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

In re CARLOS F., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS F.,

Defendant and Appellant.

F062833

(Super. Ct. No. JW117852-00)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Peter A. Warmerdam, Referee.

Robert McLaughlin, 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, Michael A. Canzoneri and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Cornell, Acting P.J., Poochigian, J., and Detjen, J.

In June 2011, following a contested jurisdiction hearing, the juvenile court found true allegations that appellant, Carlos F., a minor, committed, as alleged in count 1, assault with a firearm, in violation of Penal Code section 245, subdivision (a)(2)¹ and, as alleged in count 2, the offense commonly known as street terrorism, in violation of section 186.22, subdivision (a) (section 186.22(a)), and found true an enhancement allegation that the count 1 offense was a violent felony, committed for the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1)(C) (section 186.22(b)(1)(C)). The court found not true an allegation that in committing the count 1 offense appellant personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)).

In July 2011, following the subsequent disposition hearing, the court adjudged appellant a ward of the court; ordered him committed to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ), formerly known as the California Youth Authority (CYA); and declared his maximum term of physical confinement (MTPC) to be 14 years eight months, calculated as follows: four years on the count 1 offense, 10 years on the accompanying section 186.22(b)(1)(C) enhancement, and eight months on the count 2 offense.

On appeal, appellant argues in his opening brief that the court (1) abused its discretion in ordering appellant committed to DJJ, and (2) erred in finding true the section 186.22(b)(1)(C) enhancement allegation because the count 1 offense was not a violent felony within the meaning of section 667.5, subdivision (c). In addition, he argues in his reply brief for the first time that imposition of sentence on the count 2

¹ Except as otherwise indicated, all statutory references are to the Penal Code.

offense violated section 654. We strike the MTPC, remand for further proceedings, and otherwise affirm.

FACTS

The Instant Offense

Kevin O. testified to the following. At the time of the jurisdiction hearing he was 14 years old. On one occasion, while walking in the area of a park, on his way home from a friend's house, he saw, in the park, appellant, Oscar B., and approximately three other people. Appellant was holding a handgun. He said "south side Delano," and, from a distance of five to 10 feet away, fired a shot, which hit Kevin. Kevin, at that point, "just left." He went home and showed his mother his wound, which apparently was on the upper part of one of his legs.² Kevin's mother "called the hospital," and appellant went to Kern Medical Center, where he was treated.

Although Kevin did not testify as to the date of the assault, he was shown a photograph of his wound, and testified that the photograph depicted how he looked on March 27, 2011 (March 27).

Gang Evidence

Kevin further testified that appellant is a "southern gang member." At the jurisdiction hearing, Kevin testified he himself was not a gang member, but he admitted telling Officer Travis Brewer, whom he spoke to at the hospital, that he was a "northern street gang member."

City of Delano Police Officer Mario Nunez testified to the following. On March 27, pursuant to the consent of appellant's parents, he conducted a search of

² Kevin testified his mother "told [Kevin's] cousin to pull down [Kevin's] shorts and she [saw the] wound." Kevin testified the bullet was not removed from his body, and the report of the probation officer (RPO) states the bullet remains lodged in his "thigh area."

appellant's bedroom. During the search, he found a handwritten letter which appeared to have been written and signed by appellant. The writing in the letter was in blue and all of the letter "N's" had been crossed out. The color blue is "used by Sorenos [*sic*] or southern gang."³ The letter "N" stands for "Norteno," and "a southern gang member ... will mark it out" to express disrespect for the Norteno gang.

City of Bakersfield Police Officer Tim Diaz, after qualifying as a "gang expert," testified that the Surenos is a criminal street gang in Kern County. The "primary activities" of the gang include "assaults with firearms."

Officer Diaz opined that on March 27, appellant was an "active participant" in the Surenos. He based his opinion on various factors, including information he had received of the following: appellant had, in the past, admitted being a "southern Hispanic gang member"; he had "identified his rivals as ... Norteno gang members"; he "has been in several fights in the past involving northern Hispanic gang members"; and he has "tattoos associating south with the [Surenos] criminal street gang."

Officer Diaz opined that Oscar B. was also a member of the Surenos criminal street gang on March 27.

In response to a detailed hypothetical question that tracked the facts of the instant case, Officer Diaz opined that such an offense would have been "committed for the benefit of, at the direction of, or in association with the [Surenos] criminal street gang[.]" and was "committed with the specific intent to promote, further, or assist in ... criminal conduct by the criminal street gang members[.]"

³ The spelling "Sorenos" is incorrect. The Spanish word for southern is "sureno" and the criminal street gang that identifies with Southern California is the Surenos. (See *People ex. rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1133 (dis. opn. of Mosk, J.); *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1156, fn. 3.)

Additional Factual Background⁴

Appellant was 16 years old at the time of the disposition hearing. He has been involved in a “gang-related verbal argument” and multiple “gang related physical altercation[s]” in school. While being detained in juvenile hall, he had been “placed on administrative restriction for gang-related tagging in his room.”

Based on appellant’s statements to the probation officer and an “examin[ation] of the circumstances in totality,” the officer concluded that appellant’s “involvement and motive in the shooting was solely based on [appellant’s] gang affiliation and his entrenchment in the gang subculture.” Appellant, because of his “propensity toward violence, coupled with the fact he is immersed in the gang lifestyle,” poses “a serious risk to the community.”

The probation officer further opined as follows. “[D]ue to the serious nature and the egregiousness of the offense, no local programs would be appropriate for [appellant].” Appellant is in need of a “long-term commitment.” “Local commitment programs are not equipped with the level of services necessary to provide [appellant] treatment” The Kern Crossroads Facility does not have “gang intervention” and “victim awareness” programs, “nor would it provide a lengthy enough period of detention to adequately hold [appellant] accountable while at the same time providing protection for the minor and the community.” At DJJ, appellant “will be assessed to identify his individual needs in order to customize a program best suited for him.” Services available at DJJ include “Victim Awareness Curriculum, Anger Replacement Training, and gang intervention counseling.” In addition, appellant would attend school at DJJ and would be able to “work toward his high school diploma.”

⁴ Information in this section is taken from the RPO.

The RPO did not indicate appellant had suffered any prior adjudications. The probation officer stated appellant “has a minimal background with the Probation Department, and he has not been tried in any local programs”

DISCUSSION

Commitment to DJJ

Commitment to DJJ requires a two-part showing. First, “it is required that there be evidence in the record demonstrating probable benefit to the minor ...” (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576; accord, *In re Pedro M.* (2000) 81 Cal.App.4th 550, 556.) Second, there must be “evidence supporting a determination that less restrictive alternatives are ineffective or inappropriate.” (*In re Teofilio A.*, *supra*, 210 Cal.App.3d at p. 576.) An appellate court will not lightly substitute its judgment for that of the juvenile court but rather must indulge all reasonable inferences in favor of the decision and affirm the decision if it is supported by substantial evidence. (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396; *In re Asean D.* (1993) 14 Cal.App.4th 467, 473.) “In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law.” (*In re Carl N.* (2008) 160 Cal.App.4th 423, 432 (*Carl N.*))

“The statutory declaration of the purposes of the juvenile court law is set forth in [Welfare and Institutions Code] section 202. [Citation.] Before the 1984 amendment to section 202, California courts consistently held that “[j]uvenile commitment proceedings are designed for the purposes of rehabilitation and treatment, not punishment.” [Citation.] California courts treated a commitment to CYA as ‘the placement of last resort’ for juvenile offenders. [Citation.]” (*Carl N.*, *supra*, 160 Cal.App.4th at p. 432.)

“However, ‘[i]n 1984, the Legislature replaced the provisions of section 202 with new language which emphasized different priorities for the juvenile justice system.’ [Citation.] Section 202, subdivision (b) (hereafter section 202(b)) now recognizes

punishment as a rehabilitative tool. [Citation.] That subdivision provides in part: ‘Minors under the jurisdiction of the juvenile court who are in need of protective services shall receive care, treatment, and guidance consistent with their best interest and the best interest of the public. Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. *This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter.*’ (§ 202(b), italics added.)” (*Carl N.*, *supra*, 160 Cal.App.4th 432; accord, *In re Lorenza M.* (1989) 212 Cal.App.3d 49, 57 [Welf. & Inst. Code § 202 “now recognizes punishment as a rehabilitative tool and emphasizes the protection and safety of the public”].)

“Section 202 also shifted its emphasis from a primarily less restrictive alternative approach oriented towards the benefit of the minor to the express “protection and safety of the public” [citations], where care, treatment, and guidance shall conform to the interests of public safety and protection. [Citation.] [Citation.] ‘Thus, it is clear that the Legislature intended to place greater emphasis on punishment for rehabilitative purposes and on a restrictive commitment as a means of protecting the public safety.’ [Citation.] It is also clear ... that a commitment to CYA ‘may be made in the first instance, without previous resort to less restrictive placements.’” (*Carl N.*, *supra*, 160 Cal.App.4th at pp. 432-433.)

Appellant does not dispute, and we conclude, that the record contains substantial evidence—e.g., indications in the RPO that DJJ provides counseling in the areas of anger management, victim awareness and “gang intervention” as well as educational opportunities—that DJJ commitment would be of probable benefit to appellant. Appellant’s argument focuses on the other prong of the showing required for DJJ

commitment. He argues that because he had suffered no prior adjudications, he had “never been given the chance to rehabilitate at a less restrictive placement,” and therefore there was no evidence that a placement less restrictive than DJJ would have been ineffective or inappropriate. We disagree.

Appellant shot another boy at nearly point-blank range. He stands adjudicated in the instance case of an extremely serious offense. As the probation officer noted, “This was a senseless shooting with a complete disregard for the victim’s life. [Appellant] is extremely fortunate to not be before the Court as a result of a murder.” In addition, the record is replete with evidence that, as the probation officer notes, appellant “is immersed in the gang lifestyle” Finally, the probation officer stated that local programs, including the Kern Crossroads Facility, are not of sufficient duration and do not offer the programs appellant needs. These factors provide ample support for the conclusion that a disposition less restrictive than DJJ commitment would be both inappropriate—because such disposition would not be adequate to hold appellant accountable for his actions and provide for the safety and protection of the public—and ineffective. (*In re Samuel B.* (1986) 184 Cal.App.3d 1100, 1104, overruled on other grounds in *People v. Hernandez* (1988) 46 Cal.3d 194, 206, footnote 14 [in determining disposition of juvenile offender, “gravity of the offense is always a consideration with other factors”]; Welf. & Inst. Code, § 725.5 [factors to consider in determining appropriate disposition include “the circumstances and gravity of the offense committed by the minor”]; *In re John H.* (1978) 21 Cal.3d 18, 27 [CYA commitment upheld based in part on minor’s gang involvement]; *In re Sergio R.* (1991) 228 Cal.App.3d 588, 602-603 [CYA commitment upheld based in part on minor’s gang involvement].) The order committing appellant to DJJ was well within the court’s discretion.

The Gang Enhancement

The first paragraph of section 186.22, subdivision (b)(1) defines what we term the gang enhancement. That section provides for additional punishment for a felony conviction where the felony is committed “for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” The remainder of section 186.22, subdivision (b)(1) sets forth “alternative methods” for determining the extra punishment. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.) When a defendant commits a violent felony *as defined in section 667.5, subdivision (c)* (section 667.5(c)), the enhancement adds 10 years to the term for the substantive offense (§ 186.22(b)(1)(C)); when the triggering offense is a serious felony as defined in section 1192.7, the additional term is five years (§ 186.22, subd. (b)(1)(B)); and in all other cases the additional term is two, three or four years, at the court’s discretion (§ 186.22, subd. (b)(1)(A)).

Here, as indicated above, the court found that the count 1 aggravated assault was a violent felony and, accordingly, under section 186.22(b)(1)(C), included in the MTPC a period of 10 years. However, as appellant contends and the People concede, the count 1 offense did not qualify as a violent felony under section 667.5(c).

Section 667.5(c) includes, in its list of violent felonies, the following: “Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 ... or any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55.” (§ 667.5, subd. (c)(8).) Here, as the parties note, a section 12022.7, subdivision (a) great bodily injury allegation was alleged and found not true, and the prosecution did not allege firearm use under sections 12022.3, subdivision (a), 12022.5 or 12022.55. The parties also agree the count 1 offense does not qualify as a violent felony

under any other provision of section 667.5(c). Therefore, the court erred in finding true the section 186.22(b)(1)(C) enhancement allegation and in including in appellant's MTPC the prescribed 10-year term for that enhancement. Because the substantive portion of the enhancement was found true, we will remand the matter to allow the juvenile court to determine which of the remaining alternative sentencing provisions—subdivision (b)(1)(A) or (b)(1)(B) of section 186.22—applies, and recalculate the MTPC accordingly.

Section 654

Appellant contends the court calculated his MTPC in violation of section 654⁵ by including in the MTPC the sentence for street terrorism. Specifically, he argues that the count 1 assault “provided the factual basis to prove the ‘felonious criminal conduct’ element of the street terrorism charge,” and therefore, the additional inclusion of a term for the street terrorism count constituted impermissible double punishment “for the same criminal conduct.”

However, appellant raises this argument for the first time in his reply brief, and, as our Supreme Court has stated: “[T]he rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. [Citations.]” (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26 (*Smithey*)).

Appellant suggests he had good reason for not raising this claim in his opening brief, because he bases this contention on the very recent Fourth District Court of Appeal case of *People v. Louie* (2012) 203 Cal.App.4th 388, petition for review filed February 7, 2012 (*Louie*), which was decided after he filed his opening brief. In that case, a jury

⁵ Section 654, subdivision (a) provides: “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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

convicted the defendant of street terrorism and two other felony counts, and found true gang enhancement allegations under section 186.22, subdivision (b) as to the latter two counts. Justice Blease’s opinion holds that imposition of sentence on the street terrorism count and the gang enhancements violated section 654 because the other two felonies, for which punishment was also imposed, constituted the “felonious criminal conduct” upon which the street terrorism count and the enhancements were based. (*Id.* at pp. 396, 397.)⁶

However, the issue—whether a defendant can be punished both for street terrorism and another felony where the other felony is the “felonious criminal conduct” of the gang that is used to establish the charge of street terrorism—has been the subject of several California Courts of Appeal decisions, including *People v. Sanchez* (2009) 179 Cal.App.4th 1297, which supports appellant’s argument.⁷ The issue is currently before the Supreme Court in *People v. Mesa* (2010) 186 Cal.App.4th 773, review granted October 27, 2010, S185688. No good reason appears for appellant not raising this issue in his opening brief. We therefore decline to address his argument on this point. (*Smithey, supra*, 20 Cal.4th at p. 1017, fn. 26.)

DISPOSITION

The maximum term of physical confinement of 14 years eight months declared by the court is stricken. The matter is remanded to the juvenile court. On remand, the court is directed to declare a new maximum term of physical confinement. In setting the new maximum term of physical confinement, the court is further directed to determine the sentence for the gang enhancement under either subdivision (b)(1)(A) or (b)(1)(B) of Penal Code section 186.22. The judgment is otherwise affirmed.

⁶ The other two justices concurred in the result, but for a different reason. (*Louie, supra*, 203 Cal.App.4th at pp. 400-402 (conc. opn. of Nicholson, J., joined by Hoch, J.))

⁷ The case of *People v. Herrera* (1999) 70 Cal.App.4th 1456, reached a contrary result.