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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS MONGE,

Defendant and Appellant.

B282225

(Los Angeles County
Super. Ct. No. KA107313)

Appeal from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Reversed in part and affirmed in part with directions.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Carlos Monge of attempted murder in violation of Penal Code sections 664 and 187, subdivision (a) (count 1),¹ and of shooting from a motor vehicle in violation of section 26100, subdivision (c) (count 2). The jury found the attempted murder to be premeditated and also found true a criminal street gang enhancement allegation (§ 186.22, subd. (b)(1)(C)) and a personal firearm enhancement allegation (§ 12022.53, subds. (b)-(e)). After finding true prior conviction allegations under sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i), the court sentenced Monge to an aggregate term of 39 years to life. Monge filed a timely notice of appeal.

On appeal, Monge challenges the sufficiency of the evidence to support the jury's findings on the gang and firearm allegations. Specifically, he contends that the evidence does not support the "primary activities" element needed to characterize his gang as a criminal street gang. He also contends that, without substantial evidence to support the gang enhancement finding, the findings supporting the firearm enhancement cannot stand. Further, Monge contends that, even if the evidence was sufficient to support the firearm allegations, the jury's true findings under section 12022.53, subdivisions (b) and (c), as to count 2, were unauthorized. As to the first two contentions, we conclude that substantial evidence supports the jury's findings on the enhancement allegations. As to the latter contention, the People concede, and we agree, that reversal as to those findings is required.

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

While this appeal was pending, Monge filed a motion seeking leave to file a supplemental brief based upon a recent amendment to section 12022.53, which permits the trial court to strike a firearm enhancement that would otherwise be imposed under that statute. (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 2.) We granted the motion and invited the parties to file a response and a reply. In his supplemental brief, Monge contends that the amendment to section 12022.53 should apply retroactively to him and that the case should be remanded to the trial court to permit that court to exercise its discretion under the amendment. The Attorney General concedes the point, and we agree.

FACTUAL AND PROCEDURAL SUMMARY

On the evening of September 1, 2014, the victim was sitting on his bicycle talking to L.A. when he was shot three times. L.A. called 911, after which various police officers from the Pomona Police Department responded to the scene. Upon his arrival, Officer Steve Prentice spoke to the victim, who said that he was a member of the Happy Town gang and went by the moniker “B.”² The victim said that he had not seen any cars in the area and was unable to identify the shooter. Paramedics arrived and removed the victim by ambulance.

Officer Prentice interviewed L.A., who said she did see what had transpired. In a subsequent interview, L.A. told Officer Prentice that she was talking with the victim when he was shot by a male in a red Astro van which then sped away. She said that the victim belonged to the Happy Town gang and was known as “B.”

² We refer to the victim’s gang moniker as “B” to protect his identity.

L.A. testified at the preliminary hearing that she had witnessed the incident. At trial, however, L.A. testified that she was not present at any shooting and denied that she had previously testified in court to that effect.

Officer Prentice also interviewed a neighbor, Luis M., and his son, who were in their backyard when they heard gunshots coming from the street in front of the house. The son said he went to the street and saw the victim's bicycle on the ground, with the victim nearby. The son then saw a red Astro van speed off with a male Hispanic at the wheel, wearing a gray sweatshirt hoodie. He called 911 and reported seeing the van and hearing three to five gunshots.

Officer Jason Conley was en route to the site, traveling westbound on Holt, when he saw a red GMC Safari, a vehicle having the same body type as an Astro van, traveling eastbound. Upon learning that the van was a possible suspect vehicle, the officer made a U-turn to get behind the van. Other units, including one driven by Detective Christopher Blank, pulled behind Officer Conley. Officer Conley attempted without success to stop the red van, after which the van pulled into a driveway on North Weber. Both occupants, Monge (the passenger) and codefendant Sergio Delacruz (the driver), fled the vehicle. Officer Conley and Detective Blank pulled into the driveway, exited their vehicles, and pursued Monge and Delacruz. Detective Blank eventually took Monge into custody at gunpoint and was assisted by Officer Conley, who had aborted his pursuit of Delacruz. Delacruz was taken into custody a short time later.

During Detective Blank's pursuit of Monge, an area resident saw Monge throw a black revolver-type handgun over a fence. That gun, containing one live round and five spent casings, was

later recovered and was swabbed for DNA. Monge's DNA represented the "lion's share" of the DNA found on the gun.

Thereafter, L.A. was taken to a field show-up where she identified Monge as the shooter; she was unable to positively identify Delacruz as one of the perpetrators. Gunshot residue tests performed on Monge's and Delacruz's hands were positive for the presence of gunshot residue.

At trial, Officer Michael Lee testified as a gang expert that he was familiar with both the West Side Pomona gang and one of its rival gangs, the Happy Town gang. He opined that both Monge and Delacruz, at the time of the events, were members of West Side Pomona and that the victim, at the time of the events, was a member of Happy Town. The officer further testified that West Side Pomona's primary activities are felony vandalism, narcotic sales, possession of firearms, and assaults with deadly weapons. He indicated that both West Side Pomona and Happy Town have territories and that the shooting of the victim took place in the Happy Town territory. In response to a hypothetical question, Officer Lee opined that, based upon the facts presented, a drive-by shooting of a Happy Town member by two West Side Pomona members within the Happy Town territory would have been committed for the benefit of West Side Pomona.³ On redirect

³ Officer Lee explained: "You had two members drive into a rival gang member's neighborhood armed with a firearm and when they come across that member, they start shooting at him—when they come across a rival gang member, they start shooting at him. What they're doing is they're even—if they don't call out their gang and tell that other person where they're from, what they're doing is committing a violent crime on behalf of the gang. . . . Because when

examination, Officer Lee stated that, although he was unable to give an exact number as to the investigations in which he had participated involving West Side Pomona and those crimes, he did say that he had “investigated numerous crimes of that regard.”

DISCUSSION

I. Substantial Evidence Supports the Jury’s Gang and Firearm Enhancement Findings.

A. *The Gang Allegations*

Monge contends that the evidence is insufficient to support the “primary activities” component of the gang enhancement finding. We disagree.

Section 186.22, subdivision (f) defines “criminal street gang” as follows: “[A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of [certain enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.”

“‘In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains 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 draw all reasonable inferences in favor of the verdict, and presume

they get back, they’re going to tell other people what they did and it’s going to elevate their own status within the gang.”

the existence of every fact the jury could reasonably deduce from the evidence that supports its findings.” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 947–948.)

“Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Also sufficient might be a gang expert’s opinion based on conversations with the defendant and other gang members, on personal investigations of hundreds of crimes committed by gang members, and information from colleagues in his own police department and other law enforcement agencies. (*Ibid.*) “Expert testimony based on an adequate factual foundation might also be sufficient.” (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 611.) Finally, “any material that forms the basis of an expert’s opinion testimony must be reliable.” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

Here, Officer Lee testified as to his background, training, education and experience in the area of criminal street gangs. After completing six months of field training with respect to gang investigations, he continued to take classes on his own. He comes into contact with gang members on a daily basis and often engages in conversations with them. He has had contact with gang members both as victims and as potential witnesses to crimes. In addition to his own investigations, he speaks to other detectives and officers regarding their investigations of gang-related crimes. In the last 10 years he had investigated more than 100 gang-related crimes. The officer was familiar with the crimes enumerated in

section 186.22, subdivision (e).⁴ In response to the prosecutor's inquiry as to whether any of those crimes are among the primary activities in which West Side Pomona is engaged, he said, "Yes, sir. Felony vandalism, narcotic sales, possession of a firearm, assault with a deadly weapon would be their primary activities." Later, in response to the prosecutor's inquiry as to the number of investigations in which he had participated involving those crimes and West Side Pomona, the officer said, "I couldn't give you an exact number, you know. There's oftentimes a lot of these crimes aren't—aren't reported to the police and you won't hear about them until they're—you know, until down the road a little ways." The prosecutor then asked, "Have you investigated numerous crimes of that regard, though?" The officer responded, "Yes, sir."

Relying on *In re Alexander L.*, *supra*, 149 Cal.App.4th 605, Monge maintains that Officer Lee's testimony was unreliable in that it failed to provide specifics as to the circumstances of the crimes he had investigated, or "where, when or how [he] had obtained the information." In *Alexander L.*, a gang expert responded to an inquiry as to the primary activities of the defendant's gang, stating: "I know they've committed quite a

⁴ As applicable here, these crimes include the following: assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in section 245; sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances, as defined in sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code; felony vandalism, as defined in paragraph (1) of subdivision (b) of section 594; and possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of section 29610.

few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' ” (*Id.* at p. 611.) In finding this evidence to be insufficient to establish the nature of the gang's primary activities, the court explained: “No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information. He did not directly testify that criminal activities constituted [the gang's] primary activities.” (*Id.* at pp. 611-612.) The court continued: “Even if we could reasonably infer that [the expert] meant that the primary activities of the gang were the crimes to which he referred, his testimony lacked an adequate foundation. . . . [¶] We cannot know whether the basis of [his] testimony on this point was reliable, because information establishing reliability was never elicited from him at trial. It is impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay.” (*Id.* at p. 612.)

Monge contends—for the same reasons given in *Alexander L.*—that what he characterizes as “conclusory testimony” offered by Officer Lee cannot be considered substantial evidence as to the nature of West Side Pomona's primary activities. He asserts that “[Officer] Lee's entire testimony on this issue consisted of his saying that various crimes he listed were the primary activities of West Side Pomona, that often times these crimes were never reported to the police, but only heard about in some vague way down the road a bit and that he had investigated numerous crimes of that regard.” Borrowing language from *Alexander L.*, he contends, “No specifics were elicited as to the circumstances of these crimes, or

where, when, or how [Officer] Lee had obtained the information. Therefore, it cannot be known whether the basis of [Officer] Lee's testimony on this issue was reliable, because information establishing reliability was never elicited from him at trial. [¶] That makes it impossible to tell whether his claimed knowledge of West Side Pomona's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay." We do not agree.

A similar issue was addressed in *People v. Martinez* (2008) 158 Cal.App.4th 1324 (*Martinez*). In that case, a gang expert, who had spent most of his 14 years in law enforcement dealing with gangs, testified that he was familiar with the defendant's gang "based on regular investigations of its activity and interaction with its members." (*Id.* at p. 1330.) He testified that the gang's primary activities included robbery, assault, theft, and vandalism. He also testified about two predicate offenses, both robberies. (*Ibid.*)

Relying on *In re Alexander L.*, *supra*, 149 Cal.App.4th 605, the *Martinez* defendant asserted that the gang expert's testimony lacked foundation and was therefore insufficient to establish the "primary activities" element. (*Martinez, supra*, 158 Cal.App.4th at p. 1330.) Rejecting the defendant's argument, the court explained that in *Alexander L.*, "the expert never specifically testified about the primary activities of the gang. He merely stated 'he "kn[e]w" that the gang had been involved in certain crimes. . . . He did not directly testify that criminal activities constituted [the gang's] primary activities.'" (*Ibid.*) In contrast, the expert in *Martinez* had both training and experience as a gang expert and specifically testified as to the gang's primary activities. Moreover, his experience dealing with gangs, which included investigations and personal conversations with members and reviews of reports,

was deemed sufficient “to establish the foundation for his testimony.” (*Ibid.*)

And so it is here. Officer Lee’s testimony as to his background, training, and education in the area of criminal street gangs, together with his day-to-day experience dealing directly with gang members and with other officers regarding their own gang investigations, was sufficient to establish a foundation for his direct testimony as to the nature of West Side Pomona’s primary activities. And, as in *Martinez*, Officer Lee specifically testified as to West Side Pomona’s primary activities. Moreover, and contrary to Monge’s assertion, our research has not disclosed any case requiring a gang expert to provide detailed information as to investigations in which he was involved as a means of establishing the primary activities element.

For the foregoing reasons, we conclude that Officer Lee’s testimony provided substantial evidence to support the jury’s finding that West Side Pomona’s primary activities include the commission of one or more crimes enumerated in section 186.22, subdivision (e).

B. *The Firearm Allegations*

Monge’s second contention, that there is insufficient evidence to support the jury’s findings on the firearm allegations, is predicated on his first contention. He maintains that, without substantial evidence to support the section 186.22, subdivision (b)(1)(C) finding, there is insufficient evidence to support the findings under section 12022.53, subdivisions (b), (c), and (d). Because we have concluded that substantial evidence supports the jury’s true findings as to the gang allegations under section 186.22, Monge’s argument necessarily fails.

II. The Section 12022.53, Subdivisions (b) and (c) True Findings Must be Stricken.

The People concede and we agree that the section 12022.53, subdivisions (b) and (c) true findings as to count 2 are unauthorized and must be stricken. The jury convicted Monge of discharging a firearm from a motor vehicle, in violation of section 26100, subdivision (c). Such violation is not listed as one of the offenses under section 12022.53, subdivision (a), so as to warrant an enhancement under subdivision (b) or (c). Thus, the jury's true findings and the sentence imposed under those subdivisions were unauthorized and must therefore be stricken.

III. The Trial Court May Strike the Firearm Enhancements in Light of a Recent Amendment to Section 12022.53.

At the time of Monge's sentencing, the trial court was required to impose the firearm enhancements under section 12022.53 when applicable. While this appeal was pending, the Legislature amended that statute to provide that "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." (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 2.)⁵ The amendment went into effect on January 1, 2018. (See Cal. Const., art. IV, § 8, subd. (c).) Monge

⁵ Under section 1385, the court "may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed," and, generally, "to strike or dismiss an enhancement" or "strike the additional punishment for that enhancement." (§ 1385, subs. (a) & (c); see *People v. Meloney* (2003) 30 Cal.4th 1145, 1155.)

contends that, because his judgment is not final, the statute should be applied retroactively to permit the trial court to strike his firearm enhancements. We agree.

Generally, amendments to the Penal Code do not apply retroactively. (See Pen. Code, § 3.) Our Supreme Court, however, has recognized an exception for amendments that reduce the punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745; accord, *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) The *Estrada* court explained that when the Legislature has reduced a crime's punishment, it has "expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*In re Estrada, supra*, 63 Cal.2d at p. 745.) The court inferred that "the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Ibid.*) To "hold otherwise," the court concluded, "would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Ibid.*)

The Supreme Court has extended the *Estrada* holding to amendments that do not *necessarily* reduce a defendant's punishment, but which give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; see also *People v. Superior Court (Lara)* (Feb. 1, 2018, S241231) __Cal.5th__, __ [2018 D.A.R. 1144, 1146] [" 'in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible' "].)

The amendment to section 12022.53 provides courts with discretion to strike or dismiss the firearm enhancements—and thereby reduce the punishment—that would otherwise be imposed under that statute. As the People concede, Monge should, therefore, receive the benefit of the new law. Accordingly, upon remand, the court should have the opportunity to exercise its discretion to strike the firearm enhancements.

DISPOSITION

The sentence enhancements imposed under Penal Code section 12022.53, subdivisions (b) and (c) on the conviction for count 2 are stricken. Upon remand, the trial court shall hold a sentencing hearing to consider whether, pursuant to Penal Code section 12022.53, subdivision (h), to strike or dismiss an enhancement otherwise required by Penal Code section 12022.53. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.