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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR ENRIQUE VERA,

Defendant and Appellant.

B228999

(Los Angeles County
Super. Ct. No. SA073334)

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

Dennis P. O'Connell, 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, Senior Assistant Attorney General, Jaime L. Fuster and
Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

After being charged with attempted murder (Pen. Code, §§ 187, 664),¹ Hector Enrique Vera (appellant) was convicted by a jury of attempted voluntary manslaughter (§§ 192, subd. (a), 664). The jury also found true the allegations that he personally used a firearm, personally and intentionally discharged a firearm causing great bodily injury, and personally inflicted great bodily injury (§§ 12022.53, subds. (b), (c) & (d); 12022.7). Prior to sentencing, the People moved to amend the information on the ground that the section 12022.53 enhancements were inapplicable to voluntary manslaughter charges, and asked that they be replaced with a section 12022.5, subdivision (a) enhancement. The court allowed the amendment and imposed sentence for the section 12022.5 enhancement. Appellant appeals, contending that it was error for the court to impose sentence for an enhancement that was not charged in the information. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and his roommate, Fabio Contreras, became embroiled in an argument at their apartment on January 16, 2009. Appellant took out a gun, fired three shots at Contreras, and kicked him in the torso and head. Appellant was charged with attempted willful, deliberate, and premeditated murder. The information also alleged that in the commission of the attempted murder, appellant personally used and intentionally discharged a firearm causing great bodily injury to the victim. Appellant was also accused of personally inflicting great bodily injury upon the victim. (§§ 12022.53, subds. (b), (c) & (d), 12022.7, subd. (a).)

At trial, appellant testified on his own behalf. He confirmed that he had argued with Contreras, but claimed that Contreras attacked him first with a golf club. He said he took out his gun to stop Contreras from continuing to hit him. He admitted that he fired three shots.

¹ All further statutory references are to the Penal Code.

As noted, after appellant was convicted of the lesser included offense of attempted voluntary manslaughter, the People sought to amend the information, noting that section 12022.53 did not apply to the crime of manslaughter. Appellant's counsel argued that the trial court was bound by the allegations charged in the information. The court ruled, "[I]t would not be serving the ends of justice to say that [appellant] gets a pass on the gun allegation when, in fact, the jurors found that he used, fired a weapon. [Appellant] admitted it on the stand. And I think the word 'windfall' is correct that [the prosecutor] is using, that [appellant] should not receive a windfall because there was a technical error made in the verdict form [and] that he was always on notice that he was going to receive an enhanced sentence because of the use of a gun if that was found to be true."

The court then sentenced appellant to 10 years, consisting of three years for the attempted voluntary manslaughter, three years for the section 12022.7 enhancement, and four years for the section 12022.5 enhancement.

DISCUSSION

It is undisputed that section 12022.53 does not apply to the crime for which appellant was convicted, attempted voluntary manslaughter. Nonetheless, appellant contends that because the jury found the section 12022.53 enhancements true, the court was barred from imposing a sentence pursuant to section 12022.5. In support of his argument, he points to the language of section 12022.53, subdivision (j) that states: "When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another enhancement provides for a greater penalty or a longer term of imprisonment." In appellant's view, given the jury's finding, the court was caught in a "Catch 22." It could not impose a sentence pursuant to section 12022.53 because it does not apply to the crime of attempted voluntary manslaughter and it could not impose a sentence pursuant to section 12022.5 because section 12022.53, subdivision (j) does not allow a sentence authorized under any

other provision of law, unless the other enhancement provides for a greater penalty. The potential sentence under section 12022.5 provides a lesser penalty than that possible pursuant to section 12022.53. Thus, appellant asserts, the trial court was left in a position where it could impose no sentence for the firearm enhancement.

The flaw in appellant's circular argument is patently obvious. If section 12022.53 does not apply to the crime of attempted voluntary manslaughter, the limiting language in subdivision (j) is equally inapplicable. The question is whether the court had the authority to impose a sentence pursuant to section 12022.5 even though the jury did not find appellant violated that specific code section. Appellant does not directly address that issue.

We find the answer to our inquiry in *People v. Strickland* (1974) 11 Cal.3d 946 (*Strickland*). There, the defendant was charged with murder. The jury convicted him of the lesser included offense of voluntary manslaughter and found true the allegation that he used a firearm within the meaning of section 12022.5. (*Id.* at p. 951.) As in our case, the enhancement did not apply to the crime for which the defendant was convicted. The Supreme Court concluded that although the defendant could not be sentenced pursuant to section 12022.5, he was subject to additional punishment under section 12022 for being armed with a deadly weapon during the commission of the voluntary manslaughter because that section ““would be applicable in any case in which 12022.5 applies.”” (*Id.* at p. 961, citing *People v. Provencher* (1973) 33 Cal.App.3d 546, 550.) With respect to the fact that the section 12022 enhancement was not alleged, the court found that as the defendant had been charged with using a firearm under section 12022.5, he had notice that his conduct could also violate section 12022's prohibition against using a deadly weapon during the commission of an offense. (*Strickland, supra*, at p. 961.)

The principle enunciated in *Strickland* applies with more force in the instant case. Here, appellant was specifically charged with using a firearm during the commission of the charged crime. The jury's determination that he used a firearm is precisely the same finding necessary to enhance a sentence pursuant to either section 12022.53 or 12022.5. Indeed, the same jury instruction is used to define use of a firearm within the meaning of

both sections. (CALCRIM No. 3146.) Because the jury made the necessary factual finding, it was proper for the trial court to sentence appellant pursuant to section 12022.5. (*Strickland, supra*, 11 Cal.3d at p. 961.)

DISPOSITION

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.