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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.

MAURILLO IVAN ROSEL, JR.,

Defendant and Appellant.

G047003

(Super. Ct. No. 07NF2702)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Reversed in part and affirmed as modified.

William D. Farber, 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, Lynne G. McGinnis and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

On this appeal after remand, defendant Maurillo Ivan Rosel, Jr., raises a number of sentencing errors. The Attorney General concedes two of the three errors, and as we shall discuss below, we accept the concessions and shall modify the judgment accordingly. As to the third error, defendant's sentence on one count of street terrorism (Pen. Code, § 186.22, subd. (a)),¹ the Attorney General correctly contends that a California Supreme Court decision requires reversal of that count altogether. We agree and order defendant's conviction on that count reversed.

I
FACTS

In 2009, defendant was convicted of second degree robbery (§§ 211/215.5, subd. (c)), with enhancements for the personal use of a firearm (§ 12022.53, subd. (b)), and for committing the crime for the benefit of a street gang (§ 186.22, subd. (b)(1)), count one). He was also convicted of misdemeanor battery on a peace officer without injury (§ 243, subd. b, count two), as a lesser included offense of felony battery on a peace officer (§ 243, subd. (c)(2)); of active participation in a street gang (§ 186.22, subd. (a), count three); and misdemeanor escape after arrest (§ 836.6, subd. (b), count four). His original sentence was 22 years. In *People v. Rosel* (Jan. 26, 2012, G044481) [nonpub. opn.], we reversed the gang enhancement for a lack of substantial evidence and affirmed the judgment in all other respects.

Defendant was resentenced on June 1, 2012. The court vacated the 10-year sentence on the gang enhancement, and resentenced defendant to the low term of two years for the robbery in count one, and a 10-year consecutive sentence for the firearm enhancement. The court imposed concurrent terms of one year and four months each on

¹ Subsequent statutory references are to the Penal Code.

counts two and three, and stayed sentence on count four. The total term after sentencing on remand was 12 years in state prison. Defendant now appeals.

II

DISCUSSION

Sentence on Count Two

Defendant was originally charged with the felony offense of battery on a peace officer with injury under section 243, subdivision (c)(2). The jury convicted defendant of the lesser included offense of misdemeanor battery on a peace officer without injury (§ 243, subd. (b).) At the resentencing hearing, the court imposed a sentence of one year and four months on this count. Defendant argues, and the Attorney General concedes, that this sentence was unauthorized.

We agree with the parties. “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case. . . . [L]egal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement.” (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn.omitted.) Section 243, subdivision (b), states the offense “is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.” Because the maximum length of confinement was one year, a sentence of one year and four months is unauthorized. We therefore reduce the sentence on that count to one year rather than one year and four months, to be served concurrent to count one as ordered by the trial court.

Defendant also points out that the abstract of judgment incorrectly lists the statute he was convicted under as section 243, subdivision (c)(2), when he was actually convicted under section 243, subdivision (b). The Attorney General appears to agree,

describing the offense of which defendant was convicted as a violation of section 243, subdivision (b). The parties are correct. “It is undisputed that battery without injury on a deputy probation officer in violation of section 243, subdivision (b), is a lesser misdemeanor offense necessarily included within the charged felony offense of battery with injury on a [peace] officer in violation of section 243, subdivision (c)(1).” (*People v. Hayes* (2006) 142 Cal.App.4th 175, 180, fn. omitted.) “Subdivision (c)(2) applies when a battery with injury is committed against a peace officer.” (*Id.* at p. 180, fn. 3.) We shall order the judgment and the abstract of judgment modified accordingly.

Sentence on Count Three

Defendant initially argued that his sentence on the street terrorism count should have been stayed pursuant to section 654. His opening brief, however, was filed before the Supreme Court decided *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*.) The Attorney General’s brief, filed after *Rodriguez* was decided, contended the section 654 argument was moot because there was insufficient evidence to support the conviction at all. Defendant, in his reply brief, agreed, and we concur.

Rodriguez held that a gang member does not violate section 186.22, subdivision (a) if he or she “commits a felony, but acts alone[.]” (*Rodriguez, supra*, 55 Cal.4th at p. 1128.) In order to violate section 186.22, subdivision (a), the requisite “felonious criminal conduct” (§ 186.22, subd. (a)) must “be committed by at least two gang members.” (*Id.* at p. 1132.) The defendant in *Rodriguez* was a gang member who committed an attempted robbery. “There was no evidence that [the] defendant acted with anyone else.” (*Rodriguez, supra*, 55 Cal.4th at p. 1129.) He contended that he could not be convicted of violating section 186.22, subdivision (a) because he did not “promote[], further[], or assist[]” any felonious criminal conduct by members of the gang. (§ 186.22,

subd. (a).) The California Supreme Court agreed, holding that the plain meaning of the word “members” mandates that “felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he [or she] is a gang member. [Citation.]” (*Id.* at p. 1132.)

Here, defendant was not alone at the time of the robbery — he was a passenger in a car driven by another individual. (*People v. Rosel, supra*, G044481.) The Attorney General concedes the identity of the second person was never established at trial. Without proof that the robbery was “committed by at least two gang members” (*Rodriguez, supra*, 55 Cal.4th at p. 1132) there is insufficient evidence to support defendant’s conviction on count three, and it must be reversed.

Correction of the Abstract of Judgment

Defendant’s final argument is that the abstract of judgment inaccurately lists his misdemeanor convictions on counts two and four as felonies. He requests correction, and the Attorney General has no objection. As these offenses are both misdemeanors (§ 243, subd. (b), § 836.6, subd. (b)), the abstract should be corrected to reflect this. (See *People v. Kim* (2012) 212 Cal.App.4th 117, 123-124 [“courts have inherent authority to correct clerical errors in a sentence at any time”].)

III

DISPOSITION

It is ordered that: 1) Defendant’s conviction on count three is reversed; 2) defendant’s sentence on count two is reduced to one year; 3) the judgment and abstract of judgment are ordered modified to reflect that defendant’s conviction on count two is a conviction under section 243, subdivision (b); and 4) the abstract of judgment is ordered corrected to reflect that counts two and four are misdemeanors.

The trial court is directed to issue a new abstract of judgment reflecting these modifications and corrections and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.