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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ZENAIDA CHRISTINA CORDOVA, Defendant and Appellant.	B252641 (Los Angeles County Super. Ct. No. BA282476)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed.

Laura S. Kelly, 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, Jonathan J. Kline and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Zenaida Christina Cordova appeals from the judgment entered following her convictions by jury on two counts of carjacking (Pen. Code,[1] § 215, subd. (a); counts 1 & 4) with a finding as to count 1 she personally used a firearm (§ 12022.53, subd. (b)), count 2 – kidnapping to carjack (§ 209.5, subd. (a)), and count 3 – kidnapping to rob (§ 209, subd. (b)(1)) with findings as to each offense she committed it for the benefit of a criminal street gang (§ 186.22, subd. (b)).[2] The court sentenced appellant to prison on count 1 to 15 years to life, plus 10 years for the firearm enhancement and, following a later appellate remand, resentenced appellant to prison on each of counts 2 and 3 to a concurrent term of life with a minimum parole eligibility term of 15 calendar years. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

1. *The Substantive Offenses*.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established[3] that on April 13, 2005, appellant and her accomplices committed against Bryan Johnson the offenses alleged in counts 2 and 3.[4] On April 14, 2005, appellant and accomplices committed against Karen Arakelian the offense alleged in count 1.

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[1] Subsequent statutory references are to the Penal Code.

[2] This is the fourth decision following an appeal by appellant. The first was *People v. Zenaida Christina Cordova* (July 29, 2008, B198305) [nonpub. opn.] (*Cordova I*)). The second was *People v. Zenaida Christina Cordova* (Nov. 23, 2010, B217448) [nonpub. opn.] (*Cordova II*)). The third was *People v. Zenaida Christina Cordova* (Oct. 2, 2012, B232947) [nonpub. opn.] (*Cordova III*)). We discuss these cases *post.*

[3] A more extensive recitation of the facts of appellant's offenses may be found in *Cordova I.*

[4] As discussed *post*, the offense alleged in count 4 was a lesser included offense of the offense alleged in count 2.

2. *The March 16, 2007 Sentencing Hearing.*

At the March 16, 2007 sentencing hearing, appellant was represented by counsel and the trial court imposed sentence. (At all times herein mentioned, the trial court judge was the same and appellant's trial counsel was the same.) In sum, the court imposed the following prison terms: 30 years to life on count 1, a life term on each of counts 2 and 3, and one year eight months, plus five years to life, on count 4.

3. *The July 10, 2007 Recall of Appellant's Sentence.*

Appellant moved to recall her sentence and, on July 10, 2007, the court conducted a hearing on the motion and noted the following.[5] Prior to trial, the People had offered appellant and her codefendant Valdez a package deal pursuant to which appellant would have been sentenced to prison for a total of about 15 years. Appellant had been willing to accept the package offer but Valdez had rejected it. As a result, following a trial, appellant was convicted and her prison sentence was 36 years eight months to life. Valdez was tried twice, each trial resulted in a hung jury, and his case ultimately was dismissed.

The court also indicated as follows. During the March 16, 2007 sentencing hearing, the court stated appellant had chosen the gang life. However, the charges were severe and the court had misgivings about appellant's sentence. The court had suggested appellant file, pursuant to section 1170, subdivision (d), a motion to recall the sentence, and appellant had done so.

Appellant's counsel indicated appellant was more involved with count 1 than with the remaining counts. Appellant's counsel also commented, inter alia, "I think that the court can still impose a very hefty sentence on [appellant], even if the court were to consider *striking the gang allegations* and staying imposition of the life sentence on the other counts." (Italics added.) The prosecutor argued as follows. Appellant was heavily entrenched in the gang lifestyle. The hung juries as to Valdez were attributable to

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[5] Although the court, on March 16, 2007, appeared to impose consecutive sentences on counts 1 through 4, the court, on July 10, 2007, characterized those sentences as concurrent.

identification problems inapplicable to appellant. The court did not "have a strong reason to *strike* or stay any sentencing from 186.22(b)." (Italics added.) The court should not modify appellant's sentence.

The court discussed appellant's memorandum regarding sentence modification on count 1 and the following later occurred: "[The Court]: . . . what we're really talking is mid term of five years, and *that's without any regard to the special allegations, especially the one pursuant to 186.22*, which make it 15 years to life and an additional 10 on the 12022.53(b). What I believe . . . you [appellant's counsel] are saying to the court is *strike the gang allegation* and impose the mid term of five years plus the additional 10 years for the use of the firearm, for a total sentence in count 1 of 15 years? [¶] [Appellant's Counsel]: That's correct."

The following then occurred: "The Court: Then what you're asking simply on counts 2 and 3, which are violations of 209.5(a) and 209(b), . . . you're asking me to impose and stay those life sentences pending completion of the sentence on count 1. And also, as to count [4], you'd like me to impose either concurrent or consecutive sentences – again, the mid term for 215(a) would be one-third the mid term on a consecutive sentence, which would be 20 months – *and strike the gang allegation*. [¶] [Appellant's Counsel]: That's correct." (Italics added.)

The prosecutor suggested if the court were to "*strike* or stay" (italics added) the subdivision (b)(4)(B) gang allegation, the court would still have to impose the 10-year subdivision (b)(1)(C) gang enhancement, with the result appellant's total prison sentence would still be more than 16 years. The prosecutor later stated, "Of course, *the People don't want the court to strike the gang allegation*." (Italics added.) The court replied, "I understand. The court *recognizes that's an alternative* as well." (Italics added.) The court received information about appellant's age and criminal record. The court, analogizing to the Three Strikes law, indicated it could choose to strike gang allegations as to one or more counts.

The court let stand the prison sentence of 30 years to life on count 1. As to counts 2 and 3, the court "stay[ed] imposition of life sentences." As to count 4, the court imposed a concurrent five-year middle term. At one point, the court stated as to count 4, "*I'm going to strike the gang allegation* under 186.22 . . . that's under 186.22(b)(4) and 186.22(b)(1)(C)." (Italics added.) The court later stated, "Total sentence, 30 years to life. And it should be noted in count 4, *the gang allegation under 186.22(b)(4) and 186.22(b)(1)(C)* will be stricken." (Italics added.)[6]

4. *The September 25, 2013 Resentence.*

At the September 25, 2013 resentencing hearing, the court called the case, stating it was a nonappearance matter for appellant and she was currently in prison. The record reflects counsel for the parties were present, but appellant was not personally present. The trial court resentenced appellant in compliance with *Cordova III*. Appellant's prison sentence was (1) as to count 1, 15 years to life for carjacking pursuant to section 186.22, subdivision (b)(4)(B), plus 10 years for the firearm enhancement and (2) as to each of

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[6] In *Cordova I*, we concluded, inter alia, appellant could not be convicted of carjacking (count 4) and kidnapping to carjack (count 2) because the former offense was a lesser included offense of the latter. (*Cordova I, supra*, B198305, p. 17.) We also concluded sentencing error occurred. (*Id*. at p. 20.) We, inter alia, affirmed the judgment except we remanded with directions to the trial court to dismiss count 4 and resentence appellant. (*Id*. at p. 21.) (In light of our disposition of count 4 in *Cordova I*, there is no need to discuss further that count.) On March 10, 2009, the court resentenced appellant, and the resentence included, as to each of counts 2 and 3, a term of 15 years to life allegedly pursuant section 186.22, subdivision (b)(4)(B) (the proper subdivision was subdivision (b)(5)). Appellant moved to recall the sentence but on, July 6, 2009, the trial court denied the motion. In *Cordova II*, we again concluded, inter alia, sentencing error occurred. We, inter alia, affirmed the judgment except we remanded for resentencing. On March 25, 2011, the court resentenced appellant, and the resentence included, as to each of counts 2 and 3, a term of 15 years to life allegedly pursuant section 186.22, subdivision (b)(4)(B) (the proper subdivision was subdivision (b)(5)). In *Cordova III*, we, inter alia, affirmed the judgment except we remanded for resentencing as to counts 2 and 3 only, to permit the trial court to sentence appellant on counts 2 and 3 pursuant to subdivision (b)(5). (*Cordova III, supra*, B232947, at pp. 9-10.) We noted in *Cordova III* that, although we were remanding, "the resulting sentence will likely be the same." (*Id*. at p. 10.)

counts 2 and 3, a concurrent term of life with a minimum parole eligibility term (MPET) of 15 calendar years pursuant to section 186.22, subdivision (b)(5). After the modification, the court asked appellant's counsel if he had anything further, and he replied no. We will present additional facts where pertinent below.

ISSUE

Appellant claims she was denied her right to be present at the September 25, 2013 resentencing hearing.

DISCUSSION

No Prejudicial Violation of Appellant's Right to Be Present at Resentencing Occurred.

Appellant claims as previously indicated. She argues her absence from the September 25, 2013 resentencing hearing violated (1) article I, section 15 of the state Constitution and Penal Code sections 977, subdivision (b)(1) and 1093, subdivision (a), and (2) her federal constitutional right to due process. In particular, she urges that appellant's counsel, with "[appellant] present, and possibly with [appellant's] prodding," "might well . . . have" argued the gang penalties as to counts 2 and 3 should have been stricken.

When a defendant claims the defendant's absence at time of sentencing violates federal due process, the determinative question is whether the defendant suffered damage by reason of the absence. Federal due process does not require the presence of a defendant at a proceeding when presence would be useless. (*Cf. People v. Williams* (1970) 10 Cal.App.3d 745, 751.) Moreover, we review any above-mentioned state law error for prejudice under the standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*Cf. People v. Carasi* (2008) 44 Cal.4th 1263, 1300.) Where federal error exists as a result of the defendant's absence, we review the error for prejudice under the standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Cf. People v. Davis* (2005) 36 Cal.4th 510, 532; *People v. Robertson* (1989) 48 Cal.3d 18, 62 (*Robertson*).) Appellant has the burden of demonstrating prejudice. (*Cf. People v. Panah* (2005) 35 Cal.4th 395, 443.)

For the following two independent reasons, we conclude no federal error occurred. The first reason no federal error occurred is on September 25, 2013, the trial court lacked authority to strike gang allegations, and imposition of the gang penalty under section 186.22, subdivision (b)(5) was mandatory. In *People v. Campos* (2011) 196 Cal.App.4th 438 (*Campos*), the appellate court held imposition of the gang penalty under subdivision (b)(5) was mandatory, and neither section 186.22, subdivision (g)[7] nor section 1385, subdivision (a) authorized a trial court to refuse to impose the penalty. (*Campos*, at pp. 447-454.) *Campos* observed that, for two reasons, section 186.22, subdivision (g) did not support such a refusal. First, although subdivision (g) authorized a trial court to strike additional punishment for gang enhancements, subdivision (b)(5) was not an enhancement but an alternate penalty provision.[8] (*Campos*, at pp. 448-449.) Second, although subdivision (g) authorized a trial court to refuse to impose a minimum jail sentence for misdemeanors, subdivision (b)(5) imposed an MPET in prison for felonies punishable by life. (*Campos*, at pp. 459-450.)

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[7] Section 186.22, subdivision (g), states, "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition."

[8] *Campos* stated, "We disagree with *People v. Torres* (2008) 163 Cal.App.4th 1420 to the extent it held the trial court had authority to strike the alternate penalty prescribed by section 186.22, subdivision (b)(4)(C) because the court found unusual circumstances. (*Torres*, at pp. 1422, 1424, 1433 & fns. 6, 7.) *Torres* did not analyze the applicable language of section 186.22, subdivision (g), and it repeatedly and inaccurately described the alternate penalty prescribed by section 186.22, subdivision (b)(4)(C) as a 'gang enhancement.' (*Torres*, at pp. 1422, 1424, 1427, 1433.) As explained in the text [in *Campos*], our Supreme Court has held that the punishments prescribed in subdivision (b)(4) and (5) of section 186.22 are alternate penalties, not enhancements." (*Campos, supra*, 196 Cal.App.4th at p. 449, fn. 8.)

Campos also concluded section 1385, subdivision (a) did not authorize a trial court to refuse to impose a section 186.22, subdivision (b)(5) penalty. *Campos* reasoned section 186.22, subdivision (g) contained clear legislative direction eliminating judicial use of section 1385 "to dismiss or strike gang allegations and enhancements and to refuse to impose gang alternate penalties." (*Campos*, at p. 452.)[9] We agree with *Campos* and it applies here.[10] Because the trial court lacked authority to strike gang allegations, appellant suffered no damage by reason of her absence from the September 25, 2013 resentencing hearing; therefore, no violation of her right to due process occurred.

The second reason no federal error occurred is the record demonstrates the trial court, when resentencing appellant on September 25, 2013, would not have struck the gang allegations on count 2 or count 3. On July 10, 2007, the trial court clearly believed it had discretion to strike gang allegations. Nonetheless, after a thorough reconsideration of appellant's case, the trial court on that date elected to strike gang allegations as to

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[9] *Campos* found said clear legislative direction in section 186.22, subdivision (g) for three reasons. First, section 186.22, subdivision (g) stated, "Notwithstanding any other law." (*Campos, supra*, 196 Cal.App.4th at p. 452.) Second, the conclusion trial courts could not use section 1385 to dismiss or strike gang allegations or enhancements or to refuse to impose gang alternate penalties followed from the rules that a specific statute prevails over a general statute, and a later-enacted statute prevails over an earlier-enacted statute. Third, if courts could so use section 1385, it would render section 186.22, subdivision (g) surplusage. (*Campos*, at pp. 453-454.)

[10] *People v. Venegas* (2014) 229 Cal.App.4th 849 (*Venegas*) recently disagreed with *Campos* and held a trial court has authority under section 1385 to strike or dismiss a section 186.22, subdivision (b)(4) allegation. (*Venegas*, at p. 852.) We note *Venegas* was the product of a divided court and the dissent followed *Campos*. (*Venegas*, at p. 860.) The issue of whether a trial court has power under section 1385 to dismiss a section 186.22 enhancement for gang-related crimes, or whether the court is limited to striking the punishment for the enhancement in accordance with section 186.22, subdivision (g), is pending before our Supreme Court in *People v. Fuentes* (S219109).

count 4 only.[11] After July 10, 2007, appellant never asked the trial court to strike gang allegations, although she had numerous opportunities to do so. Appellant did not, in any of the appeals leading to *Cordova I*, *Cordova II*, or *Cordova III*, contend the trial court erred to the extent it failed to strike gang allegations. *Cordova III* indicated appellant's resentence following remand would "likely be the same." (*Cordova III, supra*, B232947, p. 10.) After the September 25, 2013 resentencing, the court asked appellant's counsel if he had anything further, and he replied no.

Appellant received concurrent terms on counts 2 and 3, and has failed to demonstrate the striking of gang allegations as to those counts would have any effect on her actual incarceration, or on her potential release on parole after she has served her MPET on count 1. We conclude the trial court on July 10, 2007, elected to strike gang allegations as to count 4 only, saw no reason to revisit the issue during any subsequent resentencing proceedings, and appellant understood this. Appellant's presence during the September 25, 2013 resentencing hearing would have been useless for this reason as well.

Finally, in light of the above, even if appellant's absence from the September 25, 2013 resentencing hearing was state law and federal error, appellant has failed to meet her burden to demonstrate prejudice, and said error was harmless under any conceivable standard. (*Cf. Watson, supra*, 46 Cal.2d at p. 836; *Chapman, supra*, 386 U.S. at p. 24; *Robertson, supra*, 48 Cal.3d at p. 62.)

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[11] It is true the trial court on July 10, 2007 appeared to treat counts 2 and 3 as if there were no gang allegations as to those counts when, in fact, there were. As to each of counts 2 and 3, the jury found true an allegation the offense was committed for the benefit of a criminal street gang "pursuant to Penal Code Section 186.22, subdivision (b)(1)." However, it appears the trial court's July 10, 2007 dispositions of counts 2 and 3 did not consider the gang findings but were dispositions based on the penalties called for by the substantive offenses (*life* with the possibility of parole) without the gang findings. Nonetheless, when the court resentenced appellant on March 10, 2009, and March 25, 2011, those dispositions included gang penalties (see fn. 6, *ante*).

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

EDMON, P. J.

ALDRICH, J.