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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KAMORRIE RANDLE, Defendant and Appellant.	B238532 (Los Angeles County Super. Ct. No. SA057084)

APPEAL from a judgment of the Superior Court of Los Angeles County. Katherine Mader, Judge. Affirmed as modified.

Janyce Keiko Imata Blair, 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, James William Bilderback II and Mark E. Weber, Deputy Attorneys General, for Plaintiff and Respondent.

Kamorrie Randle (Randle) was convicted on one count of first degree murder, three counts of attempted premeditated murder, and three counts of attempted murder. On appeal, Randle contends: (1) the trial court abused its discretion and violated his constitutional right to a jury trial and due process of law when it failed to discharge Juror No. 3 for sleeping during trial; (2) there was insufficient evidence that a victim named Davon Howard (Howard) suffered great bodily injury within the meaning of Penal Code section 12022.53, subdivision (d);[1] and (3) the trial court erred when it enhanced the sentence for both counts 5 and 6 with additional and consecutive three-year terms pursuant to section 186.22, subdivision (b)(1)(A) instead of imposing a 15-year parole ineligibility periods pursuant to subdivision (b)(5).

Regarding the sentencing matter, the People agree that the trial court erred. We modify the sentence to impose a 15-year parole eligibility periods in counts 5 and 6 pursuant to section 186.22, subdivision (b)(5). In addition, we strike the three-year additional and consecutive three-year terms imposed pursuant to section 186.22, subdivision (b)(1)(A).

As modified, the judgment is affirmed.

FACTS

The Amended Information

The amended information filed by the Los Angeles District Attorney contained counts 1 through 6 and count 8 and charged Randle with the following offenses: the murder of Scorpio Anderson (Anderson) in violation of section 187, subdivision (a) (count 1); the attempted murder of Howard (count 2), Anthony Dangerfield (Dangerfield) (count 3), John Williams (Williams) (count 4), and Miguel Ron (Ron) (count 8)[2] in violation of sections 664 and 187, subdivision (a); and the attempted premeditated murder of Alejandro Ayala (A. Ayala) (count 5) and Roberto Ayala (R. Ayala) (count 6) in violation of sections 664 and 187, subdivision (a). As to each count, it was alleged that

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

[2] On count 8, Randle was convicted of attempted premeditated murder.

Randle personally used and discharged a firearm with the meaning of section 12022.53, subdivisions (b) and (c) and that he caused great bodily injury within the meaning of section 12022.53, subdivision (d). Pursuant to section 186.22, it was also alleged that Randle committed the offenses for the benefit of or at the direction of a criminal street gang.

Randle's Admission

Prior to the voir dire of prospective jurors, Randle admitted the gang allegations pursuant to section 186.22.

The Prosecution's Case

In 2005, the 118 Gangster Crips, Acacia Block Hustlers and Little Watts were gangs based in the City of Hawthorne (Hawthorne). Christian Washington (Washington), known as Baby Herm, and Randle belonged to the 118 Gangster Crips. On March 11, 2005, a police officer responded to a shooting on a street in Hawthorne and found Washington on the sidewalk, bleeding. Hours later, Washington died.

Randle was upset about Washington's death and the failure of his fellow gang members to retaliate.

On the night of March 12, 2005, A. Ayala, R. Ayala and their sister walked along railroad tracks in Hawthorne. A man with a hood shot at the Ayalas and hit A. Ayala multiple times. Police recovered eight nine-millimeter bullet casings at the scene. A. Ayala went to the hospital and stayed for two and a half months.

Ron knew Randle from Prairie View Middle School. They saw each other in the playground. Separately, each of them often got into trouble and they would see each other when they were sent to the principal's office. In 2005, Ron was a member of the Little Watts gang. At about 8:00 p.m. on March 23, 2005, Ron parked in the City of Inglewood in an alley near a small liquor store and kept his car running while a friend went inside. A person in a hooded sweater approached the car and shot Ron twice in the chest and once in the elbow and hip. Police Officer Tyrin Bailous of the Inglewood Police Department responded to the scene of the shooting. He found Ron inside the liquor store, lying on the ground in obvious distress. Ron was surrounded by people who

were pressing blood soaked towels and pieces of clothing to his chest. Officer Bailous asked Ron if he had been shot and Ron said yes. When asked for a description of the shooter, Ron said, "I know the guy. It's [Randle] from 118 crips." According to Ron, when Randle approached the car, he said, "Fuck Twats" and then fired. Ron understood the phrase to mean, "fuck Little Watts." Ron went to the hospital for about two weeks and now suffers chronic pain and disabilities. Police recovered six nine-millimeter bullet casings from around Ron's car.

On March 25, 2005, police went to the hospital and showed Ron a six-pack photo lineup. Ron identified Randle.

About a week and a half later, on April 6, 2005, Anderson, Howard, Dangerfield and Williams saw some teenagers playing basketball with a man on Menlo Avenue. The man yelled out his affiliation with the 118 Gangster Crips gang. In response, Anderson yelled out his affiliation with the Acacia Block Hustlers. The man pulled out a gun and began shooting. As he ran away, Anderson was hit in the torso, arm and hip/buttocks area. The shot to Anderson's torso damaged vital organs and was fatal. A bullet hit Howard's right ring finger and caused it to bleed. Chris Gonzalez (Gonzalez) lived near the scene of Anderson's murder. He called the police after hearing what he thought were gunshots and seeing a suspicious black man who was running and holding something by his waist. At the scene, the police recovered eight spent nine-millimeter bullet casings.

After the shooting, Gonzalez went to the Hawthorne Police Department where he was shown more than 20 photos by police officers. Gonzalez picked a photo of Jermaine Hill (Hill) and said he looked similar to the suspicious Black man. Dangerfield and Williams also went to the Hawthorne Police Department. They reviewed photos of 118 Gangster Crip gang members and each selected a photo of Hill as resembling the shooter. Williams was only 60 percent sure. About a week later, Los Angeles County Sheriff's Detectives Richard Ramirez and Dan McElderry interviewed Gonzalez, Dangerfield and Williams again. The detectives showed each witness a six pack and they identified Randle.

In April and July 2005, Detective Ramirez and Detective McElderry interviewed Brittany W. She said she saw Randle shooting at Anderson, Howard, Dangerfield and Williams.

Randle was arrested on April 21, 2005. Five days later, detectives placed him in a cell with another member of the 118 Gangster Crips and recorded their conversation. Randle said he shot at two Mexicans who were members of the Little Watts gang and a woman as the three of them walked near a set of railroad tracks.

Ballistics tests established that the same firearm had been used to fire all 22 of the nine-millimeter bullet casings recovered from the three crime scenes.

At trial, Brittany W. feigned memory loss.

The Verdict; the Sentence

The jury found Randle guilty on all counts and found various gun use allegations to be true.

On count one (first degree murder of Anderson), Randle was sentenced to 25 years to life plus 25 years for the firearm enhancement under section 12022.53, subdivision (d). For count two (attempted murder of Howard), Randle received the midterm of seven years with a three-year gang enhancement and a 25-year firearm enhancement under section 12022.53, subdivision (d). As for count three (attempted murder of Dangerfield) and count four (attempted murder of Williams), the trial court imposed the same sentence, which was the midterm of seven years with a three-year gang enhancement plus 20 years for the firearm enhancement provided by section 12022.53, subdivision (c). On count 5 (attempted premeditated murder of A. Ayala), Randle was sentenced to life in prison with a seven-year parole ineligibility period plus a 25-year firearm enhancement under section 12022.53, subdivision (d). He also received an additional and consecutive three-year sentence enhancement based on section 186.22, subdivision (b)(1)(A). As to count 6 (attempted premeditated murder of R. Ayala), the trial court sentenced Randle to life in prison. He received a 20-year firearm enhancement under section 12022.53, subdivision (c). He also received a seven-year parole ineligibility period and, pursuant to section 186.22, subdivision (b)(1)(A), an additional and consecutive three-year sentence

enhancement. Finally, on count 8 (attempted premeditated murder of Ron), Randle was sentenced to life in prison with a 15-year parole ineligibility period. He also received 25 years for the firearm enhancement under section 12022.53, subdivision (d). The sentences on counts 1, 5, and 8 were ordered to run consecutively. On the other counts, the sentences were ordered to run concurrently. The total time of Randle's sentence was 125 years to life.

This timely appeal followed.

DISCUSSION

I. The Trial Court Acted Within the Scope of its Discretion When It Refused to Dismiss Juror No. 3 for Sleeping.

The first question presented by Randle is whether the trial court should have discharged Juror No. 3 for sleeping. In analyzing this issue, we are guided by section 1089, *People v. Fudge* (1994) 7 Cal.4th 1075 (*Fudge*) and *People v. Bonilla* (2007) 41 Cal.4th 313 (*Bonilla*).

Section 1089 provides that "[if] at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged." "'The determination of "good cause" rests in the sound discretion of the court [citations], and the court's finding thereof will be upheld if substantial evidence supports it [citation].' [Citations.]" (*Fudge*, *supra*, 7 Cal.4th at p. 1099.) Apropos to this case, *Bonilla* instructs that "[t]he trial court has the authority to discharge jurors for good cause, including sleeping during trial. [Citation.] When the trial court receives notice that such cause may exist, it has an affirmative obligation to investigate. [Citations.]" (*Bonilla, supra*, 41 Cal.4th at p. 350.)

If a trial court does "not strictly follow the provisions of section 1089," we examine whether the "defendant was prejudiced thereby." (*People v. Groves* (1961) 188 Cal.App.2d 785, 788.)

A. Relevant Facts.

Dangerfield testified on December 5, 2011. On direct examination, he explained that he was present when a black man shot at him as well as Anderson, Howard and Williams. The same day that Anderson was shot and killed, Dangerfield spoke to Hawthorne police. He looked at 30 to 40 photos. None of the people in the photos looked like the shooter. A week or two later, Dangerfield spoke to some Deputy Sheriffs and reviewed 6 to 12 photos. He recognized Randle in a photo and circled it.

On December 6, 2011, Robert Keil (Keil) testified between 10:10 a.m. and the trial's noon break about his forensic analysis of ballistics evidence from the crime scenes. Between 1:35 p.m. and 3:00 p.m., the jury heard the testimony of Officer Bailous and Hawthorne Police Detective Chris Port. Officer Bailous spoke to Ron after he was shot by Randle. Ron gave a description of the shooter and said it was Randle from the 118 Gangster Crips. Detective Port investigated the Anderson shooting and testified as a gang expert. In addition, Detective Port testified as follows: He transported Dangerfield and Williams to the Hawthorne Police Department. They looked at a series of photographs of individuals suspected to be members of the 118 Gangster Crips. Dangerfield looked at a picture of Hill and said he looked a lot like the shooter and that Hill could be the shooter's twin. But Dangerfield was not 100 percent sure. On cross-examination, defense counsel asked Detective Port about who he transported from the scene of the shooting to the police station; about Crips gangs using the color blue and red; about his opinion as to whether Randle was a gang member in March and April of 2005; about the use of field identification cards by the Hawthorne Police Department; about Cal Gangs, a computerized database for gang members within the State of California; and about photos of the known 118 Gangster Crips members and their associates maintained by the Hawthorne Police Department in 2005. Next, the defense asked Detective Port about the photos shown to Dangerfield after the Anderson murder; about how exhibits of those photos were printed from computers and produced for trial; about how photos taken on the street are transferred to a computer file; and about how a set of photos was created for Dangerfield to review.

After the trial court recessed for a break at 3:00 p.m., Randle informed the trial court that he had seen Juror No. 3 fall asleep. While the jury remained in recess, the trial court questioned Juror No. 3 as follows:

"THE [TRIAL COURT]: Juror No. 3, it was brought to my attention by someone that you might have been do[z]ing or they thought you were do[z]ing a little.

"JUROR NO. 3: I think I did for just a minute. I'm sorry. I was getting a little warm. I took off my sweater. I think that will help.

"THE [TRIAL COURT]: Do you think that you missed any part of the trial?

"JUROR NO. 3: No, I don't think so.

'THE [TRIAL COURT]: Okay. It wasn't that you missed a chunk of it because you were asleep?

"JUROR NO. 3: Oh, no.

"THE [TRIAL COURT]: Okay. You feel like you've been paying pretty close attention?

"JUROR NO. 3: Yeah.

"THE [TRIAL COURT]: Okay. Great. [¶] Let's bring in the rest of the jurors."

The cross-examination of Detective Port resumed.

Later that same day, defense counsel asked the trial court to remove Juror No. 3. On December 7, 2011, defense counsel stated to the trial court: . . . "[Y]ou're just going to have to make the call based upon her demeanor and credibility as to whether or not you think there's demonstrable evidence that she failed to hear the entire record. [¶] If she did, especially when I was cross-examining, the record should reflect, on the identification process used with Mr. Dangerfield, and that obviously is a critical piece of evidence since Mr. Dangerfield, in front of the jury, testified that none of that happened. It goes directly to his credibility. It's a key piece of evidence. And I think she should be excused."

In ruling, the trial court pointed out that *Bonilla* indicated "that a discharge of a juror is not required when he reported to the court that he had nodded off but under questioning stated that he had not missed anything." The trial court went on to explain

that it had reviewed the trial transcript of the question and answer session with Juror No. 3. It concluded that "[Juror No. 3] has struck me from the beginning as somebody who is a very conscientious juror who does pay close attention, and I do find her credible when she's indicating that she doesn't believe that she missed anything."

Subsequently, Detective Ramirez testified that when Dangerfield was shown photos, he identified Randle as the shooter.

B. Analysis.

Randle contends that substantial evidence does not support the trial court's finding that Juror No. 3 was able to perform her duty. He implies that he was prejudiced in connection with counts 1, 2, 3 and 4 because Juror No. 3 may have dozed off for about a minute when Detective Port was testifying as to Dangerfield's review of photos on the day Anderson was murdered.

We disagree.

"'[C]ourts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial.'" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1349 (*Bradford*). In the past, courts have "uniformly decline[d] to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial. [Citations.]" (*Ibid*.)

Hewing to this cautious tradition, the *Bradford* court declined to grant a new trial even though the trial court noticed that a juror was asleep during testimony, the defense counsel stated that the same juror had slept "' . . . all day yesterday, . . . '" and the trial court did not conduct an investigation. (*Bradford*, *supra*, 15 Cal.4th at pp. 1348–1349.) The court held that "the absence of any reference in the record to the juror's inattentiveness over a more substantial period indicates that the trial court did not abuse its discretion in failing to conduct an inquiry." (*Id*. at p. 1349.) An investigation into two sleeping jurors was conducted in *Bonilla*. It came on the heels of the first juror self-reporting that he had drifted off to sleep a couple times during prior days of testimony. (*Bonilla*, *supra*, 41 Cal.4th at p. 352.) Neither the trial court, court reporter or counsel had noticed whether the juror had fallen asleep or not. When asked if he missed a portion

of the trial, the juror said, "Well, not necessarily miss it. I mean, I just nodded . . . off and came back up." (*Id*. at p. 351.) The trial court asked the juror, "*So you didn't miss anything*?" (*Ibid*.) He replied, "*No, I don't think so*." (*Ibid*.) When given a chance to ask the juror questions, defense counsel asked how the juror knew how long he had been asleep. (*Ibid*.) The juror explained that he would feel his head go down and then he would bring it back up. (*Ibid*.) The trial court said, "*You were listening to all the witnesses and what have you*." (*Id*. at p. 352.) The juror said, "*Right*." (*Ibid*.) Moving on, the trial court and parties inquired into whether the second juror had been sleeping. The trial court tentatively denied a defense motion to dismiss the jurors "but invited defense counsel to follow up with a written motion supported by additional evidence." (*Ibid*.) Subsequently, the two defendants in the case filed motions and offered additional evidence that led to the dismissal of the second juror due to sleeping. (*Ibid*.) But the trial court declined to dismiss the first juror. *Bonilla* concluded that "trial court's handling of concerns about [the first juror] sleeping was well within the scope of its discretion." (*Ibid*.)

Here, Juror No. 3 dozed for "just for a minute." Though Randle did not say when he saw Juror No. 3 asleep, he voiced his concern at 3:00 p.m. on December 6, 2011. The inference is that Juror No. 3 was momentarily asleep during the testimony of either Officer Bailous or Detective Port. In the course of a trial that had seven days of testimony from 18 witnesses and involved multiple crimes and victims, the record suggests that Juror No. 3 did not sleep for a substantial enough period of time to require an investigation. Our conclusion is consistent with *Bradford* in which no investigation was required even though there was evidence the juror had been sleeping all day on a previous day of trial and even though the trial court noticed the juror sleeping during testimony. Dozing for a minute is far less substantial than the amount of sleeping by the juror in *Bradford*. Nonetheless, the trial court below conducted an investigation. Juror No. 3 said she did not think she had missed any part of the trial, and she unequivocally stated that she did not miss a "chunk" of trial. She also stated that she felt like she was paying close attention. The trial court perceived her to be conscientious and presumably

based this perception upon Juror No. 3's demeanor during questioning and the time she spent in court. On this point, it cannot be ignored that the trial court was in the best position to "observe the juror's demeanor." (*People v. Beeler* (1995) 9 Cal.4th 953, 989.) We find no error because, in our view, the trial court ruled within the scope of its discretion under *Bonilla*.

Even if there was an abuse of discretion, Randle does not suggest that reversal of a particular conviction or convictions is automatic. Nor does he specifically analyze whether there was prejudicial error under either under state law (*People v. Watson* (1956) 46 Cal.2d 818, 836 [it is reasonably probable that the jury would have reached a result more favorable to the defendant absent error]) or under the federal Constitution (*Chapman v. California* (1967) 386 U.S. 18, 24 [reversal is required unless error was harmless beyond a reasonable doubt]). To be thorough, we examined the record as a whole and conclude, beyond a reasonable doubt, Randle was not prejudiced if Juror No. 3 dozed for a minute during the afternoon of December 6, 2011.

To establish prejudice, Randle states that "the juror's inattentiveness occurred during a critical time in the development of the defense case. The prosecution's evidence amounted to the fact that the various shooting incidents were committed for gang-related reasons, that appellant was a gang member, that the same nine millimeter firearm had been used in all three discrete shooting incidents, and on identification evidence from percipient witnesses that [Randle] was the shooter in each incident. But, the identification evidence was problematic for the prosecution because many witnesses repudiated their pretrial identifications and because three percipient witnesses to the shooting incident involving [Anderson, Dangerfield, Howard and Williams] initially selected the photograph of a person named [Hill] as the shooter. As defense counsel informed the court, he was probing the identification process used with [Dangerfield] during the session in which Juror No. 3 admitted she dozed off. Counsel described the examination at that point as critical evidence on the question of Dangerfield's credibility."

The initial problem is that Randle assumes that Juror No. 3 dozed off while Detective Port was being cross-examined prior to the recess at 3:00 p.m. on December 6, 2011. This is speculative. Even if Juror No. 3 dozed off when Detective Port was being cross-examined, we fail to perceive the prejudice. Excluding the testimony of Detective Port and Dangerfield, there was overwhelming evidence that Randle shot at Anderson, Howard, Williams and Dangerfield. In pretrial interviews, Brittany W. identified Randle as the shooter. Gonzalez selected Randle's photo to identify the suspicious Black man running from the scene. Williams also identified Randle. Moreover, ballistics tests established that the same gun had been used in connection with the attempted murders of A. Ayala, R. Ayala and Ron. Randle's guilt in connection with those attempted murders was established by his jailhouse statements and by Ron's pretrial statement that he was shot by Randle.

II. Substantial Evidence Supports the Jury's Finding that Howard Suffered Great Bodily Injury.

According to Randle, Howard did not suffer great bodily injury for purposes of section 12022.53, subdivision (d).

"It is well settled that the determination of great bodily injury is essentially a question of fact, not of law. '"Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding."' (*People v. Escobar* (1992) 3 Cal.4th 740, 750 (*Escobar*).) In reviewing a sufficiency of the evidence claim, "the reviewing court's role is a limited one. '"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]"' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 738–739.) Credibility is the exclusive province of the trier

of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) An appellate court cannot reject witness testimony accepted by the trier of fact as credible unless the testimony is inherently improbable or implausible in light of the whole record. (*People v. Jackson* (1992) 10 Cal.App.4th 13, 21.)

A. The Relevant Facts.

Dangerfield testified that after the shooting, Howard "was screaming he got hit in his finger." Because Williams was an unavailable witness, the jury heard a reading of his preliminary hearing testimony in which he testified that Howard's "right ring finger was shot" and bleeding.

B. Analysis.

Section 12022.53, subdivision (d) provides that if a person attempts to murder someone and "personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." Subdivision (f) of section 12022.7 defines great bodily injury as "significant or substantial physical injury."

In *People v. Caudillo* (1978) 21 Cal.3d 562, 588–589 (*Caudillo*) our Supreme Court interpreted the statute as requiring injury that is severe and protracted rather than transitory and short-lived. Subsequent cases applied that litmus test. But in 1992, *Escobar* disapproved of *Caudillo* and noted that the standard for great bodily injury "contains no specific requirement that the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function." (*Escobar*, *supra*, 3 Cal.4th at p. 750.) Under the statute, "a 'significant or substantial physical injury' need not meet any particular standard for severity or duration, but need only be 'a substantial injury *beyond* that inherent in the offense itself.' [Citations.]" (*People v. Le* (2006) 137 Cal.App.4th 54, 58–59 (*Le*).)

Cases involving gunshot wounds provide particular illumination. The victim in *Le* suffered soft tissue injury when he was hit by a bullet that traveled through his left leg, passed into his right inner thigh and then lodged in his right outer thigh. The injury was

sufficient to constitute great bodily injury. (*Le, supra,* 137 Cal.App.4th at pp. 58–59.) A finding of great bodily injury was upheld in *People v. Mendias* (1993) 17 Cal.App.4th 195, 199–201 upon evidence that the victim was shot in the thigh and suffered a burning sensation. In *People v. Lopez* (1986) 176 Cal.App.3d 460, 462 (*Lopez*), one victim was shot in "the right cheek of the hip" and fell to the ground screaming. A second victim was shot in the left leg; the bullet passed through her left thigh. (*Id*. at p. 462.) There was no evidence that either victim sought medical treatment. (*Id*. at p. 463, fn. 5.) The *Lopez* court found sufficient evidence of great bodily injury and rejected the appellant's argument that the injuries were too superficial, transitory and short-lived under *Caudillo*. (*Lopez, supra,* at p. 463.) In *People v. Wolcott* (1983) 34 Cal.3d 92, a bullet shattered when the victim was shot. He suffered a muscle tear in his calf and cuts to his arms and legs; he lost little blood, and no sutures were used. The victim "was released from the hospital after treatment and went to work the next day. He ha[d] no permanent disability, but fe[lt] pain when his arm [was] touched near [some] unremoved bullet fragments." (*Id*. at p. 107.) The court found that there was sufficient evidence of great bodily injury. (*Id*. at p. 108.)

The concept of great bodily injury has often been examined in the context of rape. In *Escobar,* for example, the court concluded that great bodily injury for purposes of section 12022.7 was established by evidence of "extensive bruises and abrasions over the [rape] victim's legs, knees and elbows, injury to her neck and soreness in her vaginal area of such severity that it significantly impaired her ability to walk." (*Escobar*, *supra*, 3 Cal.4th at p. 750.) At issue in *People v. Cross* (2008) 45 Cal.4th 58 was whether a pregnancy without medical complications from unlawful but nonforcible sexual conduct with a minor could support a finding of great bodily injury. Our Supreme Court answered in the affirmative. (*Id*. at pp. 60–61.)

We now turn to the issue at hand.

Taken as a whole, the trial testimony of Dangerfield and preliminary hearing testimony of Williams was sufficient to trigger the enhancement under section 12022.53, subdivision (d). The injury to Howard's finger was an injury beyond that which is

inherent in attempted murder because a defendant can be guilty of that crime without actually causing physical injury. Moreover, the jury permissibly found that the injury was a significant or substantial one based on evidence that Howard was screaming and bleeding after he was shot. That evidence implies that Howard suffered pain and at least suffered a soft tissue injury. As established by *Le* and the other gunshot wound cases, a soft tissue injury is sufficient for purposes of section 12022.7. We acknowledge that the analysis is a close call because there is no direct evidence of the extent of Howard's injury. But we conclude that the determination fell within the jury's province. As explained in *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836, "A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description. Clearly it is the trier of fact that must in most situations make the determination."

Randle urges us to conclude that as a matter of law Howard's injury was not severe enough to trigger a section 12022.53, subdivision (d) sentence enhancement. According to Randle, there is an inference that Howard suffered minimal or no physical consequences from the injury. We disagree. There was evidence that Howard was in pain and bled from the wound. Next, Randle distinguishes this case from *Le* and the other gunshot wound cases on the theory that they involved penetrating wounds. He points out that the record is silent as to whether Howard's injury was a superficial bullet graze or a more serious wound. The problem with this argument is that case law does not draw a line between penetrating bullet wounds and grazing bullet wounds. It is for the jury to determine whether either type of injury is significant or substantial based on their human experience.

In Randle's view, Howard's injury was inherent in the crime of attempted premeditated murder. But Randle cited no supporting law, and the point defies logic because physical injury is not an element in attempted premeditated murder. As a corollary of sorts, Randle argues that Howard's injury is insufficient because it does not rise to the level of the injuries in *Escobar*. In that case, the court noted that the injuries of the rape victim reflected a degree of brutality and violence substantially beyond that

necessarily present in a forcible rape. (*Escobar*, *supra*, 3 Cal.4th at p. 750.) We are unmoved by the argument. The point made in *Escobar* was simply that the injuries went beyond those inherent in the crime.

III. The Section 186.22 Enhancements on Counts 5 and 6 must be Modified.

Randle maintains that the trial court erred when it imposed consecutive three-year sentences in counts 5 and 6 pursuant to section 186.22, subdivision (b)(1)(A). He requests that we remand the matter back to the trial court for resentencing under section 186.22, subdivision (b)(5). The People agree that the trial court erred. In the People's view, we should simply modify the gang enhancement penalties on counts 5 and 6 to comply with subdivision (b)(5).

Except as provided in subdivisions (b)(4) and (b)(5), section 186.22, subdivision (b)(1)(A) provides that a person convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall receive an additional two, three or four years at the trial court's discretion. Subdivision (b)(5) provides: "[A]ny person who violates [subdivision (b)] in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." (§ 186.22, subd. (b)(5).)

Pursuant to section 664, subdivision (a) attempted premeditated murder is punishable by imprisonment for life with the possibility of parole. Because Randle was convicted of that crime in counts 5 and 6, he was subject to section 186.22, subdivision (b)(5) instead of subdivision (b)(1)(A). (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1228–1229.) Thus, on counts 5 and 6, Randle must receive a 15-year parole ineligibility period rather than the seven-year parole ineligibility period prescribed by section 3046, subdivision (a)(1). (*People v. Montes* (2003) 31 Cal.4th 350, 361, fn. 14.) In addition, the three-year additional and consecutive terms imposed in counts 5 and 6 pursuant to section 186.22, subdivision (b)(1)(A) must be stricken.

DISPOSITION

Randle's sentence is modified as follows. On count 5, he is sentenced to 40 years to life in prison based on a life sentence plus 25 years under section 12022.53, subdivision (d) and a 15-year parole ineligibility period under section 186.22, subdivision (b)(5). On count 6, he is sentenced to 35 years to life in prison based on a life sentence plus 20 years under section 12022.53, subdivision (c) and a 15-year parole ineligibility period under section 186.22, subdivision (b)(5). As modified, the judgment against Randle is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD