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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDIE ERICEL BARRAGAN,

Defendant and Appellant.

G045414

(Super. Ct. No. 09NF1599)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Richard M. King, Judge. Affirmed and remanded for resentencing with directions.

Kathleen Woods Novoa, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland , Assistant Attorney
General, Steve Oetting and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff
and Respondent.

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INTRODUCTION

Defendant Eddie Ericel Barragan appeals after a jury found him guilty of attempted voluntary manslaughter, assault with a firearm, and street terrorism, and also found several sentence enhancement allegations to be true. Defendant's sole contention in this appeal is that the trial court erred by failing to stay execution of punishment for the street terrorism offense pursuant to Penal Code section 654, because it was based on the same conduct underlying the attempted voluntary manslaughter offense for which he was also punished. (All further statutory references are to the Penal Code.)

We affirm the judgment and remand for resentencing. The California Courts of Appeal have been sharply divided on the issue whether a defendant "may be punished separately for the crime of active participation in a criminal street gang [street terrorism]." (*People v. Mesa* (2012) 54 Cal.4th 191, 201 (dis. opn. of Chin, J.) (*Mesa*)). After defendant's opening brief was filed in this appeal, the California Supreme Court resolved this issue in *Mesa, supra*, 54 Cal.4th at page 193, by holding section 654 requires that execution of punishment be stayed for the offense of street terrorism when the trial court separately punishes the defendant for the felonious conduct underlying the street terrorism offense.

Here, the trial court imposed separate punishments for the attempted voluntary manslaughter offense and the street terrorism offense, which were both based on defendant's act of shooting the victim. As conceded by the Attorney General, section 654, as interpreted in *Mesa, supra*, 54 Cal.4th 191, requires that execution of punishment for the street terrorism offense be stayed.

FACTS

In June 2009, defendant and J.O. both associated with the "Barrio Small Town" gang in Anaheim. On June 2, defendant, J.O., and others were drinking beer at

J.O.'s neighbor's house; defendant and J.O. separated from the others and walked to defendant's house. Defendant went inside his house and came back outside where J.O. was waiting; he and J.O. discussed going to a liquor store to buy snacks. Defendant showed J.O. that he had a rifle with him.

Defendant and J.O. walked to Claudina Street where Jose Baltazar lived. Baltazar lived with his two sons, who were both affiliated with a rival gang of Barrio Small Town. About three months earlier, defendant had told J.O. that Baltazar had pistol-whipped him in the head.

When defendant and J.O. arrived at Baltazar's residence, "[t]here was nobody there so [they] kept on walking." Defendant said to J.O., "let's go around again." Defendant and J.O. walked down two alleys and a street, then along Claudina Street where they saw Baltazar in his car. J.O. testified that Baltazar started shouting obscenities at them and that defendant shouted back; J.O. stated Baltazar got out of the car and came closer to them. Defendant said, "fuck you" to Baltazar and then shot him, causing injury. Defendant and J.O. "took off running."

PROCEDURAL BACKGROUND

Defendant was charged in an amended information with committing attempted murder in violation of sections 664, subdivision (a) and 187, subdivision (a) (count 1), assault with a firearm in violation of section 245, subdivision (a)(2) (count 2), and street terrorism in violation of section 186.22, subdivision (a) (count 3). The amended information alleged defendant committed the attempted murder willfully, deliberately, and with premeditation within the meaning of section 664, subdivision (a).

The amended information contained the following enhancement allegations: (1) defendant committed counts 1 and 2 for the benefit of, at the direction of, and in association with a criminal street gang with the intent to promote, further, and assist in criminal conduct by members of that gang, within the meaning of

section 186.22, subdivision (b)(1); (2) pursuant to section 12022.7, subdivision (a), defendant personally inflicted great bodily injury during the commission of counts 1 and 2, within the meaning of sections 1192.7 and 667.5; (3) pursuant to section 12022.53, subdivision (d), defendant intentionally and personally discharged a firearm proximately causing great bodily injury, within the meaning of sections 1192.7 and 667.5 during the commission of count 1; and (4) pursuant to section 12022.5, subdivision (a), defendant personally used a firearm in the commission of counts 1 and 2, within the meaning of sections 1192.7 and 667.5.

The jury found defendant guilty of attempted voluntary manslaughter, the lesser included offense of count 1, and of counts 2 and 3. The section 12022.53, subdivision (d) enhancement allegation did not apply to defendant because the jury did not find him guilty of attempted murder. The jury also found the remaining enhancement allegations true except for the section 186.22, subdivision (b)(1) enhancement alleged as to counts 1 and 2.

The trial court sentenced defendant to a total prison term of 10 years by imposing (1) the middle term of three years for attempted voluntary manslaughter, (2) a consecutive term of four years for the section 12022.5, subdivision (a) enhancement as to attempted voluntary manslaughter, (3) a consecutive term of three years for the section 12022.7, subdivision (a) enhancement as to attempted voluntary manslaughter; and (4) the middle term of two years as to count 3 to run concurrently to the sentence imposed for attempted voluntary manslaughter. Pursuant to section 654, the court stayed execution of punishment on count 2 and its related enhancements that were found true by the jury.

Defendant appealed.

DISCUSSION

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.”

Defendant contends the trial court erred by imposing a concurrent sentence for count 3, the street terrorism offense, instead of staying execution of punishment on that offense under section 654. Defendant argues, “the same act is being punished by the attempted manslaughter sentence as by the term imposed for the substantive gang offense because the attempted manslaughter was the felonious criminal conduct willfully promoted, furthered or assisted by [defendant] within the meaning of section 186.22, subdivision (a). The only felony criminal conduct by [defendant] which could give rise to the section 186.22, subdivision (a) offense was the attempted manslaughter because there was no evidence presented of [defendant]’s participating in any other felonious conduct. Thus, the section 186.22, subdivision (a) offense was based on the same act—the shooting of . . . Baltazar—as the attempted manslaughter count.”

After defendant filed his opening brief, the California Supreme Court issued its opinion in *Mesa, supra*, 54 Cal.4th at page 193, in which the defendant, a gang member and convicted felon, had, on two separate occasions, shot a victim and, for each instance, was convicted of and punished for assault with a firearm, possession of a firearm by a felon, and actively participating in a criminal street gang. The 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.” (*Ibid.*) The court explained: “For each shooting incident, defendant’s sentence for the gang crime 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.” (*Id.* at p. 197.) 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.” (*Id.* at p. 200.) The court further stated, “[t]he gang crime punishes defendant for doing more than the act of shooting the victims or possessing a firearm, but there is no question that defendant’s act of shooting the victims or possessing a firearm is punished by the gang crime.” (*Ibid.*)

The Supreme Court in *Mesa, supra*, 54 Cal.4th at page 198, rejected the argument that its holding would “eviscerate the substantive offense of gang participation,” and explained, “[i]t would simply limit punishment for the offense to circumstances in which the defendant’s willful promotion, furtherance, or assistance of felonious conduct by a gang member was not also the basis for convicting the defendant of a separate offense—for example, when there are sufficient grounds to convict a defendant under section 186.22, subdivision (a), but insufficient grounds to independently convict the defendant as an accessory.”

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.)

In the respondent’s brief, the Attorney General concedes that *Mesa, supra*, 54 Cal.4th 191, requires that the execution of punishment on count 3 be stayed under section 654 because “the only evidence of felonious conduct presented was that [defendant] shot his victim in the leg” and such conduct was the basis for both attempted voluntary manslaughter and count 3.

DISPOSITION

The judgment is affirmed and the matter is remanded to the trial court for resentencing with directions to stay the execution of sentence on count 3.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.