement to Hartman was admissible for impeachment purposes. At the trial Clayton testified that, "as far [he] kn[e]w," appellant was "not affiliated" with the Hoover gang. Clayton's prior inconsistent statement to Hartman was admissible under an exception to the hearsay rule. (*People v. Zapien* (1993) 4 Cal.4th 929, 951 ["Evidence Code section 1235 authorizes the admission into evidence of a witness's prior inconsistent statement"].)[2] Appellant's confrontation rights were

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[2] Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made

not violated because Clayton testified and was subject to cross-examination by appellant. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 [124 S.Ct. 1354, 158 L.Ed. 2d 177 ["when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements"].)

Appellant argues that Hartman relied on hearsay evidence in the form of "conversations with other individuals to support his conclusion that appellant was a gang member." Appellant notes that "Hartman testified he had spoken to other officers who said that they had stopped appellant in Five-Nine Hoover gang territory" and that he "was with other known Five-Nine Hoover gang members" at the time of the stop.[3] The Attorney General concedes that this testimony "was inadmissible under state law, as it was case-specific hearsay not covered by any exception to the hearsay rule."

The admission of this hearsay evidence was harmless beyond a reasonable doubt. (See *People v. Lopez* (2012) 55

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by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action." After Clayton finished testifying, he was "excused subject to being recalled by either of the attorneys."

[3] Hartman testified that his opinion that appellant was a Five-Nine Hoover gang member was based in part on "the fact that I've spoken with other officers that have stopped [appellant] with other gang members in . . . gang areas that are claimed by the Hoovers to be their territory."

Cal.4th 569, 585 ["harmless beyond a reasonable doubt" standard applies to Confrontation Clause violation].) Appellant's gang membership was "independently proven by competent evidence." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) The competent evidence included the text messages stored on appellant's cell phone and his recorded statements to the informant in his jail cell. Appellant told the informant that he was a member of the Five-Nine Hoover criminal street gang and that his moniker was "Tiny H-Mack":

"[Informant:] Where you from, homie?
"[Appellant:] I'm from Hoover.
"[Informant:] You from Hoover?
"[Appellant:] Yeah.
"[Informant:] What Hoover you from?
"[Appellant:] 59.
"[Informant:] From 59?
"[Appellant:] Yeah. Yeah.
"[Informant:] What they call you?
"[Appellant:] Tiny H-Mack."[4]

Appellant continued: "They're [law enforcement officials are] trying to say I'm from Hoover. . . . That's why I said [to them] I'm not from nowhere."

Detective Hartman listened to the recording and heard appellant admit his gang membership. His opinion that appellant was a Hoover gang member was based in part on "what [appellant] told the confidential informant." Appellant's admission falls within an exception to the hearsay rule. (Evid.

[4] Tralane Clayton, appellant's brother-in-law and former member of the Five-Nine Hoover gang, testified that his gang moniker was "H Mack."

Code, § 1220.) The introduction of this evidence did not violate his confrontation rights. (*People v. Jennings* (2010) 50 Cal.4th 616, 661-662.)

Competent evidence of appellant's gang membership also included a conversation that Officer Timothy Colson had with appellant in July 2010. Colson asked him "if he grooved, if he's with Hoovers and he said yes."

Motive for the Gang Shooting

Appellant notes that Hartman gained general knowledge of the operation and culture of gangs "by speaking to other law enforcement officers and to other gang members and informants." In reliance on this general knowledge, Hartman opined that the shootings in the instant case were committed for the benefit of a criminal street gang. Appellant claims that Hartman's general knowledge was based on testimonial out-of-court statements. Thus, "[a]dmitting the out-of-court statements into evidence violated appellant's rights under the Confrontation Clause . . . ."

Appellant has not referred us to any case-specific facts to which Hartman testified concerning his general knowledge of gangs. "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) This is what Hartman did when he testified about the operation and culture of criminal street gangs.

Hartman's testimony was proper. In *Sanchez* the Supreme Court declared: "Our decision does 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. . . . [T]estimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.)

Prosecutorial Misconduct

During rebuttal closing argument, the prosecutor used a description of various parts of an elephant - trunk, gray skin, tail, and big ears - as an example of circumstantial evidence. The prosecutor stated: "[W]hen you put them all together, what is this? It's an elephant, and it can only be an elephant. That's an example of circumstantial evidence." The prosecutor then described the key evidence against appellant and stated: "All the evidence in this case points to one reasonable conclusion, and there's only one truth based on the evidence." "It's time to face the consequences of his [appellant's] actions, the choices that he made and hold him accountable for those choices. Find him guilty of these crimes."

Appellant argues that the prosecutor committed misconduct because she "conflated the reasonable doubt standard with the rule for evaluating circumstantial evidence." The prosecutor's "misstatement" of the law "suggested the jury could convict if it decided the prosecution's evidence was a reasonable

interpretation of the evidence. Thus, the misstatement diluted the jury's obligation to convict only if it found it had no reasonable doubt of the truth of the criminal charges."

Appellant forfeited his misconduct claim because he did not object to the prosecutor's remarks. "To preserve a misconduct claim a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the misconduct claim preserved for review. [Citation.]" (*People v. Cook* (2006) 39 Cal.4th 566, 606.) An admonition here would have cured any possible harm.

Since defense counsel "failed" to object, appellant claims that he was denied his constitutional right to effective assistance of counsel. The standard for evaluating a claim of ineffective counsel is set forth in *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]: "First, [appellant] must show that counsel's performance was deficient. . . . Second, [appellant] must show that the deficient performance prejudiced the defense."

Counsel's performance was not deficient. The prosecutor did not suggest that the jury should discard the reasonable doubt standard and apply a lower standard of "a reasonable interpretation of the evidence."

In any event, appellant has failed to carry his burden of showing that the prosecutor's comments prejudiced him. To prove prejudice, appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) We do not lack confidence in the outcome. The evidence

against appellant is overwhelming. Pursuant to CALCRIM Nos. 220 and 223-225, the jury was correctly instructed on reasonable doubt and circumstantial evidence. "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

Sentencing

For first degree murder appellant was sentenced to prison for 25 years to life plus a consecutive term of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1). For the attempted first degree murder in count 2, he was sentenced to a consecutive term of life with the possibility of parole plus a consecutive term of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1). For the attempted first degree murder in count 3, he was sentenced to a consecutive term of life with the possibility of parole plus 20 years pursuant to section 12022.53, subdivisions (c) and (e)(1). Pursuant to section 186.22, subdivision (b)(1)(C), as to each count the trial court imposed a consecutive 10-year term for the gang enhancement. But service of the 10-year term was stayed. As to each life sentence for murder and attempted murder, the court declared that the minimum parole eligibility period is 15 years pursuant to section 186.22, subdivision (b)(5).[5] The trial court's minutes show that

[5] "'Unlike an enhancement, which provides for an *additional term* of imprisonment, the 15–year minimum term in [section 186.22, subdivision (b)(5)] sets forth an *alternate* penalty

the aggregate sentence is 95 years to life. But the actual aggregate sentence is an indeterminate term of 105 years to life (50 years to life on count 1, 40 years to life on count 2, 15 years to life for the attempted murder in count 3) plus a determinate term of 20 years for the section 12022.53 enhancement in count 3.[6]

Appellant claims, and the Attorney General concedes, that the trial court erred in imposing and staying 10-year consecutive terms for the gang enhancements pursuant to section 186.22, subdivision (b)(1)(C). Appellant argues: "Instead, the court should have ordered that appellant serve a minimum of 15 years before being eligible for parole" pursuant to section 186.22, subdivision (b)(5). "Therefore, the gang enhancement [under section 186.22, subdivision (b)(1)(C)] must be stricken and the abstract of judgment modified to reflect that appellant cannot be eligible for parole for a minimum of 15 years under Penal Code section 186.22, subdivision (b)(5)." The Attorney General states, "[T]his court should modify the judgment to strike the 10-year gang enhancements on each count and replace them with 15-year minimum parole eligibility periods." (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [where defendant is convicted of a violent felony committed for the benefit of a criminal street gang and punishable by life imprisonment, section 186.22(b)(5), not section 186.22(b)(1)(C), "applies and imposes a minimum term of 15 years before the defendant may be considered for parole"].)

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for the underlying felony itself . . . ." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.)

[6] "[C]onsecutive enhancements are full term for indeterminate crimes." (*People v. Felix* (2000) 22 Cal.4th 651, 656.)

The parties have overlooked section 12022.53, subdivision (e)(2), which provides, "An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person 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." The jury found that a principal, not appellant, had personally discharged a firearm. Accordingly, pursuant to section 12022.53, subdivision (e)(2), the trial court could not impose additional punishment under section 186.22.

People v. Salas (2001) 89 Cal.App.4th 1275, is directly on point. There, the defendant was convicted of attempted first-degree murder. The jury found true allegations that the crime had been committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and that a principal had personally discharged a firearm and caused great bodily injury. (§ 12022.53, subds. (d), (e)(1).) Appellant was sentenced to life imprisonment for first-degree attempted murder plus a consecutive term of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1). "Pursuant to section 186.22, subdivision (b)(5), the trial court ordered defendant serve a minimum 15-year term before he could be paroled." (*People v. Salas*, *supra*, 89 Cal.App.4th at p. 1280.)

The appellate court concluded, "Defendant is correct in his assertion that since he was never found to have *personally* used a firearm, the section 186.22, subdivision (b)(5) 15-year minimum parole eligibility term is inapplicable to this case." (*People v. Salas*, *supra*, 89 Cal.App.4th at p. 1281.) The court explained: "Section 12022.53, subdivision (e)(1) creates an

exception to the *personal* use requirement of section 12022.53, subdivisions (b) through (d) in a prosecution where findings have been made pursuant to section 186.22, such as occurred in this case. In a case where section 186.22 has been found to be applicable, in order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm . . . . However, as a consequence of this expanded liability under section 12022.53, subdivision (e), the Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm. In the present case, the jury never found that defendant personally used a firearm. The only findings made by the jury were that a principal in the commission of the offense personally used a firearm. Therefore, section 12022.53, subdivision (e)(2) prevents the imposition of the 15-year minimum term specified in section 186.22, subdivision (b)(5)." (*Id*., at pp. 1281-1282.)

Because the sentence was unauthorized, we may correct it even though appellant failed to raise the issue in both the trial court and this court. "[O]bvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*People v. Smith* (2001) 24 Cal.4th 849, 852; see also *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205 ["an unauthorized sentence may be corrected at any time"].)

Disposition

The judgment is modified to strike the 10-year gang enhancements imposed pursuant to section 186.22, subdivision (b)(1)(C), and the 15-year minimum parole eligibility periods imposed pursuant to section 186.22, subdivision (b)(5). In all

other respects, the judgment is affirmed. The trial court is directed to amend the Abstract of Judgment as follows: In part 2, delete all references to section 186.22, subdivision (b)(1) (C).[7] The trial court shall send a certified copy of the amended Abstract of Judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

[7] The Abstract of Judgment does not mention the 15-year minimum parole eligibility periods imposed pursuant to section 186.22, subdivision (b)(5).

* Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.