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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.

JERI DEALLEN KENNEDY,

Defendant and Appellant.

E053593

(Super.Ct.No. FSB903643)

OPINION

APPEAL from the Superior Court of San Bernardino County. Duke D. Rouse, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part; reversed in part.

Stephen M. Lathrop, 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, and Kelley Johnson, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant and appellant Jeri Deallen Kennedy guilty of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a), count 1)¹ and assault with a firearm (§ 245, subd. (a)(2), count 2). In regard to counts 1 and 2, the jury also found true that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(C).) As to count 1, the jury further found true that defendant personally used a firearm (§ 12022.53, subds. (b), (e)(1)); that defendant personally and intentionally discharged a firearm (§ 12022.53, subds. (c), (e)(1)); and that defendant personally and intentionally discharged a firearm, which caused great bodily injury to the victim (§ 12022.53, subds. (d), (e)(1)). As to count 2, the jury also found true that defendant personally used a firearm (§ 12022.5) and that defendant personally inflicted great bodily injury upon the victim (§ 12022.7).

Defendant was sentenced to a determinate term of 10 years plus a total indeterminate term of 32 years to life in state prison with credit for time served as follows: an indeterminate term of seven years to life on count 1, plus a consecutive term of 25 years to life for the section 12022.53, subdivision (d), enhancement, plus a consecutive determinate term of 10 years for the gang enhancement allegation attached to count 1.² On appeal, defendant contends (1) his conviction on count 1 for premeditated attempted murder should be reduced to attempted murder because the amended

¹ All future statutory references are to the Penal Code unless otherwise stated.

² The sentence on count 2, as well as the remaining enhancement allegations were stayed pursuant to section 654.

information failed to allege the premeditation element in violation of his statutory and constitutional rights; and (2) his aggregate indeterminate term should be reduced to 40 years to life because the trial court improperly calculated the minimum parole eligibility on count 1 and erred in imposing the 10-year gang enhancement term. We agree with the parties that defendant's conviction for premeditated attempted murder cannot stand because premeditation was not charged and will therefore remand the matter for resentencing.

I

DISCUSSION³

A. *Premeditated Attempted Murder*

Defendant argues that his conviction on count 1 for attempted premeditated murder must be reduced to attempted murder because the amended information “pled only an unpremeditated attempted murder” in violation of section 664, subdivision (a), and his constitutional rights to due process. The People respond that defendant “appears to be correct.”

Section 664, subdivision (a), provides that the punishment for an attempt to commit a crime punishable by life imprisonment or death generally shall be a term of five, seven, or nine years. However, “the statute further provides that when the crime attempted is ‘willful, deliberate, and premeditated murder,’ the person guilty of that

³ The details of defendant's criminal conduct are not relevant to the limited legal issue raised in this appeal. Those details are set out in the parties' briefs, and we will not recount them here.

attempt shall be subject to the punishment of imprisonment for life with the possibility of parole.” (*People v. Bright* (1996) 12 Cal.4th 652, 655-656, quoting § 664, subd. (a), overruled on another ground in *People v. Seel* (2004) 34 Cal.4th 535, 541.) As is relevant to this appeal, that subdivision specifies that “[t]he additional term provided in this section for attempted willful, deliberate, and premeditated murder *shall not* be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated *is charged in the accusatory pleading* and admitted or found to be true by the trier of fact.” (§ 664, subd. (a), italics added.)

The first amended information charged defendant with attempted murder. Specifically, it alleged that “[o]n or about September 2, 2009, in the above named judicial district, the crime of ATTEMPTED MURDER, in violation of PENAL CODE SECTION 664/187(a), a felony, was committed by [defendant], who did unlawfully, and with malice aforethought attempt to murder [the victim], a human being.” However, the amended information did not allege that the attempted murder was premeditated. The original information and the complaints also failed to allege the premeditation allegation. Nonetheless, the jury was instructed pursuant to CALCRIM No. 601, that if the jury found defendant guilty of attempted murder under count 1, it must then decide whether the People have proved the additional allegation that the attempted murder was committed willfully and with deliberation and premeditation. In addition, a verdict form with a potential finding of premeditation was submitted to the jury, and the jury found the allegation to be true. At sentencing, the trial court imposed the section 664, subdivision (a), punishment of life in prison for the attempted murder conviction.

As noted *ante*, section 664, subdivision (a), provides that the fact that an attempted murder is willful, deliberate, and premeditated must be “charged in the accusatory pleading and admitted or found to be true by the trier of fact.” (See also *People v. Lee* (2003) 31 Cal.4th 613, 623 [premeditation must be alleged in the information]; *People v. Seel, supra*, 34 Cal.4th at p. 539 [premeditation is an element of the offense of attempted murder with premeditation]; *People v. Arias* (2010) 182 Cal.App.4th 1009, 1016-1021 (*Arias*) [reversal of premeditated attempted murder required when pleading requirements of § 664, subd. (a), were not met].) Here, although the jury found the premeditation allegation to be true, the fact that the attempted murder was willful, deliberate, and premeditated was not charged in the accusatory pleading. (§ 664, subd. (a).)

Arias, supra, 182 Cal.App.4th 1009, is instructive. In that case, the Court of Appeal vacated jury findings of “first degree attempted murder” and the indeterminate life sentences imposed on those verdicts because the information charged the defendant with two counts of attempted murder, but did not allege that the attempted murders were willful, deliberate, and premeditated. (*Id.* at pp. 1016-1017.) The court found that the record clearly showed “the prosecution failed to comply with the unambiguous pleading requirement set forth in section 664, subdivision (a),” and rejected the People’s forfeiture argument by relying on *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*).⁴ (*Arias*, at

⁴ In *Mancebo, supra*, 27 Cal.4th 735, our Supreme Court “found no waiver, despite the defendant’s failure to object at the time of sentencing, because the imposition of a sentencing enhancement based on an unpled enhancement allegation in violation of statutory pleading requirements amounted to an unauthorized sentence. [Citation.]” (*Arias, supra*, 182 Cal.App.4th at p. 1017.)

p. 1017.) The court reasoned that “neither the information nor any pleading gave defendant notice that he was potentially subject to the enhanced punishment provision for attempted murder under section 664, subdivision (a).” (*Id.* at p. 1019.)

The court further articulated that besides the statutory notice requirements, a defendant has a “‘due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes.’ [Citation.]” (*Arias, supra*, 182 Cal.App.4th at p. 1019.) Based upon the constitutional right to due process of law, the court reasoned that a defendant must be advised of the charges against him so he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise at trial. (*Ibid.*)

We therefore determine that the People have properly conceded error. As such, the attempted premeditated murder conviction (count 1) must be reduced to attempted murder and the matter remanded for resentencing. (See *Mancebo, supra*, 27 Cal.4th at p. 754; *Arias, supra*, 182 Cal.App.4th at p. 1021.)

B. *Sentencing Error*

Defendant also contends that his sentence should be reduced from 42 years to life to 40 years to life because the trial court improperly calculated the minimum parole eligibility term on count 1. He further claims that the court erred in imposing the 10-year gang enhancement on the life term sentence pursuant to section 186.22, subdivision

(b)(1), because subdivision (b)(1) does not apply where a defendant is sentenced to a life term; the applicable section is 186.22, subdivision (b)(5).⁵

However, as the People point out, this issue is moot because upon remand, the trial court will resentence defendant on count 1 to a determinate term under section 664, subdivision (a), including the gang enhancement and, thus, there will not be a minimum parole eligibility term. Essentially, because the attempted murder in count 1 is no longer punishable by imprisonment for life, the 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5), no longer applies. Instead, the 10-year enhancement under section 186.22, subdivision (b)(1)(C), is applicable. (See § 186.22, subd. (b)(1) & (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004, 1010 [first degree murder with true finding that murder was committed for benefit of criminal street gang was subject to the 15-year minimum parole eligibility term under § 186.22, subd. (b)(5), instead of the 10-year enhancement under § 186.22, subd. (b)(1)(C)].)

II

DISPOSITION

The finding in count 1 that the attempted murder was willful, deliberate, and premeditated is reversed. The trial court shall resentence defendant in count 1 to a determinate term under section 664, subdivision (a), plus any applicable enhancements. Upon resentencing, the superior court clerk is directed to amend the abstract of judgment

⁵ Section 186.22, subdivision (b)(5), states in relevant part that “any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.”

and to produce a minute order of the resentencing hearing. Further, the superior court clerk is directed to forward a certified copy of the amended abstract of judgment and the minute order of the resentencing hearing to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

CODRINGTON
J.