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

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY AVALOS,

Defendant and Appellant.

F067923

(Super. Ct. No. CRM026522)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Henry J. Valle, Deputy Attorneys General, for Plaintiff and Respondent.

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Michael Anthony Avalos was charged with attempted murder (Pen. Code,¹ §§ 187, subd. (a), 664; count 1) and assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1); count 2).

In connection with count 1, the information alleged that (1) the offense was willful, deliberate, and premeditated (§ 189); (2) the offense was carried out for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)); (3) defendant personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)); (4) defendant personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)); (5) defendant suffered a prior strike conviction for carjacking (§§ 667, subds. (b)-(i), 1170.12); (6) defendant was previously convicted of carjacking, a serious felony (§§ 667, subd. (a), 1192.7); and (7) defendant served a prior prison term for carjacking (§ 667.5, subd. (b)).

In connection with count 2, the information alleged that (1) the offense was carried out for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)); (2) defendant personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)); (3) defendant suffered a prior strike conviction for carjacking (§§ 667, subds. (b)-(i), 1170.12); (4) defendant was previously convicted of carjacking, a serious felony (§§ 667, subd. (a), 1192.7); and (5) defendant served a prior prison term for carjacking (§ 667.5, subd. (b)).

On count 1, the jury acquitted defendant of attempted murder, convicted him of the lesser included offense of attempted voluntary manslaughter (§§ 192, subd. (a), 664),² and found the gang, great bodily injury, and deadly weapon use allegations true. On count 2, it convicted him of assault with a knife and found the gang and great bodily

¹ Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

² The trial court issued CALCRIM Nos. 603 (Attempted Voluntary Manslaughter: Heat of Passion) and 604 (Attempted Voluntary Manslaughter: Imperfect Self-Defense). Given the evidence presented (see at pp. 3-10, *post*), the jury necessarily concluded that defendant acted in imperfect self-defense.

injury allegations true. In a bifurcated proceeding, the trial court found the prior strike conviction, prior serious felony conviction, and prior prison term allegations true on both counts.

At sentencing, the court imposed an aggregate 23-year prison term on count 1, comprised of a doubled middle term of six years plus 10 years for gang relatedness, one year for deadly weapon use, five years for the prior serious felony conviction, and one year for the prior prison term. Pursuant to section 654, it stayed an aggregate 22-year prison term on count 2, comprised of a doubled middle term of six years plus 10 years for gang relatedness, five years for the prior serious felony conviction, and one year for the prior prison term.³

On appeal, defendant claims the evidence did not support the gang enhancement. He also contends the court erroneously imposed (1) the prior serious felony conviction enhancement on each count; (2) the prior prison term enhancement on each count; and (3) both the prior serious felony conviction and prior prison term enhancements on count 1. We conclude substantial evidence supported the gang enhancement and the court committed the aforementioned sentencing errors. The judgment shall be modified accordingly and, as so modified, affirmed.

STATEMENT OF FACTS

The victim, Christopher Luvian, was a methamphetamine addict and an ex-Norteño who quit the gang after five or six years because he “didn’t like the politics.” In 2009, he joined the Northern Riders, a “dropout” gang.

On May 18, 2012, sometime between midnight and 1:00 a.m., Luvian and Ashley Sandoval were smoking cigarettes⁴ and waiting for Luvian’s ride in front of Sandoval’s

³ Pursuant to section 654, the court stayed the great bodily injury enhancement on both counts.

⁴ Luvian testified that he also smoked methamphetamine on May 17, 2012, at approximately 3:00 p.m.

apartment in Merced when Sabrina Alvarado and defendant walked by them. Alvarado was Luvian's cousin and lived in the same complex as Sandoval. Luvian once spotted defendant at Alvarado's apartment, while Sandoval met him in person on at least two occasions and "friend[ed]" him on Facebook. Both Luvian and Sandoval were aware that defendant was a Norteño known as "Sharkey." Sandoval was also aware that defendant and her ex-husband, a Norteño known as "Shyboy," were friends.

Alvarado greeted Luvian and Sandoval and headed toward her apartment. Defendant said to Luvian, "What's up, [b]ro." Luvian replied, "What's up." Defendant initially followed Alvarado, but subsequently turned around, approached Luvian, and "aggressive[ly]" asked for his name and hometown. Luvian responded with "Chris" and "Merced," respectively. Defendant declared that he was "active" and asked for Luvian's identification. Luvian chuckled and stated that he did not carry identification. He then told Alvarado, who stood about 10 feet away, to "get [her] dude." Meanwhile, defendant concealed at least one of his hands. Luvian mentioned that Sandoval's children were inside her apartment and suggested that he and defendant "do this some other time." Defendant remarked, "I don't give a fuck if there is kids in the house." Sandoval countered, "Sharkey, are you serious? You know me, don't disrespect my house. My kids are here." Defendant commented, "I know whose kids those are. Those are the homie Shyboy's kids."

Thereafter, defendant withdrew his concealed hand and charged Luvian. The two men came to blows and ended up inside Sandoval's apartment, where the brawl resumed. At one point, Sandoval exclaimed, "Are you guys fucking serious? Are you really doing ... this in [the] house?" Eventually, Luvian grabbed defendant and "swung" him to the front yard, where they continued to fight. Near the curb, Luvian stumbled, fell to the ground, recovered, and took out a pocket knife.⁵ Alvarado uttered, "What the hell. He has a knife too." Luvian then realized that he was bleeding from the body and instructed

⁵ Luvian's knife possession violated his parole.

Sandoval to call an ambulance. Defendant and Alvarado fled the scene. Neither Luvian nor Sandoval observed a knife in defendant's possession.

Luvian was stabbed multiple times in the chest, abdomen, and back, but conveyed to Sandoval that he did not want to "snitch on anybody." As a result, during the 911 call, Sandoval informed the dispatcher that she did not know who injured Luvian. Police and emergency medical personnel soon arrived. When asked about what transpired Luvian said, "I ain't telling you shit." Sandoval again maintained that she did not see or hear anything. Luvian was transported to Memorial Medical Center in Modesto, where he underwent successful emergency surgery. Meanwhile, Sandoval, who believed that Luvian would not survive, agreed to cooperate with law enforcement and revealed that defendant was the culprit. In a May 22, 2012, police interview at the hospital, Luvian corroborated Sandoval's account.⁶ Defendant was taken into custody on December 14, 2012, in San Jose.

In Merced, officers searched the two-bedroom apartment of Susan Avalos, defendant's mother, and found red clothing, numerous folding knives, and a compact disc case marked with a single dot followed by four dots, the letter "S" crossed out, and the words "fuck U," "asshole," "Shark" with the letter "S" in reverse, and "Varrio Meadow." They also observed graffiti of four dots, the Roman numeral "XIV," and the word "Shark." Susan⁷ related that defendant would sleep on the couch and leave some of his belongings in her home.

At trial, Officer Reynaldo Alvarez, a qualified gang expert, testified that the Norteños are a Hispanic criminal street gang that claims the area north of Bakersfield as

⁶ In exchange for Luvian's and Sandoval's testimonies, the prosecutor agreed to (1) terminate the remainder of Luvian's parole period stemming from a previous conviction; (2) dismiss Luvian's outstanding parole warrant; (3) dismiss Sandoval's petty theft charge; and (4) provide for the pair's airfare, food, and lodging during trial.

⁷ To avoid confusion, we refer to Susan Avalos as "Susan." No disrespect is intended.

its territory. Over 1,000 members reside in Merced alone, forming the largest gang population in the city. The Norteños are part of a larger paramilitary structure controlled by the prison gang Nuestra Familia:

“[A]t the top are the Carnales who are part of the NF or Nuestra Familia. The majority of these guys are in prison. They’re lifers. [¶] And directly under them is going to be the Northern Structure or the Nuestra [R]aza. [¶] And then directly under them is going to be ... the Norteños [T]hey’re all Northerners [¶] ... [¶] The Carnales are the guys that are going to be calling the shots. They’re the ones that have put in the work. Those are the ones who have proven themselves.”

Norteños primarily engage in homicides, shootings, stabbings, burglaries, and narcotics sales.⁸ They identify with the color red and the number 14, which corresponds to the 14th letter of the alphabet “N.” Members generally wear red clothing. Those located in San Jose may also wear teal San Jose Sharks apparel. Norteños often have tattoos of the number 14 and its variants (e.g., a single dot followed by four dots, “XIV,” “X4”), their hometowns and neighborhoods, and other symbols indicative of gang affiliation. Some of their rivals include the Sureños, Crips, Oriental Troops, and Norteño dropouts.

Alvarez noted that a dropout—i.e., one who quits a gang—is subject to retaliation.

He explained:

“A dropout is a gang member who is no longer affiliat[ed] ... with the gang ... they were a member of, so they dropped out. They no longer house with them and ... they no longer commit crimes or associate with them. [¶] ... [¶] ... [Y]ou got to remember when somebody joins a gang it’s a lifetime commitment. The gang is the most important thing. It’s not your family anymore, it’s not your kids, ... it’s the gang. So when somebody drops out it’s a sign of disrespect. They’re hated. [¶] So the gang that they dropped out from is going to target them. They’re going to try to kill them. They’re going to put hits out for them. They’re going to green light them as they say.”

⁸ Alvarez confirmed that validated Norteños were previously convicted of crimes such as attempted murder, shooting at an inhabited dwelling or vehicle, assault with a deadly weapon, assault by force likely to produce great bodily injury, and firearm possession.

The Northern Riders are a gang comprised of Norteño dropouts who “got tired of the politics, the backstabbing, the corruption and the rules” of Nuestra Familia, “decided to go out on their own,” and banded together “out of self protection.” In Merced, Northern Riders “walk[] the streets,” sell drugs, and engage in violent crimes such as homicides, shootings, and assaults. Consequently, “in the Norteño world, Merced is not seen as having that much clout or that much authority because ... a lot of dropouts run[] around in public [and] the Norteños [do] not tak[e] action on them.”

According to Alvarez, the “higher ups” have ordered the Norteños to “clean[] up” Merced:

“[F]rom our investigation ... information has been coming down through the prison they are to take action. They need to start cleaning up the streets, whether it’s through assaults, whether through shootings, whether through stabbing. They need to start putting some fear into these guys because they’re out here walking the streets and they’re not suppose[d] to be because they’re dropouts. They’re suppose[d] to be in fear of the Norteños.”

A Norteño who does not comply with this directive may be assaulted or “put ... on a hit list,” but a Norteño who “take[s] action on these dropouts ... can garner ... respect from [his] fellow gang members.”

To ascertain whether someone is an “active” member or a dropout, Norteños “run checks,” asking the subject for his name and identification and other Norteños for additional intelligence. During a check, a Norteño may even mention his own “active” status to the subject:

“If the gang member ID’s himself as an active he’s letting [the subject] know I’m active that I’m going to take care of you since you’re a dropout. You’re ... in my territory. You’re here, you’re against our cause, and he’s going to further the Norteño[s]’s agenda by committing a violent assault, by removing him. [¶] It all goes back to the Norteño[s]’s cause. They see that these dropouts are against them, that they’re against their cause and they need to be removed for that reason.”

In Merced, at least one check involved casualties. In December 2012, a Norteño dropout killed two Norteños at a party after he discovered that he was being investigated by those members.⁹

Alvarez opined that defendant was an active Norteño at the time of the stabbing. Defendant previously admitted to being a gang member, was convicted of gang-related crimes, and was housed in a Norteño jail pod. He has the moniker “Sharkey” and tattoos of the Huelga bird, a face with a red bandana, four dots, the numbers “187” and “XIV,”

⁹ At a preliminary fact hearing (see Evid. Code, § 402), Alvarez testified that he obtained information relating to Nuestra Familia’s directive from conversations with other law enforcement personnel, Norteños on the street, and five or six confidential informants and reading “kites” commanding Norteños to “take action upon their enemies.” He described a kite:

“A kite is something that gang members or people that are in custody use to communicate. So for example, somebody who is in Pelican Bay obviously isn’t going to be able to communicate all activities of their gang through phone conversations and they have limited visitors. So what they do is they write kites. They take sheets of paper ... and they write orders and instructions on them. And the way they pass them down or get them out is through females that go up there or they’ll conceal them in their rectal cavity and brought out that way.”

The court denied defense counsel’s motion to strike Alvarez’s testimony:

“I think reliance upon hearsay information, informant information is the type of evidence that gang experts have to rely on. There is no other source of information other than police reports and so forth. It is the type of information that gang experts have to rely on in order to develop information and knowledge about the under workings of the gangs.

[¶] ... [¶]

“... I think this is the only way that officers can develop information about the gang activity, what the code of conduct is. I think it’s necessary. It’s inherent in the particular issue. They don’t put out a manual saying this is what your behavior is if you’re going to be a Norteño, and you sign this oath to comply with those.”

the word “Norteno,” and the initials “VMF,” “ESSJ,” “SANJO,” and “SK.”¹⁰ Facebook photos showed defendant wearing red clothing and San Jose Sharks apparel, associating with others wearing similar attire, and “flashing gang signs.” At his mother’s apartment in Merced, where he frequented, he drew graffiti of four dots, the Roman numeral “XIV,” and the words “Shark” and “Sharkey.” Defendant also left some of his personal belongings there, including red clothing and a compact disc case marked with four dots, the initials “VMF” and “ESSJ,” and the words “shark” and “Varrío Meadow Fair,” with the letter “S” either crossed out or in reverse as a sign of disrespect toward the Sureños.

Alvarez opined that Luvian was a Northern Rider at the time of the stabbing based on police reports, conversations with Luvian and other law enforcement personnel, and Luvian’s various tattoos, such as a Playboy bunny, four dots, and the number 14.

The prosecutor hypothetically asked Alvarez whether an active Norteño who stabs a Northern Rider following a check does so for the benefit of, at the direction of, or in association with a criminal street gang. Alvarez responded in the affirmative:

“If I could break it down. This crime specifically was directed by the Norteños for several reasons. For one, they have standing orders that when they have the opportunity they’re required to take out a dropout, to take action upon them. Here you have a Norteño that’s actually confronting him, asking him where he’s from, to indeed verify if he’s a Norteño and then he pursues to stab him. So that’s where the direction comes in, but it’s also going to benefit the Norteño as they’re eliminating a rival. [¶] If the dropout is out here selling drugs he’s taking their territory, he’s taking their clients, they’re going to gain, they’re going to benefit if this guy is no longer out here operating.

“In addition, it goes back to that whole fear and respect the gang. By him stabbing this guy and removing him, he’s showing his dedication, he’s showing that he’s willing to commit violent assaults which is going to give him respect in the gang and in turn is going to create fear in the community.”

¹⁰ “VMF” stands for “Varrío Meadow Fair,” a Norteño subset in San Jose. “ESSJ” stands for “East Side San Jose,” defendant’s neighborhood. “SANJO” stands for “San Jose.” Finally, “SK” stands for “Sureño killer.”

DISCUSSION

I. Substantial evidence supported the gang enhancement

a. Standard of review

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*)). “We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.” (*Id.* at p. 60.) “Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis what[so]ever is there sufficient substantial evidence to support it.” (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) “If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*Albillar, supra*, at p. 60.)

“Although we must ensure the evidence is reasonable, credible, and of solid value, ... it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends.” (*People v. Jones* (1990) 51 Cal.3d 294, 314.) “Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.” (*Ibid.*)

b. Analysis

“[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for

the felony or attempted felony of which he or she has been convicted, be punished” (§ 186.22, subd. (b)(1).) “Thus, the trial court can impose the enhancement only if the prosecution establishes both of the following elements beyond a reasonable doubt: first, that the defendant committed a felony (a) for the benefit of, (b) at the direction of, or (c) in association with a criminal street gang; and second, that in connection with the felony, the defendant harbored the specific intent to (a) promote, (b) further, or (c) assist in any criminal conduct by gang members.” (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1358, italics omitted; see *People v. Hill* (2006) 142 Cal.App.4th 770, 774 [“There is no requirement in section 186.22, subdivision (b), that the defendant’s intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense the defendant commits.”].)

We conclude that substantial evidence supported the gang enhancement. The record—viewed in the light most favorable to the judgment—shows that defendant, a Norteño, initiated a confrontation with Luvian, a Northern Rider, and demanded his name, hometown, and identification. After defendant announced his active gang status, he attacked Luvian. During the ensuing struggle, defendant withdrew a hidden knife and stabbed Luvian multiple times in the chest, abdomen, and back. In response to a hypothetical question based on these facts, Alvarez, a qualified gang expert, testified that these acts would have been committed at the direction of Nuestra Familia, whose leaders ordered the Norteños to investigate and terrorize dropouts in Merced.¹¹ Moreover, a reasonable fact finder could infer from defendant’s conduct that defendant harbored the specific intent to promote, further, or assist in this criminal endeavor. (See *People v.*

¹¹ To the extent defendant argues that the trial court erroneously admitted Alvarez’s testimony pertaining to Nuestra Familia’s “cleanup” directive, we disagree. A gang expert may base his or her opinion upon his or her personal investigations of gang-related matters, information obtained from colleagues and other law enforcement officers, and conversations with gang members. (*People v. Gardeley* (1996) 14 Cal.4th 605, 620; *People v. Valadez* (2013) 220 Cal.App.4th 16, 29; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1121-1122, 1124; see *ante*, fn. 9.)

Manibusan (2013) 58 Cal.4th 40, 87 [“[E]vidence of a defendant’s state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence”]; *People v. Margarejo* (2008) 162 Cal.App.4th 102, 110 [“We cannot look into people’s minds directly to see their purposes. We can discover mental state only from how people act and what they say.”].)¹²

II. The trial court committed sentencing errors

a. Standard of review

If a trial court imposes a sentence unauthorized by law, a reviewing court may correct that sentence whenever the error is brought to its attention. (See *People v. Serrato* (1973) 9 Cal.3d 753, 763, overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is ‘clear and

¹² Because we find that the crimes underlying counts 1 and 2 were committed “at the direction of” a criminal street gang, we need not address whether they were also committed “for the benefit of” or “in association with” the gang. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

Defendant points out that the jury convicted him of the lesser included offense of attempted voluntary manslaughter on count 1. He claims that this result “is inconsistent with the theory that [he] was acting to benefit or at the direction of the Norteño[s] ... with the requisite intent.” We disagree. As previously mentioned, the jury necessarily concluded that defendant acted in imperfect self-defense (*ante*, fn. 2), finding that (1) he took a direct but ineffectual step toward killing Luvian; (2) he intended to kill Luvian when he took this step; (3) he actually believed that he or a third party was in imminent danger of death or great bodily injury; (4) he actually believed that immediate use of deadly force was necessary to defend himself or the third party; and (5) at least one of these beliefs was unreasonable. (See CALCRIM No. 604.) Contrary to defendant’s assertion, imperfect self-defense and the gang enhancement are not mutually exclusive. Given the evidence in this case, a reasonable jury could have determined that defendant (1) harbored both the specific intent to kill Luvian and the specific intent to promote, further, or assist in gang-sanctioned conduct; and (2) subjectively but unreasonably viewed Luvian, a dropout, as an imminent threat to himself, the Norteños, and Nuestra Familia, justifying the stabbing.

correctable' independent of any factual issues presented by the record at sentencing.”
(*People v. Scott* (1994) 9 Cal.4th 331, 354.)

b. *Analysis*

A determinate term for a given offense may be lengthened by sentence enhancements. (*People v. Ahmed* (2011) 53 Cal.4th 156, 161; *People v. Felix* (2000) 22 Cal.4th 651, 655.) “[T]here are at least two types of sentence enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense.” (*People v. Coronado* (1995) 12 Cal.4th 145, 156.) The first category focuses on a defendant’s status as a repeat offender while the second category focuses on the circumstances of the crime charged. (*Id.* at pp. 156-157; accord, *People v. Ahmed, supra*, at p. 161.) Enhancements for a prior serious felony conviction pursuant to section 667, subdivision (a) (*People v. Coker* (2004) 120 Cal.App.4th 581, 586), and a prior prison term pursuant to section 667.5, subdivision (b) (*People v. Coronado, supra*, at p. 156), fall under the first category.

Status enhancements “have nothing to do with particular counts [and] ... are added only once as a step in arriving at the aggregate sentence.” (*People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401; see § 1170.1, subd. (a).) For instance, “when imposing a determinate sentence on a recidivist offender convicted of multiple offenses, a trial court is to impose an enhancement for a prior conviction only once to increase the aggregate term, and not separately to increase the principal or subordinate term imposed for each new offense.” (*People v. Williams* (2004) 34 Cal.4th 397, 400, italics omitted, citing *People v. Tassell, supra*, at pp. 89-92.) Furthermore, prior serious felony conviction and prior prison term enhancements cannot be imposed cumulatively if they were based on the same prior offense. (*People v. Jones* (1993) 5 Cal.4th 1142, 1144-1153; accord, *People v. Baird* (1995) 12 Cal.4th 126, 128; *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) “[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of

which is a section 667 enhancement, the greatest enhancement, but only that one, will apply.” (*People v. Jones, supra*, at p. 1150; accord, *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1669.)

The court erroneously imposed the prior serious felony conviction and prior prison term enhancements twice. The prior serious felony conviction and prior prison term enhancements were based on the same carjacking offense.

DISPOSITION

The redundant status enhancements imposed on count 2 are stricken. The prior prison term enhancement on count 1 is stayed. The trial court is directed to amend the abstract of judgment accordingly and to transmit certified copies thereof to the appropriate authorities. As so modified, the judgment is affirmed.

DETJEN, J.

WE CONCUR:

LEVY, Acting P.J.

SMITH, J.