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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB MEDINA,

Defendant and Appellant.

2d Crim. No. B233379
(Super. Ct. No. 1329846)
(Santa Barbara County)

Jacob Medina appeals the judgment entered after he pled no contest to attempted murder (Pen. Code,¹ §§ 187, subd. (a), 664), and actively participating in a criminal street gang (§ 186.22, subd. (a), hereinafter referred to as the gang crime²). He also admitted the allegation that the attempted murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). The trial court sentenced him to 15 years in state prison consisting of a five-year term for the attempted murder, a concurrent three-year term for the gang crime, and a consecutive 10-year term for the gang enhancement allegation. Appellant contends the court violated section 654 by failing to stay the sentence on the gang crime, and abused its discretion in refusing to strike the gang

¹ All further undesignated statutory references are to the Penal Code.

² In referring to the substantive section 186.22 charge as "the gang crime," we adopt the nomenclature recently used by our Supreme Court in *People v. Mesa* (2012) 54 Cal.4th 191.

enhancement allegation at sentencing. We shall order the three-year term imposed for the gang crime stayed pursuant to section 654. Otherwise, we affirm.

STATEMENT OF FACTS

Because appellant pled no contest prior to trial, the relevant facts are derived from the presentencing report. On September 20, 2007, appellant and approximately 10 fellow members of the Eastside gang set out to find and attack a rival Westside gang member. Appellant brought a "special" knife from his residence because the ones his fellow gang members had "weren't good enough."

At about 10:20 p.m., appellant and his fellow gang members were driving around in the area of the Westside gang's territory when they saw the 17-year-old male victim³ walking up the street. The gang parked around the corner so that the victim could not see them. As the gang approached the victim, one of them yelled, "He's a weak sider, he's a weak sider." Appellant and his fellow gang members proceeded to grab the victim and stab him multiple times. After the others had stopped stabbing the victim, appellant stabbed him an additional five to ten times. One of appellant's accomplices told the police that appellant was "jerking it [his knife] to make the wound bigger from side to side" and "was trying to kill the guy." The victim suffered approximately 35 lacerations and required emergency medical treatment. One of the lacerations to his abdomen caused bleeding in his lung cavity, which prompted his transfer to the hospital's intensive care unit.

After appellant and his fellow gang members fled the scene, they washed their knives in bleach, encased them in a block of concrete, and dropped the concrete block into the pond at the Santa Barbara Bird Refuge. The knives were subsequently recovered.

Appellant was arrested two years later. At the time of his arrest, he was enrolled as a student and worked at Santa Barbara City College.

³ The victim's name is not identified in the record. He is simply referred to as "John Doe."

DISCUSSION

I.

Section 654

Appellant contends the court erred in failing to stay the three-year sentence imposed for the gang crime (§ 186.22, subd. (a)) pursuant to section 654 because it effectively punishes him a second time for the attempted murder for which he was also sentenced. In light of recent Supreme Court precedent, we agree.

"[T]he gang crime has three elements: (1) '[a]ctive participation in a criminal street gang, in the sense of participation that is more than nominal or passive,' (2) "'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,'" and (3) 'the person "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." [Citation.].' [Citation.]" (*People v. Mesa, supra*, 54 Cal.4th at p. 197.) In *Mesa*, our Supreme Court held that any sentence imposed for the gang crime must be stayed pursuant to section 654 when the third element of the crime is established by proof the defendant committed a felony for which he or she has been separately punished. (*Id.* at p. 196.)

Here, it is undisputed that appellant was charged with and convicted of the gang crime based on the underlying felony of attempted murder, for which he received a five-year prison sentence.⁴ It necessarily follows that appellant could not be separately punished for the gang crime.

⁴ In pleading no contest to both charges, appellant admitted the following: "On 9/20/07 in Santa Barbara County I [,] along with another Eastside Gang Member[,], attempted to kill another human being with malice aforethought. At the time I was an active participant in the Eastside criminal street gang which had 3 or more members. The attempted murder was done for the benefit of the Eastside gang with the specific intent to promote the gang's criminal conduct. The primary activity of the gang on 9/20/07 was attempted murder."

II.

Gang Enhancement Allegation

Appellant claims the court abused its discretion in declining to dismiss the gang enhancement allegation (§ 186.22, subd. (b)). We conclude otherwise.

Section 186.22, subdivision (g) establishes the scope of a trial court's discretion to strike a gang enhancement: "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section . . . in an unusual case where the interests of justice would best be served . . ." Trial courts also have authority to strike enhancement findings "in furtherance of justice" pursuant to section 1385, subdivision (a). Whether a case is "unusual," and whether the interests of justice would be served by striking the gang enhancement, are matters for the trial court's sound discretion. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530-531; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) It is appropriate for the trial court to consider whether the circumstances of the offense and the defendant's background take the case outside the spirit of the sentencing statute. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review the trial court's refusal to strike the enhancement for abuse of discretion. Under this deferential standard, the court's ruling will not be reversed on appeal unless the appellant demonstrates that the court exercised its discretion in an ". . . arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, neither appellant's history nor the circumstances of the charged offense took the case outside the spirit of the statutory scheme that requires increased punishment for gang-related offenses. In arguing to the contrary, appellant downplays the egregiousness of the crime of which he was convicted and ignores the facts demonstrating his primary participation in it. While he highlights the evidence indicating his attempts to reform himself after the crime was committed, no mention is made of the facts that he also (1) continued to associate with fellow gang members; (2) was convicted

in 2008 of being in possession of a deadly weapon; and (3) was charged in 2010 with committing vandalism while in jail. He also fails to account for the fact that the court considered the evidence of his reformation in imposing the low term for the attempted murder.⁵

The record also belies appellant's claim that the court erroneously believed it lacked the authority to consider his post-arrest conduct in deciding whether to strike the gang enhancement. The record citation he offers in support of this assertion merely reflects the court's statement that "[t]he fact that [appellant] has turned his life around is not something that the legislature has countenanced as a reason *for granting probation* in this sort of case" (Italics added.) Contrary to appellant's assertion, the record reflects the court's understanding that its task was to determine "a proper punishment given the totality of the circumstances before the Court." The court reasoned that although appellant had "apparently made positive changes in his life" after the crime was committed, the interests of justice would not be served by striking the 10-year gang enhancement. Appellant fails to meet his burden of demonstrating that this ruling amounts to an abuse of discretion.

DISPOSITION

The judgment is modified to stay the three-year sentence on count 3 (§ 186.22, subd. (a)) pursuant to section 654. The clerk of the superior court is directed to amend the abstract of judgment and forward a certified copy thereof to the California

⁵ Appellant notes the court initially made comments indicating its belief that it could not strike the gang enhancement without violating appellant's plea bargain. Appellant goes on to acknowledge, however, that the court subsequently stated, "[i]f I were to exercise discretion, I don't think this would be a case where [striking the gang enhancement] would in any sense be appropriate in any event . . . , so I'll exercise discretion and make that finding also."

Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Frank J. Ochoa, Judge
Superior Court County of Santa Barbara

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