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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVANTE MARQUIS SCOTT,

Defendant and Appellant.

E052276

(Super.Ct.No. RIF148527)

OPINION

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified with directions.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Garrett Beaumont and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

In 2009, when defendant Javante Marquis Scott was 16, he shot from a car window at three Hispanic youths, hitting and seriously injuring one of them.

Defendant's father was a member of the 1200 Blocc Crips, with the moniker "Tiptoe." Defendant's older brother was also a member of the 1200 Blocc Crips, with the moniker "Lil' Tiptoe." Although defendant denied being a gang member, there was overwhelming evidence that he, too, was a member of the 1200 Blocc Crips, with the moniker, "Baby Tiptoe."

The 1200 Blocc Crips were hostile to various Hispanic gangs, including the Tiny Dukes. Defendant wrote rap lyrics about cruising around in a car and shooting rival gang members. His cell phone identified him as "Baby Duke Killa."

According to the driver of the car, just before shooting, defendant said, "Watch this, watch these dicks run." Defendant and other members of the 1200 Blocc Crips referred to members of the Tiny Dukes as "Tiny Diccs" or just "Diccs." However, none of the victims were actually gang members.

Defendant admitted firing the shots, although he testified that he did so only because the driver of the car told him to and that he "didn't intend to hit nobody."

Defendant was found guilty on:

1. Three counts of premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)), with enhancements for personally and intentionally discharging a firearm causing great bodily injury (Pen. Code, § 12022.53, subd. (d))¹ and gang enhancements (Pen. Code, § 186.22, subd. (b)).

¹ All three Penal Code section 12022.53 enhancements were based on the great bodily injury to the single victim who was actually injured. (See *People v. Mason* (2002) 96 Cal.App.4th 1, 10-14.)

2. Three counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)), with firearm enhancements (Pen. Code, § 12022.5, subd. (a), 12022.55), gang enhancements (Pen. Code, § 186.22, subd. (b)), and, on one of the three counts, a great bodily injury enhancement (Pen. Code, § 12022.7, subd. (a)).

3. One count of gang participation (Pen. Code, § 186.22, subd. (a)).

As a result, defendant was sentenced to a total of 120 years to life in prison,² plus the usual fines and fees.

Defendant contends:

1. The gang expert was improperly allowed to testify that the charged gang enhancements were true.

2. The trial court failed to specify that the sentences on the attempted murder counts were consecutive, rather than concurrent; hence, they must be deemed concurrent.

3. Penal Code section 654 required the trial court to stay the sentence for gang participation (count 7).

4. The sentencing minute order and the abstract of judgment erroneously include an enhancement to count 1.

We agree that Penal Code section 654 precluded any separate punishment for gang participation. We further agree that (as the People concede) the minute order and the abstract must be corrected. We find no other error.

² As will be seen (see parts II and IV, *post*), there are some issues as to what sentence the trial court actually imposed.

I

THE GANG EXPERT'S TESTIMONY

Defendant contends that his trial counsel rendered ineffective assistance by failing to object when the gang expert testified that the gang enhancements were true.

A. *Additional Factual and Procedural Background.*

Sergeant Brian Smith testified as a gang expert. In response to hypothetical questions incorporating in detail the evidence in this case, he opined that such a shooting would be committed for the benefit of a gang. He concluded, “[Y]ou can’t ignore it. It’s there. It’s all — all the pieces fit together.”

B. *Analysis.*

Defense counsel did not object to any of the questions and answers that defendant now contends were erroneous. Accordingly, he forfeited such a contention as a basis for reversal on appeal. (Evid. Code, § 353, subd. (a).) Defendant therefore contends that his counsel’s failure to object constituted ineffective assistance. We discuss the issue under this rubric.

“ . . . ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. Defendant thus

bears the burden of establishing constitutionally inadequate assistance of counsel.

[Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]’ [Citation.]” (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

“A witness may not express an opinion on a defendant’s guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] ‘Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.’ [Citation.]” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.) However, “[g]enerally, an expert may render opinion testimony on the basis of facts given ‘in a hypothetical question that asks the expert to assume their truth.’ [Citation.]” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

Defendant argues that, using a “sham hypothetical,” Sergeant Smith essentially rendered an opinion that he was guilty. We disagree.

Recently, in *People v. Vang* (2011) 52 Cal.4th 1038, our Supreme Court held that “[h]ypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence.” (*Id.* at p. 1051.) “[A] hypothetical question must be rooted in facts shown by the evidence’ [Citations.]” (*Id.* at pp. 1045-1046.) “[T]his rule means

that the prosecutor's hypothetical questions had to be based on what the evidence showed *these* defendants did, not what someone else might have done. The questions were directed to helping the jury determine whether *these* defendants, not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*Id.* at p. 1046.)

The court explained: "[E]xpert testimony is permitted even if it embraces the ultimate issue to be decided. [Citation.] The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Id.* at pp. 1049-1050.)

It concluded: "Defendant Vang also cites cases involving statutes that prohibit an expert to testify on a certain point. The cases generally hold that a party may not circumvent the prohibition by using hypothetical questions. [Citations.] The[se] cases are inapposite. If a statute prohibits an expert from expressing an opinion on a point, it may be correct not to allow the expert to express that opinion by using hypothetical questions. But no statute prohibits an expert from expressing an opinion regarding whether a crime was gang related. Indeed, it is settled that an expert may express such an opinion. To the extent the expert may not express an opinion regarding the actual defendants, that is because the jury can determine what the defendants did as well as an expert, not because of a prohibition against the expert opining on the entire subject.

Using hypothetical questions is just as appropriate on this point as on other matters about which an expert may testify.” (*People v. Vang, supra*, 52 Cal.4th at pp. 1051-1052.)

Here, Sergeant Smith never expressed an opinion that the gang enhancements were, in fact, true. The testimony that defendant claims was improper related to just one element of the gang enhancement — whether the crimes were “committed for the benefit of, at the direction of, or in association with” a gang. (Pen. Code, § 186.22, subd. (b)(1).) *Vang* specifically approved of expert testimony on this topic, at least in hypothetical form. Moreover, *Vang* specifically approved of hypothetical questions on this topic that mirror the facts of the case.

Defendant argues, however, that Sergeant Smith crossed the boundaries set in *Vang* with his concluding words, “[Y]ou can’t ignore it. It’s there. It’s all — all the pieces fit together.” In context, he was apparently referring to the “pieces” supplied by the hypothetical and perhaps also the additional “pieces” supplied by his expertise.

But even assuming, for the sake of argument, that these isolated words could be understood as expressing an opinion as to guilt, defendant cannot show that he was prejudiced. As *Vang* suggested, if the jury credited the expert’s opinion, and if it found that the facts in the hypothetical were the actual facts, then it would have come to the same conclusion on its own. And if not, then it would have rejected the expert’s opinion. It is simply inconceivable that Sergeant Smith’s affirmation that “all the pieces fit together” had any effect on the outcome.

For these reasons, defendant’s trial counsel had no legal grounds to object, except, arguably, to Sergeant Smith’s concluding words. And, with respect to those concluding

words, he could have made a sound tactical decision not to object — because he did not want to highlight them, and because they did not add much to Sergeant Smith’s otherwise nonobjectionable testimony. Accordingly, defendant has not shown any ineffective assistance. Moreover, he has not shown any prejudice.

II

CONCURRENT VERSUS CONSECUTIVE SENTENCING

Defendant contends that the trial court failed to specify that the sentences on the attempted murder counts were to be consecutive, rather than concurrent, and, hence, they must be construed as concurrent.

A. *Additional Factual and Procedural Background.*

At sentencing, defense counsel urged the trial court to run the sentences on counts 2 and 3 concurrently to count 1. The prosecutor disagreed, arguing that the court should “sentence defendant to [the] maximum possible.”

The trial court began by stating, “It’s the intent of the Court that this young man never be released from State Prison.” It proceeded to sentence defendant as follows:

“[U]nder Count 1 . . . [¶] . . . the Court is sentencing pursuant to 186.22(b)(5), which is the 15 years to life term[;] under the 12022.53(d), the Court imposes the term of 25 years to life.

“The victim in Count 2 was a completely separate victim, and the defendant certainly made efforts to take his life as well. The term will be 15 years to life pursuant to 186.22(b)(5). [¶] The Court imposes an additional 25 years to life pursuant to 12022.53(d).

“Under Count 3, again, we have a completely separate victim, and it’s clear based upon the evidence that the defendant intended to take his life as well by shooting multiple times. The Court will impose 15 years to life pursuant to 186.22(b)(5). The 12022.53(d), allegation, 25 years to life.”

The sentences for aggravated assault (counts 4-6) were stayed pursuant to Penal Code section 654. A three-year sentence for gang participation (count 7) was run concurrently.

The trial court did not expressly state whether the sentences on counts 1 through 3 were to be concurrent or consecutive. It also did not state on the record what the total aggregate term was.

The sentencing minute order, however, states that the sentences on counts 2 and 3 are consecutive and that the total aggregate term is 135³ years to life.

The abstract of judgment likewise states that the sentences on counts 2 and 3 are consecutive.

B. *Analysis.*

Penal Code section 669 deals with concurrent and consecutive sentencing. As relevant here, it provides: “Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently.”

³ *Sic*; this should have been 120 years to life. See part IV, *post*.

Preliminarily, the People argue that defense counsel forfeited defendant's present contention by failing to raise it in the trial court. Not so. Indeed, requiring defense counsel to object that a sentence is mistakenly low would place him or her in an ethical dilemma. Penal Code section 669 states a default rule for the interpretation of a judgment. If defendant is correct, the trial court effectively sentenced him to 40 years to life. In that case, there was no issue to be raised below; the minute order and the abstract of judgment simply contained a clerical error, which can be raised at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

We turn, then, to the merits.

“ . . . ‘Rendition of judgment is an oral pronouncement.’ Entering the judgment in the minutes being a clerical function [citation], a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error. Nor is the abstract of judgment controlling. ‘The abstract of judgment is not the judgment of conviction. By its very nature, definition and terms [citation] it cannot add to or modify the judgment which it purports to digest or summarize.’ [Citation.]” (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

“The requirement that the trial court express its determination in the form of an order is not a pointless technicality. Rather, it makes clear that the *court*, not a clerk, has made the requisite determination.” (*People v. Caudillo* (1980) 101 Cal.App.3d 122, 126.)

However, the minute order may spell out matters that are implicit in the oral pronouncement. For example, “[i]n Los Angeles County, trial courts frequently orally

impose the penalties and surcharge discussed above by a shorthand reference to ‘penalty assessments.’ The responsibility then falls to the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment. *This is an acceptable practice.*” (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864, italics added.)

Here, although the trial court never used the word “consecutive,” its intent, as expressed in its oral pronouncement of judgment, was unmistakable. Defense counsel had just argued that it should sentence concurrently; the prosecutor had just argued that it should sentence consecutively. It responded by stating, “It’s the intent of the Court that this young man never be released from State Prison.” This implicitly but necessarily meant that it was not sentencing defendant concurrently, to a total of 40 years to life, but rather consecutively, to a total of 120 years to life. In addition, it stated reasons — that each count involved a separate victim and that defendant had the intent to kill each victim. Presumably these were reasons for sentencing consecutively (see Cal. Rules of Court, rule 4.425), as the other components of the sentences on these counts were not discretionary, and there was no need to state reasons for them.

“As a general rule, a record that is in conflict will be harmonized if possible. [Citation.] . . . ’ [Citation.]” (*People v. Lawrence* (2009) 46 Cal.4th 186, 194, fn. 4.) Here, there is no actual conflict between the trial court’s oral ruling and the clerk’s minute order. Rather, the minute order simply makes explicit something that is implicit in the oral ruling. When the record is viewed as a whole, the trial court did not “fail[] . . .

to determine how the terms of imprisonment on the second or subsequent judgment shall run.”

III

THE EFFECT OF PENAL CODE SECTION 654 ON THE GANG PARTICIPATION COUNT

Defendant contends that the trial court erred by failing to stay execution of the sentence for gang participation (count 7).

Penal Code section 654, subdivision (a), as relevant here, provides: “An 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.”

“The test for determining whether [Penal Code] section 654 prohibits multiple punishment has long been established: ‘Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of [Penal Code] section 654 depends on the intent and objective of the actor. . . .’ [Citation.]” (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) “[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations

shared common acts or were parts of an otherwise indivisible course of conduct.’

[Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

“‘A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.’ [Citation.]” (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1336-1337.)

On count 7, the crime of gang participation required proof that, among other things, defendant “willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang” (Pen. Code, § 186.22, subd. (a).) This requirement could be satisfied by evidence that defendant committed the current offenses. (*People v. Salcido* (2007) 149 Cal.App.4th 356, 366-368; *People v. Ngoun* (2001) 88 Cal.App.4th 432, 435-437.) Indeed, in this case, there was no evidence that defendant promoted, furthered, or assisted any *other* felonious criminal conduct by any *other* gang members.

As we held in *People v. Sanchez* (2009) 179 Cal.App.4th 1297 [Fourth Dist., Div. Two], when a defendant is convicted of gang participation, and when the only evidence of the “promote/further/assist” element of gang participation is the defendant’s commission of another felony, Penal Code section 654 prohibits punishment for both gang participation and the other felony. (*Sanchez*, at pp. 1315-1316; accord, *People v. Hunt* (2011) 196 Cal.App.4th 811, 824 [Fourth Dist., Div. Two]; see also *People v. Vu* (2006) 143 Cal.App.4th 1009, 1032-1034; contra, *People v. Herrera* (1999) 70

Cal.App.4th 1456, 1466-1468.)⁴ “[T]he underlying [felony] w[as] the act that transformed mere gang membership — which, by itself, is not a crime — into the crime of gang participation. Accordingly, it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the [felony].” (*Sanchez*, at p. 1315.)

We therefore conclude that the trial court was required to stay the sentence for gang participation (count 7).

IV

CLERICAL ERROR IN THE SENTENCE

Defendant contends that the sentencing minute order and the abstract of judgment both erroneously include an enhancement to count 1 of 15 years to life, which the trial court did not impose and which is not statutorily authorized.

As a result of the gang enhancement (referred to in the minute order as “enhancement VF”), the appropriate base term for the attempted murder in count 1 was elevated to 15 years to life. (Pen. Code, § 186.22, subd. (b)(5).) That is the term that the trial court actually imposed.

The minute order correctly reflects a base term of 15 years to life. However, it also states, “Enhancement VF in Count 1 to run consecutive to sentence imposed in Count 1.” Moreover, it reflects a total aggregate term of 135 years to life, apparently

⁴ This issue is currently before the California Supreme Court in *People v. Mesa* (2010) 186 Cal.App.4th 773, review granted October 27, 2010, S185688. Pending a decision in *Mesa*, stare decisis counsels us to adhere to our decision in *Sanchez*.

representing the 120 years to life that the trial court actually imposed (see part II, *ante*), *plus an enhancement* of 15 years to life.

The abstract of judgment similarly indicates a base term of 15 years to life, plus an enhancement of 15 years to life.

The People concede the error. Accordingly, in our disposition, we will direct the trial court to correct the minute order and the abstract.

V

DISPOSITION

The judgment is modified by staying execution of the concurrent three-year term imposed for gang participation (count 7). This stay will become permanent upon defendant's service of the remainder of his sentence. (See part III, *ante*.) Except as thus modified, the judgment is affirmed.

The superior court clerk is directed to prepare a new sentencing minute order and a new abstract of judgment, which should both (1) reflect this modification and (2) correct the clerical errors noted in part IV, *ante*. The superior court clerk is also

directed to forward a certified copy of the new abstract to the Department of Corrections and Rehabilitation.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

MILLER
J.