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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.

B232947

(Los Angeles County
Super. Ct. No. BA282476)

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

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, Steven D. Matthews and
David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Zenaida Christina Cordova appeals from the judgment entered following a jury trial which resulted in her conviction of two counts of carjacking (Pen. Code, § 215)¹ (counts 1 & 4),² during one of which (the carjacking committed in count 1) she personally used a firearm (§ 12022.53, subd. (b)),³ kidnapping to commit carjacking (§ 209.5) (count 2), and kidnapping to commit robbery (§ 209, subd. (b)(1)) (count 3), each of which were committed for the benefit of a criminal street gang (§ 186.22)).⁴ At resentencing proceedings held on March 25, 2011, the trial court sentenced Cordova to 15 years to life in prison with a consecutive term of 10 years. Although the total sentence will likely remain the same, we remand the matter to allow the trial court to impose the sentences as to counts 2 and 3 under the proper statutes, to correct the abstract of judgment and to forward a corrected copy of the abstract to the Department of Corrections. In all other respects, we affirm the judgment.

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

² Count 4 was ordered dismissed as it is a lesser included offense of count 2, kidnapping to commit carjacking. (See *People v. Cordova* (July 29, 2008, B198305) [nonpub. opn.] (*Cordova I*.)

³ Section 12022.53, subdivision (b), provides: “Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply.”

⁴ Section 186.22, subdivision (d), provides for time in county jail or prison when one is convicted of a crime “for the benefit of, at the direction of, or in association with any criminal street gang [members]”

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*⁵

The sufficiency of the evidence is not in dispute. On April 13, 2005, Cordova and two accomplices kidnapped Bryan Johnson to carjack and rob him. On April 14, 2005, Cordova, who personally used a firearm during the offense, carjacked Karen Arakelian with the aid of three accomplices. Cordova committed each of the crimes for the benefit of a criminal street gang.

2. *Procedural history.*

a. *Trial.*

Cordova was tried by a jury which found her guilty of two counts of carjacking (§ 215) (counts 1 & 4), with a finding as to count 1 that she personally used a firearm during the offense (§ 12022.53, subd. (b)), kidnapping to commit carjacking (§ 209.5) (count 2) and kidnapping to commit robbery (§ 209, subd. (b)(1)) (count 3). In addition, the jury determined that each of the crimes had been committed for the benefit of a criminal street gang. (§ 186.22.) The trial court sentenced Cordova to a term of 30 years to life in prison. Cordova appealed.

b. *Cordova I.*

In an opinion filed on July 29, 2008 (*Cordova I*), the appellate court considered a number of issues, including those relating to Cordova's sentencing. Initially, the court noted that the jury had found Cordova guilty of kidnapping to commit carjacking (count 2) and carjacking (count 4). As the People conceded, carjacking is a lesser included offense of kidnapping to commit carjacking. Under these circumstances, Cordova's conviction of carjacking as charged in count 4 should have been reversed and the appellate court remanded the matter to the trial court with directions to dismiss the count.

⁵ For a more complete statement of facts, see *Cordova I, supra*, B198305.

The appellate court also noted that, for the carjacking alleged in count 1, the trial court had sentenced Cordova to 30 years to life in prison. The sentence consisted of the five-year mid-term for carjacking (§ 215), plus 10 years for Cordova’s use of a firearm during the offense (§ 12022.53, subd. (b)) plus 15 years to life for the finding that she committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)(B)).⁶ Cordova claimed, and the People and appellate court agreed, that the trial court erred by imposing the five-year mid-term. “[S]ection 186.22, subdivision (b)(4) . . . is an alternate penalty provision because it . . . ‘sets forth an *alternate* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute.’ [Citation.]” (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6., italics in original.) It follows that, because section 186.22, subdivision (b)(4)(B) provides an alternate penalty, the trial court erred when it *also* imposed the five-year mid-term for the offense.

With regard to counts 2 and 3, the jury found true the allegations the crimes were committed for the benefit of a criminal street gang pursuant to section 186.22, subdivision (b)(1). In addition, Cordova’s sentence included prison terms of life with the possibility of parole for the findings she kidnapped the victim during the commission of a carjacking as alleged in count 2 (§ 209.5) and kidnapped the victim to commit robbery as alleged in count 3 (§ 209, subd. (b)(1)). Each sentence was run consecutively to the other and to the term imposed for count 1. However, on a later date, and without citation to

⁶ Section 186.22, subdivision (b), provides in relevant part: “(4) Any person who is convicted of a felony enumerated in this paragraph 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, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of : [¶] (A) The term determined by the court pursuant to Section 1170 for the underlying conviction [¶] (B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; *carjacking, as defined in Section 215*; a felony violation of Section 246; or a violation of Section 12022.55.” (Italics added.)

statutory authority, the trial court stayed the life sentences. The appellate court vacated the sentences imposed for counts 2 and 3 and remanded the matter for resentencing as to those counts.

Finally, the appellate court noted that it was necessary to strike a \$20 DNA sampling charge imposed by the trial court. Legislation enacted pending Cordova's appeal rendered inapplicable the Government Code section which otherwise would have mandated such a charge.

Cordova I affirmed the judgment, "except that appellant's conviction for carjacking (count 4) [was] reversed, appellant's sentence, including the DNA sampling charge, [was] vacated, and the matter [was] remanded to the trial court with directions to dismiss count 4, and resentence appellant on the remaining counts consistent with [the court's] opinion. The trial court [was] also directed to forward to the Department of Corrections an amended abstract of judgment." Cordova appealed.

c. Cordova II.

According to this court's nonpublished opinion in *People v. Cordova* (Nov. 23, 2010, B217448) (*Cordova II*), the trial court committed several errors when it resentenced Cordova. The *Cordova II* court first determined that the trial court erroneously believed it lacked the discretion to impose concurrent sentences on counts 1 through 3. The appellate court recognized that in *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262, the court stated that "[a]bsent an express statutory provision to the contrary, section 669 provides that a trial court shall impose either concurrent or consecutive terms for multiple convictions." In view of *Rodriguez*, the *Cordova II* court "vacated [Cordova's] sentence and remanded for resentencing consistent with that opinion." The court continued: "Although we alluded to the issue of concurrent sentences, we had no occasion to reach the issue of whether a sentence on any count should have been imposed concurrently or consecutively, and *Cordova I* contains no language directing the trial court to impose consecutive (or concurrent) sentences on any count. . . . We express no opinion as to what, following remand, [Cordova's] sentence, or

any component thereof, should be or, in particular, as to whether [Cordova's] sentence on any count should be imposed consecutively as opposed to concurrently.” (*Cordova II, supra*, at p. 5.)

Cordova II also addressed the abstract of judgment. The court initially indicated that, although it had directed the trial court to dismiss count 4, it had made no mention of section 654.⁷ Count 4, carjacking, was to be dismissed because that offense amounted to a lesser included offense of count 2, kidnapping to commit carjacking. Accordingly, the abstract of judgment was to be modified to delete any reference to section 654.

In addition, as to count 1, the abstract of judgment indicated that the trial court imposed a section 186.22, subdivision (b)(4) enhancement of 10 years in prison (crime committed for the benefit of a gang) when the enhancement was actually imposed pursuant to section 12022.53, subdivision (b) (personal use of a firearm). As the abstract of judgment “must reflect the trial court’s oral judgment,” the *Cordova II* court “direct[ed] the trial court to amend the abstract . . . accordingly.” (*Cordova II, supra*, B217448, at p. 6.)

Finally, the *Cordova II* court indicated that the People claimed “that item 8 of the abstract . . . must be completed to reflect that the court imposed [Cordova’s] prison sentence of 15 years to life as to each of counts 1 through 3 pursuant to . . . section 186.22, subdivision (b).” The court agreed and indicated that it would “direct the trial court to amend the abstract of judgment accordingly.” (*Cordova II, supra*, B217448, at p. 6.)

d. *Proceedings held on March 25, 2011.*

At proceedings held on March 25, 2011, the trial court, referring to the court’s opinion in *Cordova II*, indicated that “[t]he Court of Appeal[,] having affirmed

⁷ Section 654, subdivision (a), provides in relevant part that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

[Cordova's] convictions[,] has ordered this court to resentence in accord with their opinion” The trial court then heard argument by the parties.

Counsel for Cordova asserted that the sentences for counts 1, 2 and 3 should run concurrently, in part because Cordova had wished to take an offer made by the prosecution before trial. She was, however, unable to do so. Counsel explained: “[A]t the time this case went to trial, Miss Cordova had a 17-year offer . . . that she wanted to take, begged, pleaded numerous times, including at the close of the People’s case, to accept that deal. [¶] Unfortunately for Miss Cordova, there was a co-defendant, and it was a package offer, and she was not permitted to take that deal and, as a result, was convicted of the charges [¶] So[,] consistent with her willingness to resolve the case early on but not being allowed to, I would ask the court to impose the [lowest] sentence that the court can, and I believe that that would be accomplished by running counts 1, 2 and 3 concurrent.”

The prosecutor argued that, “as to counts 1, 2 and 3, those were separate victims, and . . . normally it’s an anomaly, but . . . 12022.53[, subdivision] (b) was ten years consecutive for that section [P]lus the gang allegations, [indicate] that there was a mandate that [the sentences should be] consecutive.”

The trial court indicated that it had presided over the trial and that the jury had been unable to reach a verdict as to Cordova’s codefendant, although he had been “the primary defendant in [the] case.” When he was retried, the jury was again unable to reach a verdict. The trial court indicated it believed that, without the primary defendant, Cordova “would not [have been] involved in” these incidents. On the other hand, the trial court pointed out that Cordova had chosen “a gang life, and [she] chose a certain style, and the jury ha[d] spoken”

After weighing the various factors and indicating that it had carefully read the appellate court’s opinion, the trial court sentenced Cordova as follows: “On count 1, violation of . . . section 215 [(carjacking)], the sentence will be 15 years to life, pursuant to [section] 186.22[, subdivision] (b)(4)(B) [(gang allegation for carjacking)], and

pursuant to . . . section 12022.53[, subdivision] (b) [(use of a firearm)], ten years to run consecutively[,] [for a] [t]otal sentence [as to] count 1 [of] 15 years to life plus ten years. [¶] On count 2, . . . section 209.5 [(kidnapping to commit carjacking)], 15 years to life pursuant to [section] 186.22[, subdivision] (b)(4)(B). Total sentence count 2, 15 years to life, to run concurrently to count 1. [¶] Count 3, . . . section 209[, subdivision] (b), 15 years to life, pursuant to [section] 186.22[, subdivision] (b)(4)(B). Total sentence [for] count 3, 15 years to life, and that would run concurrently to counts 1 and 2. [¶] Count 4, . . . section 215 is dismissed as a lesser offense [of] count 2. Total sentence, 15 years to life, plus ten years.”

The trial court ordered Cordova to pay a \$200 restitution fine (§ 1202.4, subd. (b)), a suspended \$200 parole revocation restitution fine (§ 1202.45), and a \$90 court security fee (§ 1465.8, subd. (a)(1)). The court granted Cordova presentence custody credit for 2,268 days.

Cordova filed a timely notice of appeal on May 6, 2011.

CONTENTIONS

After examination of the record, on September 9, 2011, appointed counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed September 9, 2011, and again on December 6, 2011, the clerk of this court advised Cordova to submit within 30 days any contentions, grounds of appeal or arguments she wished this court to consider. In response, on December 6, 2011, Cordova personally filed a document in which she simply asked for “help.” She indicated that she had no money for an attorney and received only “\$10.00 to buy [her] hygiene.” Finally, she stated that her “parents are both dead and [she] only ha[s] one sister [who] takes care of [her] two children.” It is unclear whether Cordova is asking for financial assistance or some other form of “help.” She is, however, represented by counsel.

After independently reviewing the record and the sentencing statutes applied in this matter, on March 13, 2012, this court requested that the parties address the following

issue: “Whether, if the jury found with regard to counts 2 and 3, that appellant committed the offenses for the benefit of a criminal street gang within the meaning of . . . section 186.22 . . . , the trial court erred by imposing sentence as to those counts pursuant to . . . section 186.22, subdivision (b)(4)(B)?” Appellant filed a response on March 29, 2012. The People filed a reply on May 24, 2012.

DISCUSSION

Subdivision (b)(5) of section 186.22 provides: “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.” In count 2, Cordova was found guilty of kidnapping to commit carjacking (§ 209.5), a crime punishable by “life with the possibility of parole.” In count 3, the jury convicted her of kidnapping to commit robbery, the punishment for which is “imprisonment in the state prison for life with the possibility of parole” in cases where no person suffers death or bodily harm. Accordingly, as to counts 2 and 3, Cordova should have been sentenced pursuant to section 186.22, subdivision (b)(5) rather than subdivision (b)(4)(B), which applies to carjacking.

Because the trial court sentenced Cordova to a total term of 15 years to life, with a consecutive term of 10 years, a sentence proper under the facts of this case, the fact that it imposed sentences for two of the counts under the wrong statute makes little, if any, practical difference. However, although the resulting sentence will likely be the same, we remand for resentencing in part because subdivision (b)(5) of section 186.22 provides for punishment of imprisonment in the state prison for life or “until a minimum of 15 *calendar years* have been served” (italics added) and so that the Abstract of Judgment may be modified to properly reflect the sentence imposed. As we previously noted, the Abstract of Judgment must reflect the trial court’s oral judgment.

DISPOSITION

The judgment is affirmed, except that the sentences imposed with regard to counts 2 and 3 are vacated and the matter is remanded to the trial court to resentence appellant as to those counts consistent with this opinion. The trial court is then directed to forward to the Department of Corrections a corrected Abstract of Judgment properly reflecting the statutes under which the sentences as to counts 2 and 3 were imposed.

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KITCHING, J.

We concur:

CROSKEY, Acting P.J.

ALDRICH, J.