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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANTONIO HERRERA,

Defendant and Appellant.

F062641

(Super. Ct. No. 10CM8934)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Gregory M. Chappel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A bullet fired from a passing pickup truck struck Ricardo Uribe Castro in the leg.¹ He lost consciousness and fell to the ground. After he regained consciousness, he used his other leg to push himself beneath a parked truck, from where he heard a truck stop, heard doors open and close, and heard, “Where’s that punk?,” and, “Where’s that buster?”² He lost consciousness again. A helicopter airlifted him to a hospital where he had surgery to repair a shattered bone in his leg. He first told police that he did not see the person with the gun because the cab of the pickup truck was dark and he was just trying to get away. He later told police that José Antonio Herrera shot him and that Herrera had threatened him earlier.³ Still later, he identified Herrera in a photo lineup. At trial, he testified that he could not identify Herrera as the shooter because he was running away when he heard the gunfire and because the back-seat passenger had a firearm, too.⁴

A jury found Herrera guilty of attempted murder and found criminal-street-gang and firearm allegations true. The court imposed an aggregate sentence of 56 years to life. On appeal, he challenges the criminal-street-gang and firearm enhancements. We order the criminal-street-gang enhancement stricken but otherwise affirm the judgment.

¹ Ricardo Uribe Castro testified he does not use the name Castro, so all later references to him are to Uribe.

² “Buster” is a term of disrespect for a Norteño. Uribe testified not only that he was a Norteño but also that he was a Norteño drop-out. The prosecution’s gang expert testified that he was a drop-out who had family members in the gang who still protected him and that the gang was still part of his lifestyle.

³ Herrera once associated with the Norteños but became a Sureño in 2003. He has multiple Sureño tattoos on his body.

⁴ Additional facts, as relevant, are in the discussion (*post*).

BACKGROUND

On December 28, 2010, the district attorney filed an information⁵ charging Herrera with, inter alia, attempting to murder Uribe (Pen. Code, §§ 187, subd. (a), 664)⁶ and alleging, inter alia, personal and intentional discharge of a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1) [“subdivision (c)” and “subdivision (e)(1),” respectively],⁷ personal and intentional discharge of a firearm causing great bodily injury within the meaning of section 12022.53, subdivision (d) [“subdivision (d)”] and subdivision (e)(1), and personal infliction of great bodily injury within the meaning of section 12022.7, subdivision (a).⁸ Additionally, the information alleged, inter alia, a 2004 conviction of assault with a deadly weapon both as a serious felony or violent felony or juvenile adjudication within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and as a prior prison term (§ 667.5, subd. (a)). The information also alleged, inter alia, commission of both the attempted murder and the 2004 assault with a deadly weapon for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)

On March 7, 2011, outside the presence of the jury, Herrera admitted the allegation of the 2004 conviction of assault with a deadly weapon. On March 9, 2011, the jury found him guilty of attempted murder. The jury found the criminal street gang allegation true, found the allegation of the personal and intentional discharge of a firearm

⁵ Our summary of the information reflects several later amendments during trial.

⁶ Later statutory references are to the Penal Code.

⁷ Apparently as cryptic references to subdivision (e)(1), the briefing and the record sometimes omit the designation of the numeric paragraph. We infer nothing of substance from those omissions, and Herrera does not argue otherwise. For clarity, to distinguish subdivision (e)(1) from section 12022.53, subdivision (e)(2) (“subdivision (e)(2)”) (see *post*, part 4), we designate the numeric paragraphs throughout our opinion.

⁸ Our summary omits charges and allegations not relevant to the issues on appeal.

within the meaning of subdivision (e)(1) true, and found the allegation of the personal and intentional discharge of a firearm causing great bodily injury within the meaning of subdivision (e)(1) true. The jury found the allegation of the personal infliction of great bodily injury within the meaning of section 12022.7, subdivision (a) not true, found the allegation of the personal and intentional discharge of a firearm within the meaning of subdivision (c) not true, and found the allegation of the personal and intentional discharge of a firearm causing great bodily injury within the meaning of subdivision (d) not true.

On May 6, 2011, the court sentenced Herrera to an aggregate term of 56 years to life:

- For the attempted murder, an aggravated term of nine years doubled to 18 years under the three strikes law (§§ 190, subd. (a), 664, subd. (a), 667, subd. (e)(1), 1170.12, subd. (c)(1));
- For the criminal-street-gang enhancement, a consecutive term of 10 years (§§ 186.22, subd. (b)(1)(C), 667.5, subd. (c)(12));
- For the prior-prison-term enhancement, a consecutive term of three years (§ 667.5, subd. (a)); and
- For the enhancement for personal and intentional discharge of a firearm causing great bodily injury (subd. (e)(1)), a consecutive term of 25 years to life.

DISCUSSION

1. Firearm Enhancement: Pleading

Herrera requests the striking of the firearm enhancement, which he argues was “not pled as expressly required pursuant to the statute.” Additionally, he argues that his lack of notice “of the circumstances under which he might be exposed to such additional punishment” denied him due process. The Attorney General argues the contrary. We agree with the Attorney General.

Herrera elaborates by arguing not only “that the imposition of the enhancement pursuant to [] subdivision (e)(1)⁹ must be stricken as unauthorized because it was not pled as expressly required pursuant to the statute”¹⁰ but also that “failing to notify him of the circumstances under which he might be exposed to such additional punishment” denied him due process. The information, he continues, did “not indicate in any fashion that any person other than [he] was involved in the charged offense” and failed to inform him “that [he] could suffer a further penalty under the sentencing enhancement even if he was not found to have ‘personally and intentionally discharged a firearm’ in the commission of the offense.” He argues that the information put him on notice that the enhancements in section 12022.53, subdivisions (c) or (d) would apply “only” if he had, first, “committed the offense in association with or for the benefit of a criminal street gang” *and*, second, “‘personally and intentionally discharged a firearm’ during the commission of the crime, the latter of which was specifically found ‘not true’ by the jury.” (Italics in original.) “The prosecutor in this case chose to merely refer to [] subdivision (e)(1),” he claims, but “without actually alleging the facts he sought to prove which would subject [him] to the enhancement provided for in [] subdivisions (d) and (e)(1).”

Herrera’s argument is not persuasive. Subdivision (e)(1) “imposes vicarious liability under this section on aiders and abettors who commit crimes in participation of a

⁹ “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).” (Subd. (e)(1).) (See *ante*, fn. 7.)

¹⁰ “For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.” (§ 12022.53, subd. (j) [“subdivision (j)”].)

criminal street gang” but “merely sets forth the general requirements of pleading and proof for sentencing enhancements.” (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171, 1175.) He insists that subdivision (j) requires the prosecutor to “expressly” plead the facts, but our Supreme Court observes that subdivision (j) does not “concern vicarious liability” or “shed light on the substantive requirements for subdivision [] (c) or (d).” (*Id.* at p. 1174.) Subdivision (j) “is simply a restatement of section 1170.1, subdivision (e), which provides that ‘[a]ll enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.’” (*Id.* at p. 1175.)

Herrera’s argument about the allegations section 12022.53 authorizes is essentially a quibble with the wording of the statute. The Legislature wrote subdivisions (c) and (d) to apply to “any person” who “*personally* and intentionally discharges a firearm” and to “any person” who “*personally* and intentionally discharges a firearm and proximately causes great bodily injury,” respectively. (Subds. (c), (d), italics added.) In a *different subdivision* of the *same statute*, the Legislature broadened the application of those two subdivisions to “*any person who is a principal* in the commission of an offense if,” inter alia, “*Any principal* in the offense committed any act specified in subdivision [] (c)[] or (d).” (Subd. (e)(1), italics added.) The information that Herrera challenges not only paraphrased *some* of the statutory language in subdivisions (c), (d), and (e)(1) but also cited *each and every one* of those subdivisions.

Even so, Herrera relies on three cases – *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), *People v. Botello* (2010) 183 Cal.App.4th 1014 (*Botello*), and *People v. Arias* (2010) 182 Cal.App.4th 1009 (*Arias*) – to seek relief. In *Mancebo*, “the trial court erred at sentencing when it purported to substitute the *unpled* multiple victim circumstances for the properly pleaded and proved gun-use circumstances.” (*Mancebo, supra*, at p. 754, italics added.) The record here is to the contrary. Here, the amended information *pled* the firearm allegations pursuant to subdivisions (c), (d), *and* (e)(1). With reference to

subdivisions (c) and (d), the jury found *not true* the allegations that Herrera “personally discharged a firearm within the meaning of [subdivision] (c)” and that he “personally discharged a firearm and caused great bodily injury upon the person of [] Uribe within the meaning of [subdivision] (d).” With reference to subdivision (e)(1), the jury found *true* the allegations that “one of the principals personally and intentionally discharged a firearm during [Uribe’s attempted murder] within the meaning of [subdivision] (e)(1)” *and* that “one of the principals personally inflicted great bodily injury upon the person of [] Uribe within the meaning of [subdivision] (e)(1).” *Mancebo* is inapposite.

In *Botello*, “the information charged each defendant with personally committing acts specified in the firearm enhancements of [] subdivisions (b) through (d), but *did not mention* the applicability of those enhancements through subdivision (e)(1).” (*Botello, supra*, 183 Cal.App.4th at p. 1027, italics added.) Here, on the other hand, the amended information *expressly pled* subdivisions (c), (d), *and* (e)(1). Herrera’s reliance on *Botello* is misplaced.

In *Arias*, “the charging document alleged defendant unlawfully and with malice aforethought attempted to murder [] but did not allege the attempted murders were willful, deliberate, and premeditated” and did not “reference subdivision (a) of section 664.” (*Arias, supra*, 182 Cal.App.4th at p. 1017.) “No request was made to amend the information to include the required allegations, and nothing in the record suggests the information was ever amended.” (*Ibid.*) “The jury’s attempted murder verdicts did not include special findings as to premeditation and deliberation, but found ‘first degree attempted murder’ as to both victims.” (*Ibid.*) *Arias* relied on *Mancebo* to order the section 664, subdivision (a) enhancement stricken because “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).” (*Arias, supra*, 182 Cal.App.4th at pp. 1019, 1021.) Here, the amended information *expressly*

pled Herrera’s potential criminal liability under the subdivision (e)(1) enhancement. His reliance on *Arias* is equally misplaced.

In short, Herrera’s attempt to bootstrap the inapposite holdings of *Mancebo*, *Botello*, and *Arias* into a denial of due process is not the least bit persuasive. “No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.” (§ 960.) That is so here.¹¹ (See, e.g., *People v. Thomas* (1987) 43 Cal.3d 818, 826; *People v. Sandoval* (2006) 140 Cal.App.4th 111, 132.)

2. Firearm Enhancement: Assistance of Counsel

Herrera argues that his attorney’s failure to object to amendment of the information “to conform to proof” by addition of the citation to subdivision (e)(1) constitutes ineffective assistance of counsel. The Attorney General argues the contrary. We agree with the Attorney General.

To establish ineffective assistance of counsel, the defendant has to show, first, that counsel’s representation fell below an objective standard of reasonableness *and*, second, that there is a reasonable probability – a probability sufficient to undermine confidence in the outcome – that but for counsel’s unprofessional errors the result of the proceeding would have been different. (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391 (*Williams*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 (*Strickland*.) Surmounting *Strickland*’s high bar is never an easy task.” (*Padilla v. Kentucky* (2010) 559 U.S. ___, ___ [176 L.Ed.2d 284, 297; 130 S.Ct. 1473, 1485] (*Padilla*.) “Judicial scrutiny of counsel’s performance must be highly deferential.” (*Ibid.*, quoting *Strickland, supra*, 466 U.S. at p. 689.)

¹¹ Our holding moots the Attorney General’s argument that Herrera forfeited his right to judicial review by not objecting.

Herrera attempts to show his attorney's representation fell below an objective standard of reasonableness by arguing there simply could be no satisfactory explanation for failure to object. The Attorney General, on the other hand, infers from the record that the "critically important" task for Herrera's attorney was to impeach Uribe's credibility as much as possible since no other eyewitness testified about, and no physical evidence linked Herrera to, the shooting. To discharge that duty, the Attorney General elaborates, Herrera's attorney elicited admissions from Uribe that he gave inconsistent statements to the police, lied to the police, and withheld key information from the police. As a matter of trial tactics, the Attorney General emphasizes, Herrera's attorney could have chosen not to object on the rationale that any reliance by the prosecutor on alternate theories of criminal liability could only draw additional attention to Uribe's conflicting statements about who might have shot him. In argument to the jury, Herrera's attorney vigorously attacked Uribe's credibility.

"When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. (*People v. Anderson* (2001) 25 Cal.4th 543, 569, citing *People v. Pope* (1979) 23 Cal.3d 412, 426.) On the basis of her analysis of the record before us, the Attorney General states a satisfactory explanation for the failure of Herrera's attorney to object. "*Strickland* does not guarantee perfect representation, only a "reasonably competent attorney.'" (*Harrington v. Richter* (2011) __ U.S. __, __ [178 L.Ed.2d 624, 645; 131 S.Ct. 770, 791], quoting *Strickland, supra*, 466 U.S. at p. 687.) Our highly deferential review of the record on direct appeal satisfies us that Herrera received the effective assistance of competent counsel to which

he is constitutionally entitled. (*Padilla, supra*, 559 U.S. at p. ____ [176 L.Ed.2d 284, 297; 130 S.Ct. 1473, 1485], *Strickland, supra*, 466 U.S. at pp. 686, 689.)¹²

3. Firearm Enhancement: Jury Findings

Herrera argues that the jury findings are insufficient to support imposition of the enhancement in subdivision (d) as applied by subdivision (e)(1). The Attorney General argues the contrary. We agree with the Attorney General.

Herrera's argument has two major components. First, he claims that the jury failed to find that a principal committed the personal and intentional discharge of a firearm causing great bodily injury within the meaning of subdivision (d) as applied by subdivision (e)(1) but found only that a principal personally and intentionally discharged a firearm within the meaning of subdivision (e)(1). That, he contends, "would potentially apply" the jury's finding to subdivision (c). Second, he argues that the jury "did not find that the same principal who discharged the firearm caused the great bodily injury or that the great bodily injury was proximately caused as a result of the discharge of the firearm by the principal found to have discharged that firearm."

The record shows that Uribe suffered great bodily injury from a bullet fired by *either* Herrera *or* the back-seat passenger. On that record, the court instructed that, if the jury were to find that Herrera attempted to murder Uribe *and* committed the crime for the benefit of a criminal street gang, the jury had to decide the truth of the allegation "that *one* of the principals personally and intentionally discharged a firearm during that crime

¹² Our holding moots Herrera's arguments that his attorney's performance prejudiced him (*Williams, supra*, 529 U.S. at p. 391, quoting *Strickland, supra*, 466 U.S. at 687, 694 ["To establish prejudice, he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"]) and that the amendment of the information violated section 1009 (see, e.g., *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1056 ["Where a defendant fails to object at trial to the adequacy of the notice he receives, any such objection is deemed waived."]).

and caused great bodily injury.” (CALCRIM No. 1402, italics added.) The court also instructed the jury that the prosecutor had the burden of proof that, first, “*Someone* who was a principal in the crime personally and intentionally discharged a firearm during the commission of the crime,” and, second, “*That person* intended to discharge the firearm,” and, third, “*That person’s* act caused great bodily injury to another person.” (*Ibid.*, italics added.)

So instructed, the jury found that a principal personally and intentionally discharged a firearm within the meaning of subdivision (e)(1) *and* that a principal personally inflicted great bodily injury on Uribe within the meaning of subdivision (e)(1). With those findings, on the evidence at trial, the jury necessarily found that the *same* principal – the back-seat passenger – personally and intentionally discharged the firearm causing great bodily injury to Uribe. The rule is well-settled that a verdict not only “is to be given a reasonable intendment” but also “is to be construed in light of the issues submitted to the jury and the instructions of the court” and that the verdict “must be upheld when, if so construed, it expresses with reasonable certainty a finding supported by the evidence.” (*People v. Radil* (1977) 76 Cal.App.3d 702, 710.) The rule applies equally to a guilty verdict and to a true finding on a sentence enhancement allegation. (*People v. Chevalier* (1997) 60 Cal.App.4th 507, 514 (*Chevalier*).

Just as the function of the jury is to find whether the necessary facts have been proven by the evidence at trial in light of the court’s instructions, so the function of the verdict is to register the jury’s findings whether the evidence sufficiently establishes those facts. (*Chevalier, supra*, 60 Cal.App.4th at p. 514.) “There is no need in this factfinding process for the enumeration in the verdict of all of the elements of the offense or enhancement. Where the jury is fully instructed as to each element of a sentence enhancement, it is not necessary that the verdict enumerate each of those elements.” (*Ibid.*) On the record here, Herrera fails to persuade us that the jury’s findings are insufficient.

4. Criminal-Street-Gang Enhancement

Herrera argues, the Attorney General agrees, and we concur that in light of the imposition of the firearm enhancement pursuant to subdivision (e)(1) the imposition of the criminal-street-gang enhancement pursuant to section 186.22, subdivision (b)(1) cannot stand. (*People v. Brookfield* (2009) 47 Cal.4th 583, 590; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1238; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282; subdivision (e)(2).)

DISPOSITION

The matter is remanded to superior court with directions (1) to strike the imposition of a consecutive term of 10 years on the criminal-street-gang enhancement (§§ 186.22, subd. (b)(1)(C), 667.5, subd. (c)(12)), (2) to amend the abstract of judgment accordingly, and (3) to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. Herrera has no right to be present at those proceedings. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1234-1235.) In all other respects, the judgment is affirmed.

Gomes, Acting P.J.

WE CONCUR:

Kane, J.

Franson, J.