Filed 6/20/06; part. pub. order 7/20/06 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANTHONY LAMAS, JR., Defendant and Appellant.	G035001 (Super. Ct. No. 04NF3521) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed in part, reversed in part, and remanded with directions.

Howard J. Stechel, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Robert Anthony Lamas, Jr., of street terrorism (Pen. Code, § 186.22, subdivision (a); all further statutory references are to this code), possession of a

loaded firearm in public by a gang member (§ 12031, subd. (a)(1)(C)), possession of a concealed firearm by a gang member (§ 12025, subds. (a)(2) & (b)(3)), and resisting a peace officer. The jury acquitted defendant on a charge of receiving the gun as stolen property. The trial court sentenced defendant to a total term of three years and eight months.

Defendant contends the trial court erroneously instructed the jury on the street terrorism and two gun possession charges. He asserts the same argument with respect to all three instructions, namely, that each crime requires the defendant commit or aid and abet "a separate felony" in addition to an underlying gang-related felony. We reject the contention as a misinterpretation of *People v. Castenada* (2000) 23 Cal.4th 743 (*Castenada*) and contrary to the Legislature's intent. (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 435 (*Ngoun*). We also conclude that, although the instruction concerning the concealed weapons charge should have included the elements of section 186.22, subdivision (a) — as the Supreme Court decided with regard to an identically-worded code section in *People v. Robles* (2000) 23 Cal.4th 1106 — the error was harmless because the jury found the omitted elements true under another properly given instruction.

Finally, we agree with defendant that his street terrorism conviction must be reversed as a lesser included offense of possession of a loaded gun in a public place by a gang member. We also agree he is entitled to a stay on the concealed weapon charge pursuant to section 654, as well as seven additional days of presentence custody credits. We therefore affirm the judgment in part, reverse in part, and remand with directions.

I

FACTUAL BACKGROUND

Because the issues defendant raises have little to do with the factual circumstances of his crime or the evidence presented at trial, we limit our recitation accordingly. In short, a Buena Park police officer noticed defendant riding a bicycle at 3:15 a.m. without lights. The officer illuminated his vehicle's spotlight and followed defendant, who fled, first on the bicycle and then on foot, jumping a wall. The officer recovered a .45 caliber gun in a planter near where defendant scaled the wall. The gun was dry, whereas the dirt in the planter was wet. The gun contained five bullets. Another officer located defendant crouched by a wall in a backyard a few houses away, and arrested him. At trial, the prosecution presented extensive evidence of defendant's active participation in a criminal street gang.

II

DISCUSSION

A. *The Trial Court Properly Instructed the Jury on Section 186.22, Subdivision (a)*

Defendant contends the trial court misinstructed the jury on the elements of street terrorism, also known as active gang participation, as defined in section 186.22, subdivision (a).[1] "Subdivision (a) create[s] a substantive offense for active participation in a criminal street gang . . . ." (*Ngoun, supra*, 88 Cal.App.4th at p. 435.) The offense is a "wobbler" because the district attorney may choose to prosecute it as a misdemeanor or

[1] Section 186.22, subdivision (a), provides: "Any 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, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

as a felony. (*Robles*, *supra*, 23 Cal.4th at p. 1113.) The Supreme Court in *Robles* identified the elements of section 186.22, subdivision (a), as follows: "Those elements are 'actively participat[ing] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity' and 'willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.'" (*Robles*, *supra*, 23 Cal.4th at p. 1115.) As we explain below, the trial court properly instructed the jury on the requisite elements.[2]

Defendant's argument is somewhat opaque, but he appears to argue the trial court should have instructed the jury a person cannot be guilty of street terrorism unless he or she commits or aids and abets "a separate felony" *in addition to* an underlying gang-related felony offense. He relies on an oft-misinterpreted snippet of *Castenada*, *supra*, 23 Cal.4th 743, 750, where the Supreme Court stated: "[A] person liable under section 186.22(a) must aid and abet a separate felony offense committed by gang members." Ripped from its context, the quotation arguably supports defendant's position.

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[2] In pertinent part, the court instructed the jury: "Every person who actively participates in any criminal street gang with knowledge that the members are engaging 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, is guilty of a violation of Penal Code, § 186.22, subdivision (a), a crime. [¶] . . . [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person actively participated in a criminal street gang; [¶] 2. The members of that gang engaged in or have engaged in a pattern of criminal gang activity; [¶] 3. That person knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and [¶] 4. That person either directly and actively committed or aided and abetted other members of that gang in committing the crimes of carrying a loaded firearm." The court also instructed the jury: "Felonious criminal conduct includes carrying a loaded firearm in a public place by a gang member, possession of stolen property or carrying a concealed firearm by a gang member." (See CALJIC No. 6.50; see also CALCRIM No. 1400.)

But in context, the quotation is part of the Supreme Court's explanation that section 186.22, subdivision (a), avoids punishing mere association with a disfavored organization and, in turn, satisfies the due process requirement of personal guilt (see *Scales v. United States* (1961) 367 U.S. 203) by criminalizing gang membership only where the defendant bears individual culpability for "a separate felony offense committed by gang members." (*Castenada*, *supra*, 23 Cal.4th at pp. 749-751.) In other words, because section 186.22, subdivision (a), "limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity" (*Castenada*, *supra*, at p. 749), anyone who violates the statute is necessarily more than a nominal or passive gang associate; indeed, he or she "'would also . . . be criminally liable as an aider and abettor to [the] specific crime' committed by the gang's members . . . ." (*Ibid.*; see generally *People v. Beeman* (1984) 35 Cal.3d 547, 560 [defining an aider and abettor as one who acts "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of" an offense (italics omitted)].)

And while *Castenada* discussed the crime of gang participation in terms of aiding and abetting, *Ngoun* clarified section 186.22, subdivision (a), also applies to a direct perpetrator's gang-related criminal conduct. After reviewing dictionary definitions of "promote," "further," and "assist," the *Ngoun* court concluded: "The literal meanings of these critical words square[] with the expressed purposes of the lawmakers. An active gang member who directly perpetrates a gang-related offense 'contributes' to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang

activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity." (88 Cal.App.4th at p. 436.)

Notably, *Ngoun* specifically rejected what appears to be defendant's contention here, i.e., that some "separate" felony is required in addition to the underlying felony committed to further, promote or assist the gang. (See *Ngoun*, *supra*, 88 Cal.App.4th at pp. 436-437 [citing cases where "a defendant [was] convicted both as a perpetrator of a substantive felony and as a gang member under section 186.22, subdivision (a) based upon the same felony"].) We agree with *Ngoun*. In sum, requiring an additional, "separate" felony would defeat the Legislature's purpose of making gang participation itself a substantive crime when it is more than passive or nominal, which is demonstrated by commission of or aiding and abetting even a single instance of gang-related felonious conduct. We therefore reject defendant's argument the jury should have been instructed an additional, separate felony is required.

Defendant next contends the trial court erred in instructing the jury that a gang member's possession of a loaded firearm in a public place constitutes "felonious criminal conduct" within the meaning of section 186.22, subdivision (a). The trial court correctly instructed the jury. Carrying a loaded firearm in public is generally a misdemeanor, but the Legislature has elevated the crime to a felony in certain instances, including when the perpetrator "is an active participant in a criminal street gang, as defined in subdivision (a) of [s]ection 186.22 . . . ." (§ 12031, subd. (a)(1)(C).)

Resisting this conclusion, defendant seeks support in *Robles*, but that reliance is misplaced. In *Robles*, the Supreme Court concluded the above-quoted language of section 12031, subdivision (a)(1)(C) — i.e., that the perpetrator "is an active participant in a criminal street gang, as defined in subdivision (a) of [s]ection 186.22" —

incorporates *all* the elements of section 186.22, subdivision (a), to elevate a gang member's possession of a loaded gun in public to a felony, *not just the element of active gang participation*. (*Robles*, *supra*, 23 Cal.4th at p. 1115.)

The Supreme Court therefore affirmed a magistrate's dismissal of a felony gun possession charge because, while the district attorney demonstrated the defendant was an active gang member, "the prosecution presented no evidence of the other requirements of section 186.22(a): 'knowledge that its members engage in or have engaged in a pattern of criminal gang activity' and 'willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.'" (*Robles*, *supra*, 23 Cal.4th at p. 1115.) But *Robles* poses no problem here because defendant does not dispute the prosecution presented evidence on all three of the required elements and, as shown in the margin (see fn. 2, *ante*), the trial court instructed the jury on all three elements — not just on active participation. We therefore conclude defendant's challenge to the gang participation instruction is without merit.

B. *The Court Properly Instructed the Jury on Section 12031, Subdivision (a)(1)(C)*

We conclude the trial court properly instructed the jury on the count concerning a gang member carrying a loaded firearm in public (§ 12031, subd. (a)(1)(C)) because the court's instruction included all three elements of section 186.22, subdivision (a), as required by *Robles*.[3] Defendant protests that "[t]he evidence did not

[3] In pertinent part, the trial court instructed the jury: "In order to prove this crime, each of the following elements must be proved: [¶] 1. A person carried a loaded firearm on[] his person while on a public[] street or in a public place[;] [¶] 2. The person had knowledge of the presence of the firearm; [¶] 3. At that time, the person was an active participant in a criminal street gang; [¶] 4. The members of that gang engaged in or have engaged in a pattern of criminal gang activity; [¶] 5. That person knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and [¶] 6. That person either directly and actively committed, or aided and abetted . . .

show [he] *used* the firearm to commit any felony offense" (italics added) but, as discussed, no additional felony offense is required. Rather, an active gang member's mere possession of a loaded firearm in a public place is a felony. (§ 12031, subd. (a)(1)(C).) And as *Ngoun* observed, perpetrating a single felony supports conviction for that offense and manifests the requisite individual culpability to support conviction for participating in a gang. As the Attorney General concedes, however, precisely because the possession offense includes all the elements of the crime of active gang participation as defined by section 186.22, subdivision (a), the former cannot be committed without necessarily committing the latter, and the latter must be reversed as a lesser included offense. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.)

C. *Error in the Instruction Regarding Section 12025, Subdivision (b)(3) Is Harmless*

Defendant is correct on his final instructional argument that the trial court failed to instruct the jury properly on the count concerning a gang member's possession of a concealed weapon.[4] (§ 12025, subds. (a)(2) & (b)(3).) Because section 12025, subdivision (b)(3), utilizes identical language as section 12031, subdivision (a)(3), to elevate the crime of carrying a concealed weapon (§ 12025, subd. (a)(2)) to a felony, the logic of *Robles* requires that the instruction on felonious carrying of a concealed weapon must include all three elements of section 186.22, subdivision (a). The trial court's

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members of that gang in committing the crime[] of . . . carrying a loaded firearm in public while being a gang member." (See CALJIC No. 12.54.1.)

[4] Section 12025, subdivision (a)(2), proscribes "[c]arr[ying] concealed upon [the] person any pistol, revolver, or other firearm capable of being concealed upon the person." Subdivision (b)(3) provides for punishment as a felony rather than a misdemeanor "[w]here the person is an active participant in a criminal street gang, as defined in subdivision (a) of [s]ection 186.22 . . . ."

instruction on this count, however, only included the first element — active participation in a criminal street gang.[5] Nonetheless, any error was harmless.

Instructional error is harmless when the jury necessarily decides the factual questions posed by erroneously omitted language adversely to the defendant under other properly given instructions. (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Because the jury concluded defendant violated the terms of section 12025, subdivisions (a)(2) and (b)(3), as given in the court's instruction (see fn. 5, *ante*), *and also* violated *all* the terms of section 186.22, subdivision (a), as accurately stated in another instruction (see fn. 2, *ante*), the jury necessarily resolved that defendant carried a concealed weapon in violation of the former statute's complete terms, which *Robles* suggests include all the elements of section 186.22, subdivision (a). In other words, the jury concluded defendant concealed a weapon on his person (see fn. 5, *ante*) and that he was active participant in a criminal street gang pursuant to all of the elements of section 186.22, subdivision (a) (see fn. 2, *ante*). Thus, any instructional error in omitting the elements of section 186.22, subdivision (a), from the four corners of the instruction on the concealed weapon charge was harmless. As the Attorney General concedes, however, the trial court erred in failing to stay defendant's sentence for carrying a concealed weapon under section 654 because the act formed part of an indivisible course of conduct that included carrying a loaded firearm in a public place. (*In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1744.)

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[5] In pertinent part, the trial court instructed the jury on the concealed gun possession charge as follows: "In order to prove this crime, each of the following elements must be proved: [¶] 1. A person carried upon his or her person a pistol, revolver, or other firearm capable of being concealed upon the person; [¶] 2. The person had knowledge of the presence of the firearm; and [¶] 3. The person was at the time an active participant in a criminal street gang." (See CALJIC No. 12.47.1.)

D. *Presentence Custody Credits*

The Attorney General concedes defendant's presentence custody credits should be corrected to reflect 268 days of actual custody and 134 days of conduct credits (§ 4019, subd. (f) [six days deemed served for every four days spent in actual custody]), for a total presentence credit of 402 days. We order the judgment modified accordingly.

III

DISPOSITION

Defendant's conviction for violation of section 186.22, subdivision (a), is reversed as a lesser included offense, and his conviction for violation of section 12025, subdivisions (a)(2) and (b)(3), is stayed pursuant to section 654; in all other respects, the judgment is affirmed. The judgment is modified (§ 1260) to reflect defendant served 268 days in actual custody before sentencing and 134 days of conduct credits, for a total presentence credit of 402 days. The trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.

Filed 7/20/06

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANTHONY LAMAS, JR., Defendant and Appellant.	G035001 (Super. Ct. No. 04NF3521) ORDER GRANTING IN PART REQUEST FOR PUBLICATION

The district attorney has requested that our opinion, filed on June 20, 2006, be certified for publication. It appears portions of the opinion meet the standards set forth in California Rules of Court, rule 976(c). The request is therefore GRANTED IN PART. (See Cal. Rules of Court, rule 976.1(a) [providing for partial publication].) Accordingly, we certify the opinion for publication with the exception of section II, subsections B, C, and D.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.