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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.

JEREMY ROBERT CASTRO,

Defendant and Appellant.

E061984

(Super.Ct.No. INF1302929)

OPINION

APPEAL from the Superior Court of Riverside County. Charles Everett Stafford, Jr., Judge. Affirmed with directions.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jeremy Robert Castro, a member of the West Drive Locos gang, shot 17-year-old C.T. in the chest at a Halloween party, causing C.T. to become paralyzed from the waist down. The jury convicted defendant of attempted first degree murder (Pen. Code, §§ 664, 187, subd. (a), count 1);<sup>1</sup> possession of a firearm (§ 29820, count 2);<sup>2</sup> active participation in a criminal street gang (§ 186.22, subd. (a), count 3); and misdemeanor resisting a peace officer (§ 148, subd. (a)(1), count 4). With regard to count 1, the jury found true the allegations that defendant: (1) committed an act for the benefit of a criminal street gang and that a principal personally used a firearm during the commission of the offense (§ 12022.53, subd. (e)); (2) personally and intentionally discharged a firearm causing great bodily injury to another (§ 12022.53, subd. (d)); (3) committed the offense to promote a criminal street gang (§ 186.22, subd. (b)); and (4) personally inflicted great bodily injury on C.T. (§ 12022.7, subd. (b)).

The trial court sentenced defendant to a total term of 5 plus 55 years to life, comprised as follows: 30 years to life for the attempted murder conviction (15 years to life, doubled for a prior serious felony conviction), a consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), and a consecutive

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<sup>1</sup> All unlabeled statutory references are to the Penal Code.

<sup>2</sup> Under section 29820, subdivision (b), a former juvenile offender may not possess a firearm until the age of 30. At trial, the parties stipulated that defendant is a former juvenile offender and was 27 years old at the time the information was filed.

determinate term of five years for the prior serious felony conviction.<sup>3</sup> The court imposed concurrent sentences of four years each for the possession of a firearm and the active gang participation convictions (counts 2, 3).

On appeal, defendant argues he did not receive a fair trial because the trial court failed to adequately ensure one of the jurors could remain impartial after an incident that occurred at the courthouse during the trial. Defendant also makes several arguments regarding his sentence. First, he contends the sentencing minute order and abstract of judgment erroneously reflect that his punishment for violation of section 186.22, subdivision (b) (commission of a felony for the benefit of a gang) was stayed, when in fact the court imposed punishment. Second, he argues the court was required to stay his punishment for the active gang participation offense (§ 186.22, subd. (a)) under section 654 pursuant to the holding of *People v. Mesa* (2012) 54 Cal.4th 191. Third, defendant asserts, and the People agree, the sentencing hearing minute order and abstract of judgment conflict with the court's oral pronouncement at the sentencing hearing. The parties agree the minute order and abstract of judgment should be corrected to reflect the correct sentences for counts 2 and 3 (i.e., four years each instead of eight years each) and to strike a \$1,000 fine unrelated to the case.

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<sup>3</sup> The court also imposed a sentence of 180 days, with credit for time served, for the misdemeanor resisting a peace officer conviction.

We disagree with defendant's biased juror argument, but agree with his arguments regarding his sentence. We therefore direct the trial court to make the changes to the minute order and the abstract of judgment discussed herein, and affirm the judgment in all other respects.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

Because the sufficiency of the evidence is not at issue in this appeal, we briefly recount the facts presented at trial. On October 31, 2013, C.T. and his two friends attended a Halloween party at a home in Desert Hot Springs. At some point during the party, defendant and another member of West Drive Locos approached C.T. and his friends in the backyard. C.T. told defendant he did not gang bang, and that he was neutral and did not want any problems. Defendant walked away from C.T., but about five minutes later, another member of West Drive Locos told C.T. to go to the front yard. C.T. refused to go. He knew of defendant's gang and was afraid of being stabbed or shot. Two members of West Drive Locos began picking a fight with one of C.T.'s friends. As C.T. stepped forward to help his friend, defendant shot C.T. in the chest.

The bullet entered C.T.'s front upper left rib cage area and exited below his right shoulder. As a result of the wound, C.T. is permanently paralyzed from the waist down.

Two days after the shooting, a police officer tried to stop defendant after defendant stepped in front of his patrol car. The police officer chased defendant on foot throughout

the surrounding neighborhood, while defendant was holding the front of his waistband as he ran. The officer ultimately caught and arrested defendant. The officer retrieved the gun defendant had tossed over a fence during the chase. This gun was later determined to be the same one that fired the bullet that shot C.T. The parties stipulated that West Drive Locos is a criminal street gang engaged in a pattern of criminal activity and that defendant had been a member of the gang for at least 13 years.

## II

### DISCUSSION

#### A. *The Court's Decision Not to Discharge Juror No. 6 Was Proper*

Defendant contends he was deprived of his constitutional right to a fair trial by the court's failure to adequately investigate an incident at the courthouse involving a member of the jury, Juror No. 6. We find no abuse of discretion in the court's treatment of Juror No. 6's concern regarding the incident; to the contrary, the court promptly and fully investigated the incident and reasonably concluded discharge was unnecessary.

##### 1. *Background facts*

After the second day of trial, the court held a hearing in chambers with both counsel present to address an issue Juror No. 6 had raised. During the hearing, Juror No. 6 told the court this was his first time serving as a juror and he was concerned about his safety due to a recent incident. He stated: “[B]efore court convened, I was using the restroom and there was [*sic*] two gentlemen on—before me. I know they didn't see me

whatsoever, but then as I was walking past, I don't know if it was ignorance or, you know, trying to get a reaction, but they were like making different sounds towards me when I walked by the bathroom. I was called a bitch.”

In response to the court's questions, Juror No. 6 said he did not recognize the two men and had not seen them inside the courtroom. He had seen the two men outside of the courtroom, walking “up and down the [hallway] a few times,” and it made him “a little nervous,” but he had “passed it off as ignorance in the hall.” He wanted to bring the matter to the court's attention “as far as personal safety.” He added, “I know I can protect myself, but I don't want to jeopardize my future.”

The trial court responded, “No. And we don't want you to either. I have a feeling it's not related [to this case].” Juror No. 6 responded, “It's not related.”

At this point, the prosecutor informed the court that earlier that day she had encountered a group of men from a different, nongang case, who were “giving a lot of people [a] hard time.” She added, “And I did let the deputy know they were in the hallway not acting appropriately. I assume we are talking about the same group of people. . . . I used to be the prosecutor on that case. And they made some comments to me today.” The prosecutor assured the court that court services knew about the situation and knew who the men were.

The court told Juror No. 6 the incident was “unrelated to this case,” he did not have to worry, and if he saw anything out of the ordinary he should immediately notify

the court. Juror No. 6 responded, “Okay.” The court ended the hearing by stating, “I don’t think there will be any problems. It sounds like this other incident was unrelated and it’s related to something else.”

## 2. *Analysis*

The trial court is authorized to discharge jurors for good cause. (§ 1089.) “When the trial court receives notice that such cause may exist, it has an affirmative obligation to investigate. [Citations.] Both the scope of any investigation and the ultimate decision whether to discharge a given juror are committed to the sound discretion of the trial court.” (*People v. Bonilla* (2007) 41 Cal.4th 313, 350.) “The [reviewing] court will not presume bias, and will uphold the trial court’s exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence. [Citation.]’ ” (*People v. Jablonski* (2006) 37 Cal.4th 774, 807 (*Jablonski*).

This case is similar to *Jablonski*, a capital case where the defendant argued the trial court abused its discretion in failing to discharge a potentially biased juror. (*Jablonski, supra*, 37 Cal.4th at pp. 781, 807.) During trial, the juror informed the court that she had received a mysterious phone call from a person whose voice she did not recognize. The juror was concerned the call might be related to the case because the caller had identified himself as Carl, which was the defendant’s middle name. The court assured the juror the defendant could not have her phone number, and the juror agreed it had probably been a “crank call.” (*Id.* at p. 807.) The court asked her if she could be fair

and impartial after this incident and she responded she could. (*Ibid.*) In rejecting the defendant's claim of abuse of discretion, the California Supreme Court concluded the trial court's decision not to discharge the juror was reasonable because the record did not demonstrate "that the juror was unable to fulfill her functions as a demonstrable reality." (*Ibid.*)

Here, defendant argues it was "*probable*" Juror No. 6 was biased as a result of the courthouse incident and it "*may have been difficult* for Juror No. 6 to remain impartial." (Italics added.) In order to find an abuse of discretion we would have to do more than agree with defendant that bias was a possibility; we would have to find that bias was a *demonstrable reality*. (*Jablonski, supra*, 37 Cal.4th at p. 807 ["Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a 'demonstrable reality' ".])

Defendant cannot meet this standard on the record before us. Any claim of bias on the part of Juror No. 6 necessarily depends on the premise that the juror believed the two men giving him trouble were affiliated with defendant's gang, West Drive Locos. Like the juror in *Jablonski* who concluded the call was a crank call (and therefore implicitly agreed with the trial court that the call was unrelated to the case), Juror No. 6 explicitly agreed the incident in the courthouse bathroom and hallway was not related to the case. The court told Juror No. 6 it did not believe the incident was related to the case and Juror No. 6 replied, "It's not related."

Moreover, after Juror No. 6 concluded the incident was not related to the case, the prosecution confirmed this conclusion by explaining she was familiar with the two men and they were involved in a different case before a different judge. This explanation could only strengthen Juror No. 6's belief the incident was unrelated to defendant's case. Based on this record, the trial court could reasonably conclude Juror No. 6 harbored no bias because he understood the two men were not affiliated with West Drive Locos and were present at the courthouse due to their involvement in another case.

Defendant takes issue with the trial court's investigation into the incident, asserting the court should have asked Juror No. 6 whether he could remain fair and impartial and should have "give[n] Juror No. 6's descriptions to court services to ensure that the two men in question were part of the unrelated case described by the prosecutor, and then reported this information back to the juror." Our task on review is to uphold the court's decision unless we can discern from the record that bias was a demonstrable reality. (*Jablonski, supra*, 37 Cal.4th at p. 807.) The trial court is in the best position to determine whether a juror is capable of remaining impartial. The manner in which a court investigates a juror's abilities is committed to its sound discretion (*People v. Bonilla, supra*, 41 Cal.4th at p. 350), and we will not invade that discretion to require adherence to a particular set of procedures.

We are satisfied the court conducted an investigation thorough enough to assure itself that Juror No. 6 was not biased. The court could reasonably interpret the juror's

statement that the incident was “not related” as tantamount to a confirmation that the incident did not cause the juror to become biased against defendant. Furthermore, the prosecutor’s description of the men and her assurances they were not related to defendant’s case, and she had already contacted court services, were sufficient to satisfy the court no further investigatory action was needed. We find no abuse of discretion in the trial court’s decision not to discharge Juror No. 6.

B. *The Court Imposed Punishment Under Section 186.22, Subdivision (b)(5)*

The sentencing hearing minute order and abstract of judgment state the enhancement under section 186.22, subdivision (b)(1)(C) was stayed. As we interpret defendant’s argument, the court imposed his punishment for violation of section 186.22, subdivision (b) by using the 15-year minimum *parole eligibility period* specified in section 186.22, subdivision (b)(5), rather than using a sentence *enhancement* for a particular term of years under section 186.22, subdivision (b)(1). Thus, the minute order and abstract of judgment should be modified to reflect the punishment was imposed rather than stayed. The People contend the court stayed the sentence *enhancement* for the gang allegation and therefore the minute order and abstract of judgment are correct. The People further argue the trial court had discretion to stay the enhancement and properly exercised its discretion in doing so.

We agree with defendant. A trial court is not authorized to stay punishment “for the enhancements provided in [section 186.22, subdivision (b)]” (§ 186.22, subd. (g)),

and we conclude the trial court did not do so here. We find it clear from the transcript of the sentencing hearing that the trial court imposed punishment for violation of section 186.22, subdivision (b) by modifying the minimum parole eligibility period for defendant's attempted first degree murder conviction (which typically is a minimum of seven years) to a minimum of 15 years pursuant to section 186.22, subdivision (b)(5).

1. *Factual background*

For the attempted first degree murder conviction (count 1), the probation report recommended a total term of 55 years to life. The exposure calculation chart in the report states the term for count 1 is "replaced by associated enhancement," which enhancement is listed as "PC 186.22(b)(5)." At the sentencing hearing, the prosecutor provided the court with a proposed sentence and defense counsel submitted. Based on the probation report's recommendation and counsel's own research, the prosecutor recommended for "[c]ount 1 for the 664/187 . . . raising [it] to 15 to life because of the 186.22(b)," then doubling the 15-year indeterminate sentence to a 30-year indeterminate sentence based on defendant's prior strike conviction. The prosecutor indicated this calculation was supported by *People v. Jefferson* (1999) 21 Cal.4th 86. The prosecutor also recommended adding 25 years to life to count 1, for the section 12022.53 firearm enhancement.

The prosecutor then recommended that "the remaining allegations under Count 1 . . . be 654'd because they are contained in the 12022.53(d) and the 186.22(b),

making the defendant's mandatory sentence under Count 1 55 to life." In other words, the court should impose punishment for the true findings on the firearm and gang allegations, but stay punishment for the other count 1 allegations.

In response, the court stated, "So the total sentence as to Count 1 is 30 years to life, plus the 25 years to life. . . . [¶] The allegation under 1202[2].7(b) is stayed in light of the 12022.53 enhancement. And as to the other enhancements related to Count 1, they will be also stayed." Both the sentencing hearing minute order and the abstract of judgment reflect that the court imposed and stayed an enhancement under section 186.22, subdivision (b)(1)(C).

## 2. *Analysis*

Section 186.22, subdivision (b)(5) is an alternate penalty provision that applies to any gang-related felony that is punishable by life imprisonment. (*People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7.) The provision establishes a 15-year minimum parole eligibility period, rather than a sentence enhancement for a particular term of years. (*People v. Johnson* (2003) 109 Cal.App.4th 1230, 1237.) In a three strikes case, the 15-year minimum term may be doubled under section 667, subdivision (e)(1) due to a prior strike conviction because section 186.22, subdivision (b)(5) is an alternate penalty provision, not an enhancement. (*People v. Jefferson, supra*, 21 Cal.4th at pp. 100-101.)

Attempted first degree murder is a crime punishable by life imprisonment. (§§ 664, 187.) The minimum parole eligibility period for attempted first degree murder is

seven years. (§§ 664, 187, 3046; *People v. Jefferson, supra*, 21 Cal.4th at p. 93.) Here, the trial court imposed a base term of 15 years to life for count 1, doubled to 30 years to life for defendant's prior strike. We conclude the trial court's imposition of a 30-year-to-life sentence for count 1 utilized the alternate penalty provision in section 186.22, subdivision (b)(5). We base this conclusion on the probation report, which specifically references section 186.22, subdivision (b)(5). We also base this conclusion on the prosecutor's sentence recommendation. The prosecutor suggested "raising" the base term for the attempted first degree murder to 15 years to life and, in so doing, cited to *Jefferson*, a case involving the use of section 186.22, subdivision (b)(5) as an alternate penalty provision for an attempted first degree murder conviction.

We further conclude, contrary to the People's contention, that the trial court did not intend to impose and stay a sentence enhancement under section 186.22, subdivision (b)(1) for count 1. Such a conclusion is required for two reasons.

First, if a court imposes the alternate penalty provision in section 186.22, subdivision (b)(5), it cannot impose the sentence enhancement provisions of section 186.22, subdivision (b)(1). (*People v. Johnson, supra*, 109 Cal.App.4th at pp. 1236-1239 [in sentencing defendant to prison for 15 years to life for second degree murder, court could not impose consecutive 10-year term for gang allegation under section 186.22, subd. (b)(1)(C)].) Here, the court's intention to impose the alternate penalty provision is clearer on the record than its intention to impose and stay a sentence enhancement. The

court never specifically references a sentence enhancement under section 186.22, subdivision (b)(1)(C). The only statement that could be interpreted as a reference to that code section is when the court stated that the “other enhancements related to Count 1 . . . will be also stayed.” Even if the court intended to reference the sentence enhancement in section 186.22, subdivision (b)(1)(C), we would conclude the reference was simply an inadvertent mistake.

Second, section 186.22, subdivision (g) provides that a court is only authorized to impose or strike the sentence enhancements in section 186.22, subdivision (b). If a court chooses to strike an enhancement, it must “specif[y] on the record and enter[] into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.” (§ 186.22, subd. (g).) In other words, even if the court could have imposed both the alternate penalty provision under section 186.22, subdivision (b)(5) and a sentence enhancement under section 186.22, subdivision (b)(1), it did not have authority to stay the enhancement. Rather than conclude the court erroneously stayed the enhancement, we interpret the statement about staying the “other” count 1 enhancements to not include the section 186.22, subdivision (b)(1)(C) gang enhancement.

Because we conclude the court imposed defendant’s punishment for violation of section 186.22, subdivision (b) using the alternate penalty provision under section 186.22, subdivision (b)(5), the minute order and abstract of judgment should be modified

to reflect this imposition and to delete the reference to a stay of the enhancement under section 186.22, subdivision (b)(1)(C).

C. *Punishment for Count 3 Should Have Been Stayed Under Section 654*

Section 654, subdivision (a) provides, in part: “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 court imposed a concurrent four-year sentence for count 3, the active gang participation offense. Defendant contends section 654 and the holding of *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*) preclude punishment “for both the gang enhancement and the substantive gang offense.” The People respond that the court was not required to stay defendant’s sentence for the active gang participation offense because the court had already stayed the gang enhancement. As just discussed, the court did not impose and stay a gang enhancement under section 186.22, subdivision (b)(1)(C), it imposed the alternate penalty provision under section 186.22, subdivision (b)(5). We agree with defendant that *Mesa* requires a stay of the sentence for count 3, but not because of his punishment for violating section 186.22, subdivision (b); rather, because of his punishment for attempted murder.

In *Mesa*, the defendant, a gang member and convicted felon, shot victims on two separate occasions. (*Mesa, supra*, 54 Cal.4th at pp. 193-194.) He was convicted of and

punished for assault with a firearm, possession of a firearm by a felon, and active gang participation for each instance. (*Id.* at pp. 194-195.) The California Supreme Court held that “punishing defendant for assault with a firearm and for possession of a firearm by a felon precludes additional punishment for actively participating in a criminal street gang.” (*Id.* at p. 193.) The court explained: “For each shooting incident, defendant’s sentence for the gang crime [section 186.22, subdivision (a)] violates section 654 because it punishes defendant a second time either for the assault with a firearm or for possession of a firearm by a felon. ‘Here, the underlying [felonies] were the act[s] that transformed mere gang membership—which, by itself, is not a crime—into the crime 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.]” (*Id.* at pp. 197-198.) In holding that section 654 required a stay of the defendant’s sentence for the active gang participation offense, the court stated, “the evidence of the shooting or firearm possession offenses committed by defendant *was the only evidence* that he promoted, furthered, or assisted felonious criminal conduct by members of the gang.” (*Mesa, supra*, at p. 200.)

Similarly here, the only evidence that defendant promoted felonious criminal conduct by members of the gang was the evidence that he committed attempted first degree murder. The trial court instructed the jury that, in order to prove active gang

participation, “the People must prove that: [¶] One, the defendant actively participated in a criminal street gang; [¶] Two, when the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; and [¶] Three, the defendant willfully assisted, furthered, or promoted *felonious criminal conduct* by members of the gang.” (Italics added.) During her closing arguments regarding count 3, the prosecutor told the jurors: “[E]lements one and two have been stipulated to. Element three is that he willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by directly and actively committing a felony offense[] or aiding and abetting a felony offense. [¶] *He directly and actively committed a felony offense when he shot [C.T.]* Count 3 has been met beyond a reasonable doubt.” (Italics added.)

Because the only evidence of felonious conduct presented at trial was that defendant shot C.T., and such conduct was the basis for both count 1 and count 3, *Mesa’s* holding controls. The trial court was therefore required to stay defendant’s sentence on count 3. Even though “there appears to be little practical difference between imposing concurrent sentences, as the trial court did, and staying sentence” on count 3, “the law is settled that the sentences must be stayed to the extent that section 654 prohibits multiple punishment.” (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

D. *The Sentences for Counts 2 and 3 and the \$1,000 Fine*

Defendant argues, and the People correctly concede, the sentencing hearing minute order and the abstract of judgment do not correspond with the sentences the trial court imposed for counts 2 and 3 at the sentencing hearing. Both parties also agree the minute order and abstract of judgment include a \$1,000 fine unrelated to defendant's case.

The minute order and abstract of judgment state that the court imposed concurrent eight-year sentences for counts 2 and 3 and that the court imposed a \$1,000 fine. However, the reporter's transcript of the sentencing hearing establishes that the trial court imposed concurrent four-year sentences for both the count 2 and 3 convictions. The transcript does not mention a \$1,000 fine.

“In a criminal case, it is the *oral pronouncement of sentence* that constitutes the judgment.” (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324, citing *People v. Mesa* (1975) 14 Cal.3d 466, 471.) Thus, where there is a discrepancy between the transcript of the sentencing hearing and the minute order or the abstract of judgment, “[t]he record of the oral pronouncement of the court controls.” (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2.) Such discrepancies in minute orders or abstracts of judgment “are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal.” (*People v. Scott, supra*, at p. 1324, citing *People v. Mitchell* (2001) 26 Cal.4th 181, 188.)

III

DISPOSITION

The judgment is modified to stay, pursuant to section 654, the sentence on count 3. The trial court is directed to modify the minute order dated September 26, 2014 and the abstract of judgment: (1) to reflect that defendant's sentence for count 3 is stayed; (2) to reflect that the court did not stay an enhancement under section 186.22, subdivision (b)(1)(C) but rather imposed an alternate penalty provision under section 186.22, subdivision (b)(5); (3) to reflect that defendant's sentences for count 2 and count 3 are four years each (as opposed to eight years each); and (4) to strike the \$1,000 fine. The trial court is directed to deliver a certified copy of the modified minute order and abstract of judgment to the Department of Corrections and Rehabilitation. In all other aspects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
J.

We concur:

HOLLENHORST  
Acting P. J.

MILLER  
J.