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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.

MARTIN PEREZ, JR.,

Defendant and Appellant.

G046201

(Super. Ct. No. 09CF0157)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed as modified.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Martin Perez, Jr., of attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a); count 1),¹ assault with a deadly weapon (§ 245, subd. (a)(1); count 2), assault likely to cause great bodily injury (§ 245, subd. (a)(1); count 3), and active participation in a criminal street gang (§ 186.22, subd. (a); count 4). The jury found that defendant committed the first three counts for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), but did not commit attempted murder with premeditation and deliberation. The court sentenced defendant to a total prison term of 21 years on count 1, including 10 years for the associated gang enhancement.²

On appeal, defendant contends the court abused its discretion by declining to strike the gang enhancement to count 1. He also asserts he is entitled to three additional days of custody credit. We agree defendant is entitled to additional custody credit. In all other respects, we affirm the judgment.

FACTS

On January 16, 2009, Martin Valerio and Francisco Montero attended a party in a motel room. Someone asked them what gang they claimed. Valerio replied, “I don’t bang.” Montero said “he kicks it with Crooks.” Several males at the party started swearing. Defendant said, “This is Lyon Street” and “Fuck the cucarachas,” a derogatory reference to the Los Crooks gang, which is a rival of the Lyon Street gang.

¹ All statutory references are to the Penal Code.

² On count 2, the court imposed a midterm sentence of three years, plus 10 years for the gang enhancement, and three years for the great bodily injury enhancement, but stayed execution of the entire sentence pursuant to section 654. On count 3, the court sentenced defendant to a concurrent midterm sentence of three years and struck the gang enhancement for purposes of sentencing only. On count 4, the court imposed a midterm sentence of two years, but stayed execution of sentence pursuant to section 654.

Valerio and Montero decided to leave the party. They left the motel room, followed shortly thereafter by defendant and several other people.

The room was on the second floor of the building. Valerio started down the motel stairs ahead of Montero. Defendant and at least two other males (including Armando Guevara) caught up with Montero and started beating him up.

Valerio came back upstairs and approached the largest person attacking Montero, i.e., defendant. Defendant asked Valerio, "You want some, too?" Defendant and Valerio fought until defendant started poking Valerio with a cold hard object on Valerio's back, body, and head. Valerio ran.

Valerio and Montero went to a nearby Del Taco restaurant. There, Valerio realized he had been stabbed. Police officers found Valerio covered with blood on the floor of the Del Taco, as well as a bloody T-shirt and bloody napkins in the Del Taco restroom. They found a trail of blood leading from the motel hallway to the Del Taco. Valerio had suffered stab wounds to his head, neck, back, and stomach, which required surgery and hospitalization, and left him with scars.

Officers searched defendant's home and found evidence of his affiliation with the Lyon Street gang, including gang-related photographs on his computer. Defendant's cell phone wallpaper had a banner reading, "R.I.P. Kid," and the date January 18, 2009. Kid was Jose Granillo, who died after he was shot by Los Crooks gang members in November 2008.

The jurors heard a recording of defendant's police interview. In the interview, defendant acknowledged going after and hitting Montero (the short "fool" who claimed to kick it with Crooks) and then going at it in self-defense against Valerio (the tall one who came from behind defendant and "tried to jump in"). Defendant eventually admitted stabbing Valerio (the person who came at him from behind) about six times with a "filero," a knife with a small blade he got from work. He had thrown the knife out the window as he drove away from the scene with his girlfriend. Defendant, whose

moniker is “Chino,” had joined the Lyon Street gang when he was 14 years old. He had been recruited to join the gang because he had been “putting in work.” He would “post up” outside all night every night, even in bad weather. He had recruited people for the gang. Even though he had moved to Los Angeles, he was “still placking” for the Lyon Street gang, for example, by writing on a basketball court like a big billboard.

A gang expert testified that within gang culture, “putting in work” means committing crime, and “posting up” means “standing on a street corner telling everybody you’re there” for the gang. The expert identified Lyon Street graffiti on the backboard of a basketball court in front of defendant’s home and on items found inside his house. In the expert’s opinion, as of January 16, 2009, (1) Lyon Street gang had around 20 members; (2) defendant and Guevara were active participants; and (3) the gang’s primary activities were robbery, vehicle theft, and burglary. In response to a hypothetical question, the expert opined that defendant’s crimes of attempted murder, assault with a deadly weapon, assault with force likely to produce great bodily injury, and receiving stolen property were committed for the benefit of or in association with the Lyon Street gang.

DISCUSSION

The Court Did Not Abuse Its Discretion by Declining to Strike the Gang Enhancement

Defendant contends the court should have stricken the gang enhancement in the interests of justice. He argues that, “for his actions in the present case, with his prior juvenile record, a [21-year] sentence was an unjust result.”

Section 186.22, subdivision (b)(1)(C), establishes a 10-year enhancement for persons convicted of violent felonies within the meaning of section 667.5, subdivision (c), if the felony is “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.” (§ 186.22, subd. (b)(1).) Section 186.22 is part of the Street Terrorism Enforcement and Prevention Act, also known as the STEP Act, which the Legislature enacted after finding that ““California is in a state of crisis . . . caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.”” (*People v. Gardeley* (1996) 14 Cal.4th 605, 615.)

Section 186.22, subdivision (g) gives a court the discretion to strike the 10-year enhancement “in an unusual case where the interests of justice would best be served” Similarly, section 1385, subdivision (c), confers on a court the discretion “to dismiss or strike an enhancement, or to ‘strike the additional punishment for that enhancement in the furtherance of justice.’” (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155.) The phrase, ““furtherance of justice,” requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal.”” (*People v. Orin* (1975) 13 Cal.3d 937, 945.) “Inherent in this legislative grant of judicial discretion is the recognition that ““[m]andatory, arbitrary or rigid sentencing procedures invariably lead to unjust results.””” (*People v. Jones* (2007) 157 Cal.App.4th 1373, 1379.)

A court’s decision not to exercise its section 1385 discretion to dismiss is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) A “trial court’s sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an ‘individualized consideration of the offense, the offender, and the public interest.’” (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

At the December 2, 2011 sentencing hearing, the court stated it had read defendant’s probation report and its attachments. Defense counsel asked the court not to impose the gang enhancement, although he conceded that substantial evidence supported

it. Alternatively, defense counsel requested a new trial on the issue of the gang enhancement.

The prosecutor asked the court to sentence defendant to the maximum term. The prosecutor identified as aggravating factors that (1) defendant committed a violent crime by stabbing Valerio 12 times and causing him great bodily injury; and (2) in jail, defendant maintained his gang lifestyle by instigating a racial altercation, tagging his cell, writing to other gang members, requesting gang-related rap lyrics, requesting gang books about the Mafia, and using gang slang and his gang moniker. Consequently, the prosecutor argued, society needed to be protected from defendant.

The court sentenced defendant to the midterm on count 1, plus gang, knife, and great bodily injury enhancements, resulting in a total prison term of 21 years. The court stated that defendant almost killed his victim and clearly had a gang-related motivation for the crime. The court imposed a concurrent sentence on count 3, and imposed sentence but stayed execution on the remaining counts. (See fn. 2.)

Defendant argues the court acted irrationally, arbitrarily, and outside the bounds of reason by sentencing him to 21 years in prison, a sentence he claims is unjust and unreasonably long. To support his argument, he points out he was 18 years old when he committed the offense, had no prior adult criminal record, had a limited juvenile record, had obtained his GED while in custody, and had been meeting with a Jehovah's Witness elder. Defendant contends he "was not looking for trouble" on the night of the offense, but rather had a chance encounter with Montano, sought to avenge the murder of his friend "Kid," and to defend himself against Valerio. He observes the court could have stricken the gang enhancement and still have sentenced him to 11 or 13 years in prison.

Defendant's argument fails. His lack of a prior adult criminal record is not surprising, since he was only 18 years old at the time of the offense. Despite obtaining his GED and meeting with a religious elder while in custody, he continued his gang lifestyle in jail. During a nine-month period in jail, he had "been involved in 11 rule violations, including two major violations, one of which was [for] inciting a racial riot." He had been charged and sentenced for defacing his bunk and his cell wall with Lyon Street graffiti. The probation officer reported (1) defendant expressed no remorse for the victims or his actions; (2) defendant lacked respect for the court and law enforcement; and (3) defendant's gang involvement appeared to be ongoing. Although defendant was not necessarily looking for trouble on the night of the party, he nonetheless violently stabbed Valerio with total disregard of Valerio's life. In sum, the court acted well within its discretion by declining to strike the gang enhancement as to count 1.

Calculation of Presentence Custody Credits

Defendant contends, and the Attorney General agrees, that the court erroneously calculated defendant's presentence custody credits. Defendant served 1,046 days of actual time in custody. At sentencing, the court acknowledged defendant had "1,046 days of actual time." But the court and defense counsel then erroneously agreed defendant should be given 153 days of conduct credits. Under section 2933.1, subdivision (a), defendant should have accrued work time credit of no more than 15 percent of his actual time served, i.e., 156 days. Although the court minutes reflect a nunc pro tunc order correcting defendant's conduct credit to 156 days, the abstract of judgment inaccurately records 153 days of local conduct credit and therefore must be corrected.

DISPOSITION

The judgment is modified to grant defendant a total of 1,202 days of presentence credits, comprised of 1,046 days of actual custody credit and 156 days of conduct credits. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, we affirm the judgment.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.