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

THE PEOPLE,

Plaintiff and Respondent,

v.

CORY ANTHONY COLLINS,

Defendant and Appellant.

F062943

(Super. Ct. No. BF124567B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Sylvia Whatley Beckham, 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, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Gomes, J., and Kane, J.

A jury convicted appellant, Cory Anthony Collins, of robbery (count 1/Pen. Code, § 211)¹ and active participation in a criminal street gang (count 4/§ 186.22, subd. (a)), and found true a criminal street gang enhancement (§ 186.22, subd. (b)) that attached to the robbery count. In a separate proceeding, the court found true a serious felony enhancement (§ 667, subd. (a)), three prior prison term enhancements (§ 667.5, subd. (b)), and allegations that Collins had a prior conviction within the meaning of the three strikes law (§ 667, subds. (b)-(i)).

On appeal, Collins contends that the court erred by its failure to stay the concurrent six-year term it imposed on his participation in a criminal street gang conviction. We will find merit to this contention and stay the term imposed on this conviction. In all other respects, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On August 20, 2008, Collins and another man entered a clothing store, told the clerk it was a “stickup,” and walked her to the back of the store where a safe was located. Collins and his confederate were unable to open the safe and eventually left the store with \$580 they took from two cash registers. During the trial, a police officer testified that Collins and the other man were both active participants in a local criminal street gang.

On August 10, 2009, the jury rendered its verdict in this matter.

On October 14, 2009, the trial court sentenced Collins to an aggregate, determinate term of 27 years as follows: a 10-year term on Collins’s robbery conviction (the upper term of five years, doubled to 10 years because of Collins’s strike conviction), a 10-year gang enhancement in that count, a stayed six-year term on Collins’s gang participation conviction in count 4 (the aggravated term of three years, doubled to six

¹ All further statutory references are to the Penal Code.

years because of Collins’s prior strike conviction), a five-year serious felony enhancement, and two one-year prior prison term enhancements.

Following Collins’s timely appeal, in an unpublished opinion filed on January 27, 2011, this court reversed and vacated the gang enhancement, vacated Collins’s sentence, and remanded the matter to the trial court for resentencing.

On July 14, 2011, the court resentenced Collins to an aggregate 17-year term as follows: a 10-year term on Collins’s robbery conviction (the upper term of five years, doubled to 10 years because of Collins’s strike conviction), a concurrent six-year term on Collins’s gang participation conviction (the aggravated term of three years, doubled to six years because of Collins’s prior strike conviction), a five-year serious felony enhancement, and two one-year prior prison term enhancements.

DISCUSSION

Penal Code 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.”

Section 186.22, subdivision (a), applies to “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” As the statutory text indicates, the gang participation crime has three elements: (1) “[a]ctive participation in a criminal street gang, in the sense of participation that is more than nominal or passive”; (2) “knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity”; and (3) “the person ‘willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.’ [Citation.]” (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

In *People v. Mesa* (2012) 54 Cal. 4th 191 (*Mesa*), the Supreme Court held that “‘section 654 precludes multiple punishment for both (1) gang participation [in violation of section 186.22, subdivision (a)], 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.]” (*Id.* at pp. 197-198.)

Here, Collins’s robbery offense was used to satisfy element number three of his gang participation offense, i.e., it was used to prove that he willfully promoted, furthered, or assisted in felonious criminal conduct by members of a gang. In accord with *Mesa*, we conclude that section 654 precluded the court from imposing punishment on his gang participation offense. Further, “‘imposition of concurrent sentences is precluded by section 654 [citations] because [under such a sentence] the defendant is deemed to be *subjected* to the term of *both* sentences although they are served simultaneously.’ [Citations.]” (*People v. Duff* (2010) 50 Cal.4th 787, 796.) Therefore, we will stay the six-year term the court imposed on Collins’s gang participation conviction in count 4.

DISPOSITION

The six-year term imposed on Collins’s gang participation conviction in count 4 is stayed. The trial court is directed to prepare an amended abstract of judgment that is consistent with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.