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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.

JOSEPH HERNANDEZ,

Defendant and Appellant.

E053563

(Super.Ct.No. RIF153872)

OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. Affirmed with directions.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette Cavalier, and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION<sup>1</sup>

Defendant Joseph Hernandez is an admitted member of the Florencia 13 criminal street gang. Defendant was the driver of a vehicle involved in a drive-by shooting. Defendant's passenger fired four gunshots at another vehicle driven by Alberto Gonzalez, who recognized defendant from high school.

A jury convicted defendant of attempted murder (§§ 664/187, subd. (a)); discharging a firearm at an occupied vehicle (§ 246); street terrorism (§ 186.22, subd. (a)); and related enhancements for personal discharge of a firearm by a principal on count 1 (§ 12022.53, (c)(e)) and acting for the benefit of a street gang on counts 1 and 2. (§ 186.22, subd. (b).)

The court sentenced defendant to a prison term of life with the possibility of parole on count 1, plus 20 years for the firearm enhancement.<sup>2</sup> The court stayed a 10-year sentence for the gang enhancement on count 1 and stayed the imposition of sentence on counts 2 and 3.

On appeal, defendant argues the court abused its discretion by admitting evidence of defendant's prior arrest for possession of a firearm. Defendant also contends the court was not authorized to impose and stay the 10-year gang enhancement on count 1. We

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<sup>1</sup> All statutory references are to the Penal Code unless stated otherwise.

<sup>2</sup> Respondent's brief incorrectly states the life sentence as being without possibility of parole.

reject defendant's substantive arguments and affirm the judgment, subject to modification of the sentence on count 1 as explained below in part IV.

## II

### FACTUAL BACKGROUND

#### *A. Prosecution's Evidence*

##### *1. The Shooting*

About 3:00 p.m. on November 29, 2009, Gonzalez was driving a black Nissan Xterra in Mira Loma when he noticed a white Volkswagen Jetta driving in the opposite direction. The Jetta made a U-turn and began following Gonzalez. The Jetta pulled up next to Gonzalez in the opposite lane of traffic. The Jetta's windows were slightly tinted but Gonzalez saw a driver and a passenger. He recognized the driver as defendant because defendant had attended Gonzalez's high school.

The Jetta's passenger rolled down his window and flashed an upside down "F" sign, which stands for Florencia 13. Gonzalez was not a gang member but he did associate with members of the Mira Loma Dodd Street gang, a rival of Florencia 13.

Gonzalez tried to speed away from the Jetta, honking his horn to draw attention to the Nissan. When he slowed down for an approaching car, defendant drove next to the Nissan. The passenger, an Hispanic male with a shaved head, about 18 years old, opened the passenger door and stuck out his arm. Gonzalez ducked and heard four gunshots. Two bullets penetrated the Nissan's driver's door, one bullet grazing Gonzalez's shoe. Two shots hit the Nissan in the back as Gonzalez pulled ahead.

Defendant was arrested, while driving a white Jetta, on December 2, 2009.

## *2. Gang Evidence*

A gang expert testified that the Florencia 13 gang had a total membership between 2,500 and 3,000 and 20 local members. In 2008 and 2009, the gang's primary activities were car theft, gun possession, vandalism, and assault.

The expert testified that defendant was an active participant in Florencia 13 based on the expert's knowledge of defendant for four years and the indicia of defendant's gang involvement, including tattoos, admissions, contacts, and field identifications. On May 7, 2009, defendant told another police officer that he was a gang member and he would work for the gang if he was forced; otherwise, he would risk being disciplined.

The expert testified that defendant committed the shooting in association with and for the benefit of Florencia 13, based on defendant's passenger flashing the "F" hand sign and defendant pursuing Gonzalez to facilitate the shooting. The attempted murder also benefitted the gang by enhancing its reputation and instilling fear in the community.

## *B. Defense Evidence*

Defendant was born in August 1990. Defendant testified he joined Florencia 13 when he was 14 years old. He was officially "rushed" into the gang (beaten up by some members) when he was 16 years old. He participated in vandalism and fighting for the gang. The gang was rivals with the Mira Loma gang. Defendant was 19 years old at the time of the shooting.

In 2007, when he was 17 years old, defendant acquired a girlfriend and began to disassociate from the gang. When defendant's girlfriend became pregnant in 2008, they began living together. At age 18, defendant stopped tagging and fighting and began

working at a San Dimas country club. After his son was born in January 2009, defendant considered himself inactive and the gang members respected that decision. Defendant was promoted to waiter and he got a second job as a warehouse manager in Rancho Cucamonga. He continued to live with his girlfriend and their son.

Defendant bought a white Jetta in November 2009. On November 29, 2009, defendant made an appointment to have his car windows tinted at 12:30 pm. He dropped the car off at 11:10 a.m. The tinting was performed by Car Audio Depot in Pomona. The work was scheduled to begin at 12:30 pm. The process would typically last 90 minutes. Customers were told they could not roll down the windows for three days or the tinting would peel. From 2:30 p.m. until 9:00 p.m., defendant attended a barbecue in Rubidoux where he displayed his tinted windows to the host and guests.

On December 2, 2009, defendant made contact with the police. During an interview, defendant explained he had been in Pomona on the day of the shooting and offered the receipt for window tinting. Defendant did not roll down the windows for three days as he had been instructed.

### *C. Prosecution's Rebuttal*

According to the deputy who interviewed him, defendant said he was in Pomona until 4:00 p.m., after the time of the shooting, and at the Rubidoux barbecue from 5:00 p.m. to 8:00 p.m. A witness said that defendant had told her his tinting appointment was at 2:30 p.m. and she did not see him at the barbecue until 4:00 p.m.

The gang expert explained it is common for defendants to disclaim active gang involvement to avoid enhanced punishment.

### III

#### EVIDENCE OF PRIOR ARREST

Over defendant's objection, the court allowed evidence that, in April or May 2009, the gang expert stopped defendant driving a car with Jesse Ortiz, another gang member. The officers found a gun in a hidden compartment. Defendant was arrested but never charged. After being detained, defendant told a deputy at the jail he was a member of Florencia 13.

Defendant argues the subject evidence was more prejudicial than probative and the court abused its discretion by allowing its admission. Respondent counters the evidence was relevant to show defendant's active participation in Florencia 13 and, furthermore, the evidence did not cause any prejudice.

The deferential abuse of discretion standard of review applies to Evidence Code section 352 rulings. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1171.) "Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt." (*People v. Crew* (2003) 31 Cal.4th 822, 842.) A ruling that is arbitrary, capricious, or patently absurd is an abuse of discretion. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.)

Our Supreme Court held in *People v. Tran* (2011) 51 Cal.4th 1040: "Without doubt, evidence a defendant committed an offense on a separate occasion is inherently prejudicial. [Citations.] But Evidence Code section 352 requires the exclusion of evidence only when its probative value is *substantially* outweighed by its prejudicial

effect. ‘Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome” [citation].’ [Citation.]

“[S]everal factors . . . might serve to increase or decrease the probative value or the prejudicial effect of evidence of uncharged misconduct and thus are relevant to the weighing process required by Evidence Code section 352.

“The probative value of the evidence is enhanced if it emanates from a source independent of evidence of the charged offense because the risk that the witness’s account was influenced by knowledge of the charged offense is thereby eliminated. [Citation.] On the other hand, the prejudicial effect of the evidence is increased if the uncharged acts did not result in a criminal conviction. This is because the jury might be inclined to punish the defendant for the uncharged acts regardless of whether it considers the defendant guilty of the charged offense and because the absence of a conviction increases the likelihood of confusing the issues, in that the jury will have to determine whether the uncharged acts occurred. [Citation.] The potential for prejudice is decreased, however, when testimony describing the defendant’s uncharged acts is no stronger or more inflammatory than the testimony concerning the charged offense. [Citation.]” (*People v. Tran, supra*, 51 Cal.4th at p. 1047.)

Additionally, “[i]n cases . . . where evidence is admitted under Evidence Code section 1101, subdivision (b), the evidence is probative because of its tendency to establish an *intermediary* fact from which the ultimate fact of guilt of a charged crime may be inferred. [Citations.]” (*People v. Tran, supra*, 51 Cal.4th at p. 1048.)

Furthermore, “. . . the trial court of course retains discretion to exclude details of offenses or related conduct that might tend to inflame without furthering the purpose for admitting the evidence.” (*Id.* at p. 1049.)

Here defendant was charged in count 3 with street terrorism, involving active gang participation, knowledge of a gang’s criminal activity, and facilitating criminal gang conduct. (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) Evidence that, in May 2009, defendant was driving a car with a gang member as a passenger and a concealed weapon tended to show all the elements of street terrorism committed in November 2009.

Furthermore, the “probative value of the evidence” was enhanced because it emanated from the gang expert, “a source independent of evidence of the charged offense . . . .” (*People v. Tran, supra*, 51 Cal.4th at p. 1047.) Even though the arrest was uncharged, “the potential for prejudice” was decreased because the “testimony describing the defendant’s uncharged acts [was] no stronger or more inflammatory than the testimony concerning the charged offense. [Citation.]” (*Ibid.*)

Nor are the two incidents so strikingly similar as to cause prejudice. In the May incident, defendant was stopped while driving with a fellow gang member but the gun was not in use. In the instant crime, defendant and his armed passenger were stalking their victim. The former incident did not mean the jury would infer guilt in the present case. Thus, there was no danger of undue prejudice from allowing the evidence of the uncharged offense.

Any error was also harmless because Gonzalez recognized defendant driving the car and positively identified him in a photographic lineup. Defendant admitted he owned

a white Jetta with tinted windows. Even if defendant had recently had his windows tinted, opening the window may not have affected the tinting and the shooting occurred from an open car door, not a window. The defense evidence was inconsistent about where defendant was the day and time of the shooting. Finally, all evidence supported that defendant was an active member of Florencia 13.

Both parties agree the prosecutor did not emphasize the uncharged incident. Under these circumstances, it is not reasonably probable defendant would have received a more favorable verdict if the court had excluded evidence about the uncharged verdict. (*People v. Earp* (1999) 20 Cal.4th 826, 878.)

#### IV

#### SENTENCING

The parties agree the trial court erred in imposing and staying a 10-year gang enhancement on count 1. Instead, the court should have imposed a 15-year minimum eligibility term under section 186.22, subdivision (b)(5). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006-1007.) Defendant argues that the 15-year minimum term should be stricken not stayed because section 12022.5, subdivision (e)(2), does not allow the gang enhancement unless defendant personally used a firearm. The People counter that the 15-year minimum term should be stayed not stricken. We agree.

In *People v. Brookfield* (2009) 47 Cal.4th 583, the California Supreme Court declared: “Subdivision (e) of section 12022.53 explains how a trial court is to sentence a defendant in a case in which the provisions of sections 186.22 and 12022.53 both apply. Subdivision (e)(1) of section 12022.53 provides: ‘The enhancements provided in this

section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).’ . . . And section 12022.53(e)(2) provides: ‘An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.’

“Section 12022.53’s subdivision (e)(1) has this effect: Ordinarily, section 12022.53’s sentence enhancements apply only to *personal* use or discharge of a firearm in the commission of a statutorily specified offense, but when the offense is committed to benefit a criminal street gang, the statute’s additional punishments apply even if, as in this case, the defendant did not personally use or discharge a firearm but another principal did. Section 12022.53(e)(2), however, limits the effect of subdivision (e)(1). A defendant who *personally* uses or discharges a firearm in the commission of a gang-related offense is subject to *both* the increased punishment provided for in section 186.22 *and* the increased punishment provided for in section 12022.53. In contrast, when another principal in the offense uses or discharges a firearm but the defendant does not, there is no imposition of an ‘enhancement for participation in a criminal street gang . . . in addition to an enhancement imposed pursuant to’ section 12022.53. (§ 12022.53(e)(2).)”

(*People v. Brookfield, supra*, 47 Cal.4th at p. 590.)

“It appears that the Legislature’s use of the term ‘enhancement’ in section 12022.53(e)(2) was intended to refer broadly to any greater term of imprisonment for a crime that, as here, is committed to benefit a criminal street gang. This means that, as used in the statute, the word ‘enhancement’ includes not only the sentence enhancements in section 186.22, but also the alternate penalty provisions in that section . . . .

“Section 12022.53’s sentencing scheme distinguishes between four types of offenders. The first group consists of those offenders who personally used or discharged a firearm in committing a gang-related offense that is specified in section 12022.53. These defendants are subject to *both* to the harsh enhancement provisions of 12022.53 *and* the gang-related sentence increases of section 186.22. The second group consists of *accomplices* to a gang-related offense specified in section 12022.53 in which, as here, not the defendant but another principal personally used or discharges a firearm. They are subject to additional punishment under *either* section 12022.53 *or* the gang-related sentence increases under section 186.22, but not *both*. The third group consists of those who personally used or discharged a firearm during an offense that is specified in section 12022.53 but is *not gang related*. They are subject to additional punishment under section 12022.53, but because the crime is not gang related, the gang-related sentence increases of section 186.22 do not apply. The fourth group consists of those who committed a crime that is listed in section 12022.53 but is not gang related, and who did not personally use or discharge a firearm. This last group of defendants is not subject *either* to the gang-related sentence increases of section 186.22 (because the crime was not gang related) *or* to the additional punishment provisions of section 12022.53 (because the

offender did not personally use or discharge a firearm).” (*People v. Brookfield, supra*, 41 Cal.4th at pp. 593-594.)

In the present case, defendant occupies the second category. He was an accomplice to a gang-related offense specified in section 12022.53 in which another principal personally used or discharged a firearm. Defendant is subject to additional punishment under either section 12022.53 or the gang-related sentence increase under section 186.22, but not both. Otherwise, when an increased sentence is imposed under section 186.22, “the perpetrator who personally used or discharged the gun and the accomplice who did not do so would receive equally severe penalties. To allow such a result would be inconsistent with the Legislature’s apparent goal, in section 12022.53’s subdivision (e), of reserving the most severe sentences for those who *personally* used or discharged a firearm in the commission of a gang-related crime.” (*People v. Brookfield, supra*, 47 Cal.4th at p. 594.)

As we read *Brookfield*, it supports imposing but staying the 15-year minimum parole-eligibility term under section 186.22, subdivision (b)(5). (See *People v. Sinclair* (2008) 166 Cal.App.4th 848, 853-854; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282; see generally Cal. Rules of Court, rule 4.447 [“[n]o finding of an enhancement may be stricken or dismissed because imposition of the term either is prohibited by law or exceeds limitations on the imposition of multiple enhancements”; sentencing judge must “stay execution of so much of the term as is prohibited or exceeds the applicable limit”].)

V

DISPOSITION

The abstract of judgment and judgment are modified as to count 1 to strike the 10-year enhancement imposed pursuant to section 186.22, subdivision (b)(1), and, instead, to impose and stay a 15-year minimum parole-eligibility term pursuant to section 186.22, subdivision (b)(5). As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

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CODRINGTON  
J.

We concur:

RAMIREZ  
P.J.

MILLER  
J.