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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DARIUS ISAIAH PEETE,

Defendant and Appellant.

D060504

(Super. Ct. No. SCD230827)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed as modified; remanded with directions.

I.

INTRODUCTION

The People filed an information charging codefendants Darius Isaiah Peete and Jemere Guillory with various crimes arising from the November 5, 2010 shooting of victim Eugene Henderson. The People charged Peete with attempted premeditated

murder (Pen. Code, §§ 664, 187, subd. (a))¹ (count 1) and assault with a firearm (§ 245, subd. (a)) (count 2), and alleged that Peete committed both crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). In addition, as to count 1, the People alleged various firearm enhancements (§ 12022.53, subs. (b), (c), and (d)). As to count 2, the People alleged that Peete personally used a firearm (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a).)

The People charged codefendant Guillory with two counts of dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) (counts 3 and 4). The People alleged that Guillory committed the offenses charged in counts 3 and 4 on or about November 9, 2010, four days after the shooting. The People alleged that as to count 3, the victim was Keith Williams,² and that as to count 4, Henderson was the victim. The People also alleged that Guillory committed both crimes for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1).

The jury found Peete guilty on both counts 1 and 2, and found true all of the enhancement allegations as to those counts. The jury was unable to reach a verdict as to Guillory's guilt on counts 3 and 4, and the trial court declared a mistrial as to these counts. The trial court sentenced Peete to an aggregate term of 40 years to life in prison

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

² At trial, the People presented evidence that Williams was with Henderson, Peete, and Guillory just prior to the shooting.

on count 1. The trial court stayed imposition of sentence on count 2 pursuant to section 654.

On appeal, Peete's principal contention is that the trial court erred in denying his motion to sever his trial from Guillory's trial, because Peete and Guillory were not jointly charged with any crime. We conclude that any error in jointly trying Peete with Guillory was harmless because Peete has not demonstrated that the evidence offered at the joint trial pertaining to the charges against Guillory (counts 3 and 4) would have been inadmissible in a separate trial involving only the charges against Peete (counts 1 and 2). As we explain in the body of this opinion, evidence that a witness fears retaliation for testifying, and the basis for that fear, is admissible for the purpose of demonstrating the witness's credibility. Thus, the evidence offered at the joint trial pertaining to alleged instances of witness intimidation committed by Guillory would have been admissible in a separate trial involving only the charges against Peete. Accordingly, we affirm Peete's convictions on counts 1 and 2.

Both the People and Peete raise claims of sentencing error. For reasons explained in part III.B., *post*, we modify the trial court's sentence on count 1 and affirm the judgment as so modified.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Counts 1 and 2*

Late one evening, Peete, a member of the Skyline Piru criminal street gang, and codefendant Guillory, a member of the 5-9 Brim gang, encountered several people,

including Henderson and Henderson's friend, Williams, at a neighborhood park.

Henderson was a member of the Lincoln Park gang. Skyline Piru and Lincoln Park are enemies.

After visiting peacefully for a while, the group began to disperse. Peete invited Henderson to accompany him to meet some young women. Shortly thereafter, Guillory left the park. Peete told Williams that there would not be room in his car for Williams. Williams began to walk away from the park, toward Henderson's girlfriend's house, and Peete and Henderson began to walk out of the park in the opposite direction.

Minutes later, Peete pulled out a gun and began shooting at Henderson. Henderson suffered gunshot wounds to the face and back. After shooting Henderson, Peete ran away. Henderson jogged to his girlfriend's house, and she summoned the police and medical assistance. Henderson told Williams and his girlfriend that "the dude I was with" had just shot him. Henderson told a responding officer that "Puffaru" had shot him and that the shooter "was from Skyline." At trial, Henderson identified Peete as the shooter and testified that he knew Peete from having previously spent time in juvenile hall together. Henderson also explained that Peete's nickname was "Baby Puff."³

B. *Counts 3 and 4*

At trial, the People presented evidence that Guillory attempted to dissuade Henderson and Williams from cooperating with the police concerning the shooting. (See pt. III.A.3.a.(ii.), *post.*)

³ A gang detective testified that members of the Skyline Piru gang often add the letters "ru" to their nicknames, such as "Puffaru."

III.

DISCUSSION

A. *Any error that the trial court committed in denying Peete's motion to sever was harmless*

Peete contends that the trial court erred in denying his motion to sever. Peete argues that joinder was improper under section 1098 and *People v. Ortiz* (1978) 22 Cal.3d 38 (*Ortiz*) because Peete and Guillory were not jointly charged with any crime. The People contend that the trial court properly jointly tried the defendants because Peete and Guillory were charged with crimes that "[arose] out of a single set of circumstances." (*People v. Hernandez* (1983) 143 Cal.App.3d 936, 940 (*Hernandez*); see also *People v. Wickliffe* (1986) 183 Cal.App.3d 37, 41 (*Wickliffe*) [concluding that joint trials were proper where "[t]he offenses each appellant was charged with arose from a single set of circumstances against the same victim during the same time and in the same place"].) In the alternative, the People argue that any error that the trial court committed in jointly trying Peete and Guillory was harmless.

1. *Governing law*

Section 1098 provides in relevant part:

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials."

In *Ortiz*, *supra*, 22 Cal.3d at page 43, the Supreme Court "construe[d] . . . section [1098] to mean that a defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one

count of the accusatory pleading with all other defendants with whom he is tried." In that case, in count II of an information, the People charged Ortiz and codefendant Rivens with the armed robbery of a convenience store. (*Ortiz, supra*, at pp. 41-42.) Count I of the information charged Rivens and two other defendants, Fleming and Burris, with a separate armed robbery that had occurred the day before the convenience store robbery. (*Ibid.*) The jury found Fleming, Burris, and Rivens not guilty of count I and found Ortiz guilty of count II. (*Id.* at p. 42.) The jury was unable to reach a verdict as to Rivens's guilt on count II, and the trial court declared a mistrial. (*Ibid.*)

On appeal, Ortiz claimed that the trial court erred in denying his motion for severance of his trial from that of the other defendants "upon the ground that he was not charged with the separate offense stated against Burris, Fleming and Rivens in count I." (*Ortiz, supra*, 22 Cal.3d at p. 42.) The *Ortiz* court concluded that the trial court erred in denying Ortiz's motion for severance "because he was not jointly charged with his codefendants in any count of the information." (*Ibid.*) The *Ortiz* court reasoned that the preference for joint trials for jointly charged defendants established in section 1098 "clearly implies that a joint trial is improper if there is no joint charge." (*Id.* at p. 43.) The *Ortiz* court also noted that "cases have consistently held that it is error to try together different defendants for different crimes unless at least one count of the accusatory pleading charges all the defendants with a single crime." (*Ibid.*)

In determining whether the trial court's error in denying the motion to sever was prejudicial, the *Ortiz* court considered whether there was "a reasonable probability that [Ortiz] would have obtained a more favorable result at a separate trial." (*Ortiz, supra*, 22

Cal.3d at p. 46, citing *People v. Massie* (1967) 66 Cal.2d 899, 922-923 (*Massie*.) The court explained that in making this determination, a reviewing court should consider whether "a separate trial would have been significantly less prejudicial to [the] defendant than the joint trial, and whether there was clear evidence of defendant's guilt." (*Ortiz, supra*, at p. 46, citing *Massie, supra*, at p. 921.)

In applying the *Massie* factors, the *Ortiz* court observed that the trial on count I involved the presentation of an extensive amount of evidence pertaining to the codefendants' drug usage, much of which would have been inadmissible in a separate trial. (*Ortiz, supra*, 22 Cal.3d at p. 47.) For example, the *Ortiz* court noted that Fleming "testified that she offered sexual favors to [the alleged victim of count I] in exchange for heroin, and at one point she pulled up her shirt sleeves to reveal needle marks to the jury." (*Id.* at p. 47, fn. 8.) The *Ortiz* court observed that the jury might have inferred that Ortiz, too, was a drug user and that his motive for robbing the convenience store was to obtain money to buy drugs. (*Id.* at p. 47.)

The *Ortiz* court also mentioned a second aspect of prejudice stemming from the joint trial. The court noted that Ortiz was the only defendant who had not testified, and that the trial court had given a misleading jury instruction concerning the jury's evaluation of a defendant's testimony at trial. (*Ortiz, supra*, 22 Cal.3d at p. 47.) That instruction informed the jury that "an adverse inference may be drawn from [a defendant's] failure to deny or explain certain facts if he does choose to take the stand, and that '[I]n this case defendant has elected to and has testified. . . .'" (*Ibid.*) The *Ortiz* court reasoned that the "the jury may have drawn an unfavorable inference from the fact

that only [Ortiz] failed to testify; or it may have been confused by the court's failure to note that [Ortiz] in fact did not testify and might have drawn an adverse inference from his failure to rebut the prosecution's evidence." (*Ibid.*)

With respect to the second *Massie* factor, the Supreme Court concluded that there were significant deficiencies with respect to the eyewitness testimony that had been offered to establish Ortiz's guilt, and that there was also a lack of other incriminating evidence. (*Ortiz, supra*, 22 Cal.3d at pp. 47-48.) Given the significant prejudice arising from the joint trial and the lack of overwhelming evidence against Ortiz, the *Ortiz* court concluded that there was a reasonable probability that Ortiz would have obtained a more favorable result at a separate trial and, accordingly, reversed the judgment. (*Id.* at p. 48.)

Hernandez, supra, 143 Cal.App.3d 936, involved a scenario in which several codefendants were charged with various sexual offenses arising from a " 'gang rape' " and were tried together. (*Id.* at p. 938.) On appeal, defendant Perez argued that the trial court erred under *Ortiz* in denying his motion to sever his trial from that of his codefendants because he had not been jointly charged in any of the counts alleged against the codefendants with whom he had been tried.⁴ (*Hernandez, supra*, at p. 939.) In rejecting this argument, the *Hernandez* court stated, "[O]ur reading of *Ortiz* and the cases on which it relies persuades us that the Supreme Court did not intend to extend its ruling to cases such as the one before us where codefendants jointly committed a series of crimes against

⁴ Perez was jointly charged with two counts of rape in concert with a codefendant who pleaded guilty prior to trial. (*Hernandez, supra*, 143 Cal.App.3d at p. 939.)

the same victim at the same time and in the same place." (*Ibid.*) The *Hernandez* court reasoned:

"We are convinced that the Supreme Court did not intend, in establishing a rule requiring separate trials of defendants not jointly charged, to include within the purview of that rule defendants charged with crimes arising out of a single set of circumstances. The evil sought to be avoided by *Ortiz* was the prejudicial impact of irrelevant evidence. In a joint trial of unrelated offenses, the jury would hear evidence concerning the conduct of defendant's associates, which evidence would not have been admissible in a separate trial. (*[Ortiz,] supra*, 22 Cal.3d at p. 47.) Here, of course, evidence concerning the conduct of all of the victim's assailants would have been admissible in either a joint or separate trial. Furthermore, a requirement of separate trials would subject the victim and all witnesses to the ordeal of two complete trials, with no attendant benefit to Perez. We therefore conclude that the *Ortiz* holding does not extend to defendants charged with a crime or series of crimes committed as part of a single transaction." (*Hernandez, supra*, at pp. 940-941, fn. omitted.)

The *Hernandez* court also concluded that any error in denying Perez's motion for severance was harmless because evidence presented at the joint trial pertaining to the actions of his codefendants would have been admissible if Perez had been tried separately. (*Hernandez, supra*, 143 Cal.App.3d at p. 941 ["Although Perez may have been prejudiced by the presentation to the jury of evidence concerning the sodomy and oral copulation committed by the codefendants, a separate trial would not have eliminated that evidence" because "the testimony of the victim concerning the crimes to which she was subjected on the night of her party would have been the same, whether presented in a trial against three defendants or only one"].)

In *Wickliffe, supra*, 183 Cal.App.3d 37, the Court of Appeal applied *Hernandez* and concluded that the trial court had not erred in jointly trying two defendants, Mott and

Wickliffe, who had been charged with crimes arising out of the defendants' attempt to repossess a truck from the victim, Hayden. The People charged Mott with offenses related to driving under the influence, and charged Wickliffe with offenses related to his commission of an assault and battery on Hayden. (*Id.* at pp. 40-41.) The *Wickliffe* court concluded that a joint trial was proper in light of the interrelated factual nature of the charged crimes:

"Appellants Mott and Wickliffe were drinking together before the incident. They went to Hayden's home to repossess his truck. Hayden was injured when Wickliffe knocked him from the moving truck, and the rear wheels on that truck, which was driven by Mott, crushed Hayden's midsection. They left the scene together, without stopping, after they had injured Hayden. The offenses each appellant was charged with arose from a single set of circumstances against the same victim during the same time and in the same place. Hence, appellants were properly tried together." (*Id.* at p. 41.)

The *Wickliffe* court also concluded that any error in conducting a joint trial was harmless because "evidence concerning the conduct of both Mott and Wickliffe would have been admissible in either a joint or separate trial." (*Wickliffe, supra*, 183 Cal.App.3d at p. 43.)

2. *Factual and procedural background*

a. *Peete's pretrial motion to sever*

Prior to trial, Peete filed a motion to sever his trial from Guillory's. In his motion, Peete contended that the trial court should grant his motion to sever for three reasons:

1) at a joint trial, it was likely that the jury would improperly consider evidence offered against Guillory as evidence tending to prove Peete's guilt; 2) Peete would be unable to call Guillory, who was willing to present exonerating testimony on Peete's behalf, as a

witness if they were tried jointly; and 3) the admission of statements that Guillory made to various witnesses in an attempt to dissuade them from testifying would violate the principles of *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).⁵

At a hearing on the motion, the prosecutor acknowledged that the "defendants are not charged with the same crimes," but argued that joinder was nonetheless proper because Peete and Guillory were charged with crimes that "shared common factual elements."⁶ In response to the trial court's inquiry whether Guillory and Peete could be jointly tried under section 1098 given that they were not jointly charged with any crime, the prosecutor stated that he would provide the court with authority supporting the proposition that it is appropriate to jointly try defendants who have committed crimes that "share[] common factual elements."

⁵ Generally speaking, *Aranda* and *Bruton* "stand for the proposition that a 'nontestifying codefendant's extrajudicial self-incriminating statement that inculcates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given.' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 652.)

With respect to his *Aranda/Bruton* claim, Peete argued:

"[T]he People are probably seeking to introduce various statements made by co-defendant Guillory, ranging from those constituting the alleged criminal threat . . . [to] incriminating jail calls made by co-defendant Guillory. *Aranda Bruton* would forbid a joint trial under these circumstances."

⁶ At the hearing on the motion, the trial court explained that since the motion for severance "was just filed today . . . there's no official response in writing from the People."

Peete's counsel argued that the critical issue in determining the severance motion was whether the evidence presented as to Guillory's guilt would be admissible in a separate trial of Peete. Peete's counsel maintained that much of the evidence that would be presented in a joint trial as to Guillory's guilt would not be admissible in a separate trial involving only the charges against Peete, and that Peete would suffer undue prejudice from the jury hearing that evidence. On the issue of admissibility, Peete's counsel argued that evidence that Guillory had made various incriminating "jail calls" "had nothing to do with [Peete]." With respect to the possibility of Guillory testifying on Peete's behalf in a separate trial, Peete's counsel stated that Peete had informed her that "he believed that would happen." However, Peete's counsel conceded that she "[had] no independent belief that that would occur."

After the prosecutor provided the court with citations to *Hernandez* and *Wickliffe*, the court heard further argument on the motion. Peete's counsel argued that *Hernandez* and *Wickliffe* were distinguishable because the crimes at issue in those cases involved "the same victim, same place, same transaction, and [the] same set of circumstances." The prosecutor countered that the crimes charged against Guillory and Peete in this case arose from the "same set of circumstances," and thus were properly joined. The prosecutor also argued that "the ultimate test" is "what would be admissible in a separate trial." On that issue, the prosecutor contended that evidence of Guillory's "witness intimidation conduct" would be "entirely admissible" in a separate trial of the charges against Peete to "show witness demeanor while testifying in court, [and] to show circumstantially a connection between Mr. Guillory and Mr. Peete"

After further argument from counsel, the trial court denied the motion to sever. In denying the motion, the court reasoned in part:

"Well, I guess the question is [are the People] allowed to use relevant evidence to bolster their case. That's the issue of cross-admissibility. . . . [¶] There is no question that the facts there and the facts in *Hernandez* are distinguishable from the facts here. It's certainly more clear that those cases involved a closer set of circumstances. . . . [¶] Common sense looking at this case is that the crimes are interconnected. They are all part of the same circumstance. . . . [¶] . . . Looking at it from Mr. Peete's standpoint . . . the evidence is . . . , I think, cross-admissible.

". . . I actually don't see a huge prejudice to Mr. Peete by the evidence of the alleged threat by Mr. Guillory. I don't see guilt by association in this circumstance. Both defendants are gang members. It's not as if we have one nongang member who is somehow being connected with a gang member. [Peete] has . . . allegedly committed a much more serious crime. It's not as if we're joining a very minor crime with a very serious crime. . . . [T]he opposite is true regarding Mr. Peete. . . . There is no credible evidence at this point that . . . one defendant . . . would, in fact, testify in a separate trial providing exonerating testimony."

b. *Peete's renewed motions for severance*

During the trial, outside the presence of the jury, the court ruled that Williams would be permitted to testify concerning certain alleged threats that Guillory made to Williams while Williams was in a holding cell with Guillory and Peete that morning, prior to the resumption of the trial. Peete's counsel renewed her severance motion. The court took the severance motion under submission. After the trial resumed, Williams testified that Peete and Guillory had spoken with him in a holding cell that morning concerning his testimony at the pending trial. Williams said that both Peete and Guillory had told him that he needed to change his story and say that someone else was the

shooter. Williams also testified that Guillory told him that Williams would be harmed in prison unless Williams "change[d] [his] story." The following day, outside the presence of the jury, the court stated:

"[Peete's counsel] made another motion to sever. I took that under submission. [¶] As we now know, the testimony that did come out was that the threats were made by both defendants, so I think that that issue is moot. [¶] So I don't know if either side wants any sort of limiting instructions with respect to that or not. Or whether a limiting instruction is appropriate, I haven't actually analyzed that yet. [¶] But I'll just raise that with both defense counsel. If you are thinking in that regard, you can draft a limiting instruction for the court to consider when we talk about instructions. "

At another point in the trial, outside the presence of the jury, the People sought permission to present evidence that while Guillory was in jail awaiting trial in this case, Guillory's girlfriend showed police reports concerning this case to a Skyline Piru gang member named Ronald Cummings and requested that Cummings contact witnesses whose names appeared in the reports. After the trial court ruled that this evidence was admissible, Peete's counsel stated, "[C]ould a limiting instruction be made that none of that evidence be considered against Mr. Peete?" The court responded:

"I think that that's appropriate [¶] So on all of these issues of limiting instructions, I want you both to keep notes of what you want to request of the court, and you should be drafting those requested instructions. . . . [¶] . . . [¶] . . . [I]f there [are other] areas that you want to make sure the court directs the jury to focus on with respect to being relevant to one defendant and not another defendant, I'm happy to give those instructions."

After this exchange, Peete's counsel renewed her request that Peete's trial be severed from Guillory's trial. The trial court stated that it considered Peete to be raising a continuing objection to the joint trial, and that it would take the objection under

submission. Although the court did not formally rule on the objection at the conclusion of the trial, by not granting a severance, the trial impliedly denied Peete's request for severance.

c. *Relevant jury instructions*

The court instructed the jury concerning the limited admissibility of certain evidence presented at trial, as follows:

"You have heard evidence that defendant Jemere Guillory made statements out of court before trial. You may not consider that evidence against defendant Darius Peete. [¶] In addition, during the trial, you heard testimony of Ron Cummings. That evidence was admitted only against defendant Jemere Guillory. You may not consider that evidence against defendant Darius Peete."

The court also provided an instruction concerning the admission of evidence for a limited purpose, in general. That instruction stated, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

The court also instructed the jury that, "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one."

3. *Any error in trying Peete and Guillory together was harmless*

We need not decide whether the trial court erred in denying Peete's motion to sever because we conclude that even if it was error to try Peete and Guillory jointly, any error was harmless.

- a. *A separate trial would not have been significantly less prejudicial to Peete*

In determining whether there is a reasonable probability that Peete would have obtained a more favorable result at a separate trial, we consider first whether "a separate trial would have been significantly less prejudicial to [him] than the joint trial" (*Ortiz, supra*, 22 Cal.3d at p. 46, citing *Massie, supra*, 66 Cal.2d at p. 921.) Peete contends that a separate trial would have been less prejudicial to him than a joint trial because much of the evidence pertaining to the witness intimidation charges against Guillory would not have been admissible in a trial involving only the attempted murder and assault charges against Peete. We agree with Peete that a key factor in determining the possibility of prejudice stemming from the joint trial is whether the evidence pertaining to the witness intimidation charges would have been admissible in a separate trial involving only the charges against Peete. (See *Ortiz, supra*, at p. 47; *Wickliffe, supra*, 183 Cal.App.3d at p. 43; *Hernandez, supra*, 143 Cal.App.3d at p. 941 [each case considering the cross-admissibility of evidence presented at the joint trial in determining prejudice].) However, because Peete has failed to identify *any* evidence from the joint trial that would not have been admissible at a separate trial, we reject Peete's contention that this factor weighs in favor of reversal.

- (i.) *The law governing the admissibility of evidence pertaining to a witness's fear of retaliation for testifying*

" [E]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is

well within the discretion of the trial court. [Citations.]' [Citations.] Moreover, evidence of a 'third party' threat may bear on the credibility of the witness, whether or not the threat is directly linked to the defendant. [Citations.]" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084 (*Mendoza*).

" '[T]he fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility.' " (*Mendoza, supra*, 52 Cal.4th at p. 1085, quoting *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369 (*Olguin*)). That is because "[a] witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony." (*Olguin, supra*, at p. 1369, italics omitted.) In addition, a jury should be permitted to evaluate "facts which would enable them to evaluate the witness's fear" since "[a] witness who expresses fear of testifying because he is afraid of being shunned by a rich uncle who disapproves of lawyers would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into her house the night before the trial." (*Ibid.*)

Our Supreme Court has also held that evidence that a witness fears retaliation for testifying is admissible even if the witness's testimony is not inconsistent with the witness's prior statements. (*Mendoza, supra*, 52 Cal.4th at p. 1086, fn. 19 [disapproving *People v. Brooks* (1979) 88 Cal.App.3d 180]; *People v. Valdez* (2012) 55 Cal.4th 82, 136, fn. 33 (*Valdez*) [disapproving *People v. Yeats* (1984) 150 Cal.App.3d 983, 986].) The *Mendoza* court explained:

"Defendant maintains that none of [the witness's] testimony on the point was admissible because she never recanted her testimony nor were there substantial inconsistencies in it. To support this position,

he relies on *People v. Brooks*[, *supra*,] 88 Cal.App.3d 180, which purported to hold that a witness's testimony concerning a threat she received was irrelevant because the witness gave no inconsistent testimony before the threat testimony was elicited. According to *Brooks*, the absence of any prior inconsistent testimony on the part of that witness meant 'there was no issue of credibility,' thus rendering 'the "threat" evidence . . . immaterial to any issue and irrelevant to the case.' (*Id.* at p. 187[, fn. omitted].)

"We are not persuaded by *Brooks* for several reasons. First, *Brooks* cited no authority for the proposition that inconsistent testimony is a prerequisite to the admission of evidence of a third party's threat or a witness's fear, and such a proposition finds no support in the terms of Evidence Code section 780.^[7] Second, as other authorities explain, evidence that a witness testifies despite fear is important to fully evaluating his or her credibility. (E.g., *Olguin, supra*, 31 Cal.App.4th at p. 1369.) The logic of this rationale does not hinge on whether the witness gave prior inconsistent testimony. Third, *Brooks* is contrary to decisions of this court that have recognized the relevance of such evidence when inconsistent testimony was not at issue. [Citations.]" (*Mendoza, supra*, 52 Cal.4th at p. 1086.)

Similarly, in *Valdez, supra*, 55 Cal.4th 82, the Supreme Court rejected a defendant's argument that a trial court had erred in admitting evidence that three witnesses were afraid to testify and the basis for those fears, in light of the People's failure to demonstrate that the witnesses' trial testimony was " 'inconsistent or otherwise suspect.' " (*Id.* at p. 135, quoting *People v. Yeats, supra*, 150 Cal.App.3d at p. 986.)

Disapproving *Yeats*, the *Valdez* court rejected the defendant's argument, reasoning:

⁷ Evidence Code section 780 provides in relevant part: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] . . . [¶] (f) The existence or nonexistence of a bias, interest, or other motive. [¶] . . . [¶] (j) His attitude toward the action in which he testifies or toward the giving of testimony."

"Defendant's argument fails in light of our recent decision in [*Mendoza, supra*, 52 Cal.4th 1056, 1086], which rejected the view that evidence of a witness's fear in testifying is inadmissible unless the witness's trial testimony is inconsistent with a prior statement. As we explained, 'evidence that a witness testifies despite fear is important to fully evaluating his or her credibility. [Citation.] The logic of this rationale does not hinge on whether the witness gave prior inconsistent testimony.' (*Ibid.*) Thus, in order to introduce evidence of the witnesses' fear, the prosecution was not required to show that their testimony was inconsistent with prior statements or otherwise suspect." (*Valdez, supra*, 55 Cal.4th at pp. 135-136.)

(ii.) *Evidence from the joint trial that Peete contends would have been inadmissible at a separate trial*

Peete identifies the following as evidence presented at the joint trial pertaining to the witness intimidation charges: Henderson's girlfriend, Jasmine Dunn, testified that a few days after the shooting, she informed police that she was afraid of possible threats and intimidation and that she was worried about herself, her sister, and Williams. San Diego Police Detective Jon Brown testified that when he spoke to Dunn, she was "frantic and frightened," and that she told Brown "that people were going to kill her." Williams testified that he was scared to testify. Williams also testified that he learned from a member of the 5-9 Brim gang named Mike Jones that Guillory was planning to kill Williams. In addition, Williams testified that Jones told him that Williams and Henderson would be killed "if stories don't get changed." Detective Brown testified that after speaking to Williams, he removed Henderson's name from the records at the hospital at which Henderson was recuperating after the shooting. Jones testified that a few days after the shooting, Guillory asked him to call Williams on the phone and ask Williams if he was going to testify. Jones also testified that Guillory asked him to tell

Williams that Henderson and Williams needed to "handle this in the streets." Jones said that he was scared that he would be hurt or killed as a result of his testimony. The People also presented evidence that Guillory's girlfriend showed police reports concerning this case to Cummings and requested that Cummings contact witnesses referred to in the reports.⁸

(iii.) *Peete has not demonstrated that the evidence offered at the joint trial pertaining to the intimidation of witnesses would not have been admissible in a separate trial*

Peete contends that the "vast majority" of the evidence discussed above would not have been admissible at a separate trial. To begin with, Peete argues that evidence of threats against Henderson would not have been admissible at a separate trial because Henderson "testified that he was not threatened by anyone," and therefore, "evidence of the threats was irrelevant to Henderson's testimony." We disagree.

Whether Henderson *actually* was threatened or not, evidence that he was in *fear* of the consequences of testifying clearly would have been admissible in a separate trial. (*Mendoza, supra*, 52 Cal.4th at p. 1084 [" '[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible' [citation]"].) Further, the People presented evidence at the joint trial from which a reasonable juror could clearly have inferred that Henderson feared retaliation for

⁸ Although not specifically referenced in Peete's brief, the People played a recording of a telephone call that Guillory made from jail to his girlfriend from which the jury could have inferred that Guillory instructed his girlfriend to tell Cummings to speak with Williams and Dunn about this case.

testifying.⁹ Detective Brown testified that after speaking with Williams, the police had Henderson's "name removed from the records [at the hospital at which he was recovering from the shooting] . . . and had security made aware of the situation so they would be aware if there was anybody coming to the hospital to harm the victim."¹⁰ Henderson agreed with the prosecutor that there was a time while he was in the hospital that he was "moved to another room" and "put under another name." This evidence likely would have been admissible in a separate trial for the purpose of demonstrating that Henderson was testifying "despite fear of recrimination." (*Olguin, supra*, 31 Cal.App.4th at p. 1369, italics omitted.) Further, the People would likely have been permitted to present evidence of the "facts which would enable them to evaluate the witness' fear." (*Ibid.*) For these reasons, we reject Peete's contention that evidence of threats intended for Henderson would have been inadmissible in a separate trial.

Peete also asserts that Jones's testimony, Cummings's testimony,¹¹ and Detective Brown's testimony would not have been relevant at a separate trial. Although Peete does not provide any argument in support of these assertions, they appear to be based on the contention, rejected above, that evidence of threats intended for Henderson would not

⁹ Henderson was not asked at trial whether he feared retaliation for testifying.

¹⁰ As noted earlier, Williams testified that Jones told him that he and *Henderson* were in danger of being killed "if stories don't get changed."

¹¹ We assume that Peete intends to refer to evidence pertaining to Cummings's statements to police investigators in which Cummings said that Guillory's girlfriend had showed him police reports concerning this case and requested that Cummings contact witnesses referred to in the reports. At trial, Cummings denied having made such statements.

have been inadmissible in a separate trial.¹² We reject any such argument for the reasons stated in the previous paragraph.

Peete also contends that "any evidence of threats against [Williams] would have been far more limited at a separate trial than the evidence ultimately adduced at this trial" because Williams's trial testimony was "entirely consistent with his prior statements to the police." Similarly, Peete argues that evidence of threats against Dunn would have been irrelevant in a separate trial because "[h]er trial testimony was entirely consistent with her prior statements to police, and thus there was no need to introduce evidence that she had been threatened" We reject these contentions as being directly contrary to *Mendoza, supra*, 52 Cal.4th at page 1086 and *Valdez, supra*, 55 Cal.4th at page 135. (See *Valdez, supra*, 55 Cal.4th at p. 135 ["Defendant's argument fails in light of our recent decision in [*Mendoza, supra*, at p. 1086], which rejected the view that evidence of a witness's fear in testifying is inadmissible unless the witness's trial testimony is inconsistent with a prior statement"].)

Peete also contends that the trial court's jury instruction informing the jury that it was not permitted to consider Guillory's out-of-court statements as evidence of Peete's guilt was insufficient to guard against the danger that the jury would consider Guillory's statements as tending to prove Peete's guilt on the attempted murder and assault charges. However, in light of Peete's failure to demonstrate that evidence of Guillory's statements

¹² We base this assumption on the fact that Peete's assertions as to the irrelevance of Jones's testimony, Cummings's testimony, and Detective Brown's testimony was made in the same paragraph of his brief in which he discusses evidence pertaining to threats against Henderson.

would not have been admissible in a separate trial, Peete would have faced the same possibility of the jury's misuse of Guillory's statements in a separate trial. More generally, the trial court indicated a willingness to instruct the jury concerning the limited purposes for which certain evidence in the joint trial could be considered, and Peete has not identified any such instruction that he would have received in the separate trial that he was denied in the joint trial.

b. *There was considerable evidence of Peete's guilt*

With respect to the second *Massie* factor, there was considerable evidence of Peete's guilt. Henderson testified that he was well acquainted with Peete, that he was with Peete prior to the shooting, and that he saw Peete shoot at him. Henderson also identified Peete as the shooter, to both Williams and to police, in the immediate wake of the shooting. In addition, Henderson identified Peete from photographic lineups as the shooter in the days following the shooting. Williams corroborated Henderson's testimony that Henderson had been with Peete prior to the shooting. The People also presented evidence of a motive for the shooting, namely, that Peete and Henderson were in rival gangs.

Peete correctly notes that Henderson's testimony concerning the manner in which the shooting occurred was not entirely clear and that there was an absence of physical evidence tying Peete to the attempted murder and assault.¹³ Further, there was some

¹³ For example, Peete notes that Henderson testified that Peete was walking behind him at the time the first shot, which struck Henderson in the face, was fired. Henderson also testified that he did not see who fired the first the shot.

evidence that Henderson may have been intoxicated near the time of the shooting.¹⁴ However, in light of the fact that Peete has not identified *any* evidence that was admitted in the joint trial that would not have been admissible in a separate trial, Peete has not demonstrated a reasonable probability that any such ambiguities in the evidence would have led to a more favorable result in a separate trial.

Accordingly, we conclude that any error in jointly trying Peete and Guillory was harmless.

B. *Sentencing claims*

1. *Peete's sentence*

On count 1, the trial court stated that it was "imposing the mandatory term of 15 years to life for conviction of premeditated attempt[ed] murder [(§§ 664, subd. (a), 189)] and the allegation pursuant to [section] 186.22, [subdivision] (b)(5)." The court imposed an additional consecutive term of 25 years to life for the section 12022.53, subdivision (d) firearm enhancement.

On count 2, the court imposed the upper term of four years (§ 245, subd. (a)), as well as additional terms of 10 years for the section 12022.5, subdivision (a) firearm enhancement,¹⁵ three years for the section 12022.7, subdivision (a) great bodily injury

¹⁴ In this regard, Henderson testified that he was a "little bit" drunk while at the park before the shooting. There also was evidence that Henderson had smoked marijuana earlier in the day and that he may have been smoking a substance similar to marijuana, called "spice," just before the shooting.

¹⁵ The 10-year sentence constituted an upper term on the firearm enhancement. (See § 12022.5 ["any person who personally uses a firearm in the commission of a felony or

enhancement, and 10 years for the section 186.22, subdivision (b)(1)(C) violent felony gang enhancement. The trial court stayed imposition of the entire sentence on count 2, including the attached enhancements, pursuant to section 654.

2. *The trial court erred in pronouncing Peete's sentence on count 1*

With respect to count 1, the People contend that Peete's sentence is properly described as a term of life in prison, with a 15-year parole ineligibility period pursuant to section 186.22, subdivision (b)(5), plus an additional consecutive 25-years-to-life sentence pursuant to section 12022.53, subdivision (d). We agree.

Section 186.22, subdivision (5) provides in relevant part, "[A]ny person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life¹⁶ shall not be paroled until a minimum of 15 calendar years have been served." While the trial court pronounced that portion of Peete's sentence on count 1 involving the section 186.22, subdivision (5) gang enhancement as an indeterminate term of years "15 years to life," the proper sentence is one of life in prison subject to a 15-year parole ineligibility period. (See *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1238, fn. 4 [explaining that the "finding on a gang allegation ensures that the defendant will serve the full 15 years of the minimum term, notwithstanding the availability of

attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years"].)

¹⁶ The felony at issue on count 1, premeditated attempted murder, is punishable by imprisonment in the state prison for life. (§§ 664, subd. (a), 189.)

conduct credits"].) Accordingly, we modify Peete's sentence on count 1 to life in prison, with a minimum 15-year parole ineligibility period, plus 25 years to life.

3. *The trial court did not violate section 1170.1, subdivision (f) or subdivision (g) in imposing and staying sentence on count 2*

With respect to count 2, Peete contends that the trial court erred in imposing a 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C) as well both a three-year great bodily injury enhancement (§ 12022.7, subd. (a)) and a 10-year firearm enhancement (§ 12022.5, subd. (a)). Peete notes that section 1170.1, subdivision (f) prohibits a trial court from imposing two enhancements based on a defendant's use of a firearm, and that section 1170.1, subdivision (g) is a nearly identical provision that prohibits a court from imposing two enhancements based on a defendant's infliction of great bodily injury. Citing *People v. Rodriguez* (2009) 47 Cal.4th 501, 508 (*Rodriguez*), Peete claims that his sentence on count 2 violated either section 1170.1, subdivision (f) or section 1170.1, subdivision (g) because the 10-year gang enhancement was based on either Peete's use of a firearm or his infliction of great bodily injury. The People concede the purported error, and ask that we remand the matter on count 2 for resentencing.

For the reasons that we explain below, we conclude that section 1170.1 subdivision (f) prohibits imposing and *executing* a sentence based on a defendant's firearm use, and that section 1170.1, subdivision (g) prohibits imposing and *executing* a sentence based on a defendant's infliction of great bodily injury. In this case, the trial court imposed and *stayed* a sentence on count 2. Thus, the court's sentence on count 2 did not violate either section 1170.1, subdivision (f) or section 1170.1, subdivision (g).

In *Rodriguez, supra*, 47 Cal.4th 501, the defendant fired several shots at three individuals who were associated with a rival gang. The jury found the defendant guilty of three counts of assault with a firearm, and also found, with respect to each count, that the defendant personally used a firearm (§ 12022.5, subd. (a)) and committed a violent felony to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). (*Rodriguez, supra*, at p. 504.) With respect to each count, the trial court imposed and executed both the firearm enhancement and the gang enhancement. (*Id.* at pp. 504–506.) The Supreme Court held that this sentence violated section 1170.1, subdivision (f). (*Rodriguez, supra*, at p. 504.) The *Rodriguez* court reasoned that it was clear that the enhancements imposed under section 12022.5 "for defendant's personal use of a firearm in each of the three assaults were, in the words of section 1170.1's subdivision (f), punishments 'for . . . using . . . a firearm in the commission of a single offense.' " (*Rodriguez, supra*, at p. 508.) The *Rodriguez* court also concluded that the gang enhancements "were likewise based on defendant's use." (*Ibid.*) The court reasoned:

"[T]he standard additional punishment for committing a felony to benefit a criminal street gang is two, three, or four years' imprisonment. (§ 186.22, subd. (b)(1)(A).) But when the crime is a 'violent felony, as defined in subdivision (c) of Section 667.5,' section 186.22's subdivision (b)(1)(C) calls for additional punishment of 10 years. Here, defendant became eligible for this 10-year punishment *only* because he 'use[d] a firearm which use [was] charged and proved as provided in . . . Section 12022.5.' (§ 667.5, subd. (c)(8).)" (*Rodriguez, supra*, 47 Cal.4th at p. 509.)

The *Rodriguez* court concluded that the "defendant's firearm use resulted in additional punishment not only under section 12022.5's subdivision (a) (providing for additional punishment for personal use of a firearm) but also under section 186.22's

subdivision (b)(1)(C), for committing a violent felony as defined in section 667.5, subdivision (c)(8) (by personal use of a firearm) to benefit a criminal street gang." (*Rodriguez, supra*, 47 Cal.4th at p. 509.) Accordingly, the *Rodriguez* court held that the imposition and execution of both enhancements violated section 1170.1, subdivision (f), and remanded the matter for resentencing to allow the trial court to restructure its sentencing choices. (*Rodriguez, supra*, at p. 509; see also *People v. Gonzalez* (2009) 178 Cal.App.4th 1325, 1328 [applying *Rodriguez* in concluding imposition of both a three-year great bodily injury enhancement (§ 12022.7, subd. (a)) and a 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) when the gang enhancement is based on the defendant's infliction of great bodily injury violated section 1170.1, subdivision (g)].)

In this case, count 2, assault with a firearm (§ 245, subd. (a)(2)), qualified as a violent felony subject to a 10-year term under section 186.22, subdivision (b)(1)(C), only because the jury found the firearm and great bodily injury enhancements (§§ 12022.5, subd. (a), 12022.7, subd. (a)) true as to that count. That is because section 186.22, subdivision (b)(1)(C) provides for a 10-year enhancement if "the felony is a violent felony, as defined in subdivision (c) of Section 667.5." Section 667.5, subdivision (c)(8) in turn defines a violent felony as including "[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7, . . . or any felony in which the defendant uses a firearm which use has been charged and proved as provided in . . . Section 12022.5" Thus, imposing and executing the 10-year gang enhancement and both the firearm enhancement and the great bodily injury enhancement would violate either

section 1170.1, subdivision (f) or section 1170.1, subdivision (g) under the reasoning of *Rodriguez, supra*, 47 Cal.4th at page 504 and *People v. Gonzalez, supra*, 178 Cal.App.4th at page 1328.

However, our inquiry does not end here because, unlike in *Rodriguez, supra*, 47 Cal.4th at pages 504-506 and *People v. Gonzalez, supra*, 178 Cal.App.4th at page 1327, in which trial courts imposed and *executed* enhancements in violation of section 1170.1, in this case, the trial court *stayed* the entire sentence on count 2. In our view, this is a critical difference. Section 1170.1 provides in relevant part:

"(f) When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, *only the greatest of those enhancements shall be imposed for that offense.* . . .

"(g) When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, *only the greatest of those enhancements shall be imposed for that offense.*" (Italics added.)

In *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1127 (*Gonzalez*), our Supreme Court interpreted similar language in section 12022.53, subdivision (f), which provides in pertinent part that when "more than one enhancement per person is found true under this section, the court shall impose on that person the enhancement that provides the longest term of imprisonment." (§ 12022.53, subd. (f).) The *Gonzalez* court explained that the term "impose," as used in that provision, means "impose and then execute," as opposed to "impose and then stay." (*Gonzalez, supra*, at pp. 1126–1127.) Accordingly, the *Gonzalez* court concluded that section 12022.53, subdivision (f), "directs that only one enhancement may be imposed and then *executed* per person for each crime, and allows a

trial court to impose and then *stay* all other prohibited enhancements." (*Gonzalez, supra*, at p. 1127.)

The same reasoning applies with equal force to section 1170.1, subdivisions (f) and (g). We therefore interpret section 1170.1, subdivisions (f) and (g) to prohibit a trial court from imposing and *executing* more than one enhancement based on a defendant's firearm use (§ 1170.1, subd. (f)), and imposing and *executing* more than one enhancement based on either a defendant's infliction of great bodily injury (§ 1170.1, subd. (g)). In this case, while the trial court could not impose and *execute* all of the enhancements at issue without violating either section 1170.1, subdivision (f) or subdivision (g) (see *Rodriguez, supra*, 47 Cal.4th at p. 509; *People v. Gonzalez, supra*, 178 Cal.App.4th at p. 1328), the trial court imposed and *stayed* Peete's entire sentence on count 2, including all of the enhancements, pursuant to section 654. Because none of the enhancements was executed, the trial court's sentence did not violate section 1170.1, subdivision (f) or subdivision (g).

IV.

DISPOSITION

Peete's sentence on count 1 is modified to life in prison, with a minimum 15-year parole eligibility period, plus 25 years to life. The trial court is directed to prepare an amended abstract of judgment reflecting this modification, and to deliver the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.