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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.

DARIONNE STEVEN SIMPSON,

Defendant and Appellant.

E054348

(Super.Ct.No. RIF10002518)

OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge.

Affirmed as modified.

Richard de la Sota, 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, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Darionne Steven Simpson guilty of two counts of attempted willful, deliberate, and premeditated murder (Pen. Code,<sup>1</sup> §§ 664, 187, subd. (a), counts 1 & 3); one count of shooting at an occupied vehicle (§ 246, count 2); one count of discharging a firearm in a grossly negligent manner (§ 246.3, count 4), a lesser included offense of shooting at an occupied vehicle; and one count of active participation in a criminal street gang (§ 186.22, subd. (a), count 5). The jury also found true that in the commission of count 1, defendant personally discharged a firearm. (§ 12022.53, subd. (c).)

Defendant was sentenced to a total determinate term of eight months, and a total indeterminate term of 14 years to life, plus 20 years, with credit for time served in state prison. On appeal, defendant contends: (1) his sentence of eight months on count 5 should have been stayed pursuant to section 654; and (2) the abstract of judgment should be corrected to reflect the sentence imposed by the trial court. We agree, and will modify the judgment.

## I

### FACTUAL BACKGROUND

#### A. *Victim M.M.*

On February 26, 2010, around 7:00 p.m., M.M. was driving his 1987 Camaro in Moreno Valley, when he saw three young Black males in a black Ford Taurus staring at him in a menacing manner. The vehicle followed M.M. and pulled in front of his vehicle.

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

When both vehicles came to a stop, M.M. saw a “gun come out the back window” and shoot at him multiple times. M.M. ducked, made a U-turn, and sped away. A bullet hit the front of M.M.’s vehicle. M.M. drove home and called the police.

Riverside County Sheriff’s deputies came to M.M.’s house, took a report, and left about 10 minutes later. Approximately 20 minutes later, deputies came back to M.M.’s home and took him to a location about a mile away for an in-field identification. M.M. identified the black Taurus as the vehicle from which shots had been fired, but was unable to identify defendant as one of the suspects. Later in the evening, deputies searched the area where the shots were fired and recovered .40-caliber shell casings.

B. *Victim M.J.*

On February 26, 2010, around the same time as the incident in victim M.M.’s case, the front passenger in the same black Taurus shot multiple times at M.J.’s silver vehicle, hitting the driver’s side door and window.<sup>2</sup> Riverside County Sheriff’s Deputy Acosta was on patrol in the area and heard four to five shots fired. Deputy Acosta then saw M.J.’s silver vehicle following the black Taurus at a high rate of speed.

M.J. pulled over, waved at the deputy, and continued to follow the black Taurus. The deputy followed M.J.’s vehicle, and when M.J. came to another stop, the deputy made contact with M.J. M.J. pointed in the direction the black Taurus was travelling, and excitedly said, ““Those guys in that black Ford Taurus just shot at me.”” Deputy Acosta

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<sup>2</sup> Victim M.J. did not appear at trial to testify. A video surveillance of a nearby liquor store captured the three Black males and the black Taurus following M.J.’s silver vehicle as M.J. left the liquor store.

pursued the black Taurus, but was unable to catch up with it. Deputy Acosta later located the black Taurus parked in the area, but did not find any suspects in the vehicle.

Riverside County Sheriff's Deputy Pierson was on routine patrol when he received a dispatch call of "shots fired." Deputy Pierson responded to the area the black vehicle was located, and as he approached the area, he saw a "[B]lack male adult walking very briskly." Deputy Pierson detained the suspect, identified as defendant, and noticed that defendant was "breathing heavily." Defendant lied to the deputy about his name.

Deputy Pierson subsequently searched the area and found a brown sweater and a blue shirt in a nearby yard. A search of defendant's person revealed a shell casing in his pocket.

After defendant waived his constitutional rights, he admitted to being at the liquor store. He also admitted to being the rear passenger in the black Taurus during the shootings. He claimed the driver of the black Taurus was from a "Crip-affiliated" gang in Los Angeles. Defendant also admitted to taking off his clothes after the shooting. He denied being the shooter and evasively claimed the front passenger was the shooter.

### C. *Gang Evidence*

A gang expert testified that the Perris Loc gang is a criminal street gang with about 75 to 90 members. The gang's territory is the southern portion of the City of Perris, and its primary activities are assault with a deadly weapon, robbery, and drug sales. Members of the gang had committed numerous crimes that showed a pattern of criminal gang activity.

Defendant had previously admitted that he was a member of the Perris Loc gang. In addition, defendant had been contacted by law enforcement with members of the gang. Defendant had multiple tattoos, such as “Front Line” and “Certified Goon,” which were affiliated with the Perris Loc gang. The gang expert concluded that on the date of the incidents, defendant was a member of the Perris Loc criminal street gang.

## II

### DISCUSSION

#### A. *Imposition of Sentence on Gang Count Conviction (Count 5)*

Following a jury trial, defendant was convicted of two counts of attempted willful, deliberate, and premeditated murder (§§ 664, 187, subd. (a), counts 1 & 3); one count of shooting at an occupied vehicle (§ 246, count 2); one count of discharging a firearm in a grossly negligent manner (§ 246.3, count 4), a lesser included offense of shooting at an occupied vehicle; and one count of active participation in a criminal street gang (§ 186.22, subd. (a), count 5). The jury also found true that in the commission of count 1, defendant personally discharged a firearm. (§ 12022.53, subd. (c).)

As a result, defendant was sentenced to a total determinate term of eight months, and a total indeterminate term of 14 years to life, plus 20 years, with credit for time served in state prison as follows: an indeterminate term of seven years to life on count 1; 20 years for the personal discharge of a firearm enhancement attached to count 1; a consecutive indeterminate term of seven years to life on count 3; and a consecutive term of eight months on count 5. Sentences on counts 2 and 4 were stayed pursuant to section 654.

Defendant argues that his eight-month sentence on his gang participation conviction (count 5) should have been stayed pursuant to section 654.<sup>3</sup> The question of whether a defendant may be sentenced both for gang participation under section 186.22, subdivision (a), and for the substantive crime that serves as the predicate to a gang participation conviction was recently resolved by our Supreme Court in *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*).

In *Mesa*, the Supreme Court found that when in a single proceeding a defendant is convicted of a substantive offense and the substantive offense is the predicate to a gang participation conviction under section 186.22, subdivision (a), imposition of a sentence on the offense with the shorter potential term must be stayed under section 654. (*Mesa, supra*, 54 Cal.4th at pp. 195-198.) Quoting from this court’s opinion in *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1301, 1315 [Fourth Dist., Div. Two] (*Sanchez*), the Supreme Court explained, “As *Sanchez* put it, ‘section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have “willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang,” [citation], and (2) the underlying felony that is used to satisfy this element of gang participation.’ [Citation.] Section 654 applies where the ‘defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself.’ [Citation.]” (*Mesa*, at pp. 197-198.)

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<sup>3</sup> Section 654 provides that a defendant may be punished only once for “[a]n act or omission that is punishable in different ways by different provisions of law.”

The instant case is indistinguishable from *Mesa* and *Sanchez*. The underlying attempted murder and firearm discharging offenses were necessary elements of count 5, the gang participation offense. Defendant's intent in committing the gang offense was identical to the intent in committing the underlying felonies. The same act that made the attempted murder and firearm discharging offenses punishable also made the gang participation offense punishable. Just as in cases of felony murder and the underlying felony, the underlying felonies here were necessary elements that transformed defendant's gang membership into a criminal offense. (*Mesa, supra*, 54 Cal.4th at pp. 197-198; *Sanchez, supra*, 179 Cal.App.4th at p. 1315.) In the absence of any evidence of an independent intent and purpose, section 654 applies to prohibit punishment for the gang participation charge in count 5.

We therefore conclude that, given the sentences for the attempted murder charges, defendant could not be punished separately for gang participation. Defendant's eight-month sentence on count 5 should have therefore been stayed pursuant to section 654.

B. *Abstract of Judgment*

Defendant next contends, and the People agree, that the abstract of judgment should be corrected to reflect the sentence imposed by the trial court. We also agree.

First, the abstract of judgment incorrectly states that defendant's sentence on the personal discharge of a firearm (§ 12022.53, subd. (c)) enhancement attached to count 1 is "20 years to life." Section 12022.53, subdivision (c), authorizes a sentence of 20 years (§ 12022.53, subd. (c)), and the trial court orally pronounced the sentence as 20 years.

Second, the trial court erroneously stated, and the abstract of judgment incorrectly states, that defendant's sentence on counts 1 and 3 for attempted premeditated murder is "7 years to life." The punishment for attempted premeditated murder is "imprisonment in the state prison for life with the possibility of parole." (§ 664, subd. (a); see also *People v. Jefferson* (1999) 21 Cal.4th 86, 90.) However, under section 3046, a defendant sentenced to life in prison with the possibility of parole must serve "at least seven calendar years" before becoming eligible for release on parole. (§ 3046, subd. (a)(1).) Therefore, defendant here should have been sentenced to consecutive sentences of life with the possibility of parole, plus 20 years for the firearm enhancement (§ 12022.53, subd. (c)) attached to count 1.

Lastly, the abstract of judgment mistakenly states that defendant's sentence on count 3 for attempted premeditated murder was stayed pursuant to section 654.

Based on the foregoing, the abstract of judgment should therefore be corrected accordingly. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate courts have inherent power to correct clerical errors contained in abstracts of judgment that do not accurately reflect the judgment].)

### III

#### DISPOSITION

The judgment is modified as follows: The eight-month term imposed on count 5 (gang participation) is hereby stayed pursuant to section 654. This stay shall become final if and when defendant has served the remainder of his sentence. The superior court clerk is directed to correct the sentencing minute order of June 24, 2011, and the abstract

of judgment to reflect that the sentence on count 5 is stayed, that the sentences on counts 1 and 3 are consecutive sentences of life with the possibility of parole, plus 20 years for the firearm enhancement (§ 12022.53, subd. (c)) attached to count 1. In addition, the superior court clerk is directed to prepare amended abstracts of judgment and to forward certified copies of the amended abstracts to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) The judgment as thus modified is affirmed.

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RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

MILLER  
J.