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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SAVATH TUCH HORN, Defendant and Appellant.	B228248 (Los Angeles County Super. Ct. No. NA066405)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed in part as modified; reversed in part with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Savath Tuch Horn, appeals after a jury: convicted him of first degree murder (Pen. Code[1], § 187); found as to the murder count he used a firearm within the meaning of section 12022.53, subdivisions (b), (c) and (d); convicted him of three counts of semiautomatic firearm assault (§ 245, subd (b)); found as to the aggravated assault counts the firearm use allegations to be true (§ 12022.5, subd. (a); and as to all counts found the gang allegations were true. (§ 186.22, subd. (b)(1)(C) & (5).) Defendant, a member of an Asian gang with a documented hatred of Latinos, challenged the four victims outside a store. The victims were Latinos who were unarmed and not gang members. Defendant pulled a gun from his waistband and shot at the four victims, killing one. The defense to the homicide and aggravated assault charges was mistaken identity. We affirm the judgments of conviction. We modify the sentence as count 1 and affirm it as modified. We order resentencing on counts 5, 6 and 7 and other modifications to the judgment.

II. GANG TESTIMONY, TERM SELECTION AND INEFFECTIVE ASSISTANCE ISSUES

First, defendant contends that the trial court impermissively permitted Long Beach Police Department Detective Joe Pirooz to testify concerning the gang allegations. Detective Pirooz testified the killing and aggravated assaults were committed for the benefit of defendant's gang. On appeal, defendant argues Detective Pirooz's testimony was beyond the allowable scope of admissible opinion evidence relying upon *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658. Defendant also objects on appeal to the use of hypothetical questions closely paralleling the facts of this case.

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[1] Future statutory references, unless otherwise indicated are to the Penal Code.

Defendant's contentions have no merit. No objection was interposed to this aspect of Detective Pirooz's testimony. Thus, defendant's contentions in this regard have been forfeited. (Evid. Code § 353; *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 81-82; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193.) Nor is there any merit to defendant's ineffective assistance of counsel contentions based on defense counsel's failure to object to Detective Pirooz's testimony. The aspects of the *Killebrew* case cited by defendant have been disapproved of by our Supreme Court in *People v. Vang* (2011) 52 Cal.4th 1038, 1044-1052. Hypothetical questions closely adhering to the facts of a gang case are in fact admissible. (*Id.* at pp. 1049-1051; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.) Further, as to the ineffectiveness issue, defendant has presented no evidence as to why defense counsel, who used Detective Pirooz's testimony during argument , failed to object. (*People v. Anderson* (2001) 25 Cal.4th 543, 569; *People v. Witcraft* (2011) 201 Cal.App.4th 659, 665.) Nonetheless, defendant has not demonstrated sufficient prejudice resulted from the absence of an objection to permit reversal on ineffective assistance of counsel grounds. (*People v. Gray* (2005) 37 Cal.4th 168, 206-207; *People v. Mace* (2011) 198 Cal.App.4th 875, 889.)

One last comment is in order on the gang issue. The opening brief argues Detective Pirooz improperly expressed an opinion on *defendant's* subjective views. We respectfully disagree with defendant that the prosecutor elicited such evidence. Any evidence which hypothetically might tangentially somehow touch on mental states or motivations was elicited in the form of answers to hypothetical inquiries. Such inquiries have explicitly been approved of by our Supreme Court. (*People v. Vang*, *supra*, 52 Cal.4th at pp. 1044-1052; *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 617-618.)

Second, defendant asserts the gang evidence compromised his due process rights to a reliable determination of his guilt. To begin with, this entire contention has been forfeited because no objection was interposed to the gang evidence's admissibility. (Evid. Code, § 353; *People v. Blacksher* (2011) 52 Cal.4th 769, 828-829 [failure to object on a state law ground that informs the trial judge of the interests at stake forfeits the constitutional issue]; *People v. Moore* (2011) 51 Cal.4th 1104, 1135 [failure to object on

state law grounds to other crimes evidence forfeits the constitutional issue]; *People v. Partida* (2005) 37 Cal.4th 428, 435 [defendant's Evid. Code, §352 objection preserved federal due process issue].) In any event, defendant has failed to demonstrate any violation of state law. Thus, his constitutional contentions are without merit. (*People v. Garcia* (2011) 52 Cal.4th 706, 755, fn. 27; *People v. Virgil* (2011) 51 Cal.4th 1210, 1234, fn. 4.)

Third, defendant argues the trial court failed to state its reasons for imposing the upper term on counts 5, 6 and 7. Defendant further argues the trial court failed to state its reasons for imposing the upper term on a section 12022.5, subdivision (a) gun use finding. No objection was interposed to the trial court's failure to state its reasons for imposing the upper terms as noted. Thus, all of defendant's contentions concerning the failure to state reasons for selecting the upper terms have been forfeited. (*People v. Scott* (1994) 9 Cal.4th 331, 352; *People v. Neal* (1993) 19 Cal.App.4th 1114, 1117.)

In any event, any error was harmless as there was no reasonable probability the trial court would have imposed less onerous sentences. (Cal. Const., art. VI, § 13; *People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1684-1685.) The following evidence supports the imposition of the upper term: defendant committed the killing and aggravated assaults while on probation; defendant had failed to comply with this probationary conditions including not reporting for probation supervision in Tulare County; defendant's convictions were numerous; defendant was a drug abuser; the offenses involved great violence and callousness in that the unarmed victims refused to fight defendant and were attempting to flee; the unarmed victims were vulnerable as they ran away from defendant; there were multiple victims; and, after the shooting, defendant took extraordinary steps to conceal his whereabouts by moving to ranch in an unpopulated area in Tulare County. Further, the existence of a single aggravating circumstance is sufficient to warrant a trial court in exercising its sentencing discretion to select the upper term. (*People v. Black* (2007) 41 Cal.4th 799, 813; *People v. Osband* (1996) 13 Cal.4th 622, 728.) Here, there were no mitigating circumstances. Because there was no reasonable probability of a different result, defendant's ineffective assistance contentions

based on the failure to object to the trial court's sentencing decisions are likewise without merit. (*People v. Gray*, *supra*, 37 Cal.4th at pp. 206-207; *People v. Mace*, *supra*, 198 Cal.App.4th at p. 889.)

Fourth, defendant argues that the imposition of the section 12022.53, subdivision (d) 25-years to life enhancement under count 1 violates the federal double jeopardy clause. This contention has no merit. (*Plascencia v. Alameida* (9th Cir. 2006) 467 F.3d 1190, 1204; *People v. Izaguirre* (2007) 42 Cal.4th 126, 128-134; *People v. Sloan* (2007) 42 Cal.4th 110, 120-123.)

III. OTHER SENTENCING ISSUES

A. Consecutive Gun Use Enhancements

Defendant argues the trial court erroneously imposed consecutive gun enhancements on counts 6 and 7 which were ordered to run concurrently. Counts 6 and 7, assault with a semiautomatic firearm, were ordered to run concurrently with counts 1 and 5. But the trial court ordered the counts 6 and 7 section 12022.5, subdivision (a)(1) firearm use enhancements to run consecutively. Because counts 6 and 7 were ordered to run concurrently, any enhancement as to those counts may not run consecutively. (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1016; *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310.) Because of this and other jurisdictional errors, we remand for resentencing on counts 5, 6 and 7 only so the trial court can reconsider its sentencing choices. (*People v. Sanchez* (1991) 230 Cal.App.3d 768, 771-772; *People v. McElroy* (1989) 208 Cal.App.3d 1415, 1431 disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)

B. Stayed Gang Finding And Enhancements

On three of the four counts, the trial court purported to stay the section 186.22 gang finding and enhancements pursuant to section 654, subdivision (a). The only count where the gang finding or enhancement was not stayed was the aggravated assault charge in count 5. As to count 1, the first degree murder of Addiel Mejia, the trial court orally stayed the section 186.22 finding pursuant to section 654, subdivision (a). There is no basis for staying the finding pursuant section 654, subdivision (a). The section 186.22 finding is not an enhancement. (*People v. Campos* (2011) 196 Cal.App.4th 438, 448; see *People v. Jefferson* (1999) 21 Cal.4th 86, 101.) Rather, the effect of a true finding in a case involving a violent felony, such as first degree murder, is to set a minimum 15-year term pursuant section 186.22, subdivision (b)(5).[2] (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004, 1010; *People v. Campos*, *supra*, 196 Cal.App.4th at pp. 445, fn. 2, 448-449.) An improper stay order pursuant to section 654, subdivision (a) is a legally unauthorized sentence subject to correction on direct appeal. (*People v. Scott*, *supra*, 9 Cal.4th at p. 354, fn. 17; *People v. Perez* (1979) 23 Cal.3d 545, 549-550; *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589.) Nor could the trial court strike the finding which set the 15-year minimum parole eligibility date pursuant to sections 186.22, subdivision (g) or 1385, subdivision (a). (*People v. Campos*, *supra*, 196 Cal.App.4th at pp. 448-454.) Upon remittitur issuance, the trial court is to vacate the section 654, subdivision (a) stay on the gang finding as to count 1.

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[2] Section 186.22, subdivision (b)(1) and (5) state: "(b)(1) Except as provided in paragraphs (4) and (5), any person who is 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, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . Except as provided in paragraph (4), any person who violates this subdivision 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."

As noted, the trial imposed the 10-year section 186.22, subdivision (b)(1)(C) enhancement as to count 5. But, the trial court imposed and pursuant to section 654, subdivision (a) stayed the 10-year section 186.22, subdivision (b)(1)(C) enhancements as to counts 6 and 7. This was a jurisdictional error. However, the trial court, unlike in connection with the homicide count, could have stricken the two gang enhancements in counts 6 and 7 pursuant to section 186.22, subdivision (g). Upon remittitur issuance, the trial court may exercise its discretion and impose or strike the two gang enhancements as is appropriate. If the section 186.22, subdivision (b)(1)(C) enhancements are stricken, the trial court must state its reasons in orally on the record and set them forth in writing in the clerk's minutes. (*People v. Torres* (2008) 163 Cal.App.4th 1420, 1433, fn. 7.)

C. Court Security Fees And Facilities Assessments

The trial court neglected to orally impose the $40 court security fees (§ 1465.8, subd. (a)(1)) and $30 facilities assessments. (Gov. Code, § 70373, subd. (a)(1)) The court facilities assessments and security fees must be imposed on all four counts. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3 [Gov. Code, § 70373, subd. (a)(1)]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865–866 [§ 1465.8, subd. (a)(1)].)

D. Parole Restitution Fine

The trial court did not orally impose the $10,000 section 1202.45 parole restitution fine and then order it stayed. The section 1202.45 parole restitution fine is mandatory given the imposition of the section 1202.4, subdivision (b)(1) restitution fine in an equal sum. (*People v. Hong* (1998) 64 Cal.App.4th 1071, 1080; see *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

E. Abstract Of Judgment

The parties advert to errors in the abstract of judgment which warrant correction. Since we are remanding for resentencing on the three aggravated assault counts, any of these cited errors should be corrected. The corrected abstract of judgment must include all section 186.22 findings except for any which are stricken as to counts 5, 6 and 7, if such occurs. Because of the complexity of the sentencing issues, the trial court is to actively and personally insure the clerk accurately prepares a correct amended abstract of judgment. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

The judgment of convictions are affirmed in their entirety. As to count 1, the stay of the section 186.22 gang finding is reversed. The oral pronouncement of a 10-year additional term as to count 1 is reversed. The gang finding which imposes a 15-year minimum parole eligibility date is ordered be imposed as to count 1. The sentences as to counts 5, 6 and 7 are reversed. The court security fees and facilities assessments described in part III(C) of this opinion are to be imposed on each count. The $10,000 section 1202.45 parole restitution fine is to be imposed and stayed. The judgment is affirmed in all other respects. Once the remittitur issues and resentencing is concluded

on counts 5, 6, and 7, the superior court clerk is to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.