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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SOPHAN POK, Defendant and Appellant.	B166394 (Los Angeles County Super. Ct. No. SA043631)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven van Sicklen, Jr., Judge. Affirmed as modified.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lane E. Winters, Supervising Deputy Attorney General and Richard T. Breen, Deputy Attorney General, for Plaintiff and Respondent.

Carlos Gonzalez, who happened to be in the territory of the Venice 13 gang, was shot to death on November 11, 2001, in retaliation for the shooting death earlier that day of John Lovejoy, a member of the Culver City Boys gang and Diablo clique to which appellant Pok belonged. Following a jury trial, appellant Sophan Pok was convicted of the first degree murder of Carlos Gonzalez (Pen. Code, § 187, count 4 or 5),[1] possession of cocaine for sale (Health & Saf. Code, § 11351, count 1), possession of methamphetamine for sale (Health & Saf. Code, § 11378, count 2), and felony evasion of police in willful disregard for safety (Veh. Code, § 2800.2, subd. (a), count 3). The jury found a principal was armed as to the two drug counts (Pen. Code, § 12022, subd. (d)); that the murder was committed for the benefit of a gang (Pen. Code, § 186.22, subd. (b)(4); and defendant personally and intentionally discharged a gun causing death (Pen. Code, § 12022.53, subd. (b),(c), and (d)).[2] Appellant was sentenced to a total of 62 years to life in prison: 25 years to life for the murder, an additional 25 years to life for the gun allegation**,** a determinate term of 10 years for the gang allegation, and a total of an additional two years for count 1, its gun enhancement, and count 3, with the remainder stayed. He appeals the judgment of conviction.

Appellant does not challenge the murder conviction. His appeal contests the sufficiency of the evidence to support the gang allegation and the allegation that a principal in the drug crimes was armed. He further contends that the trial court committed sentencing error in imposing a determinate term on the gang allegation and in giving conflicting instructions on intent regarding felony evasion. We shall strike the 10-year term for the gang allegation (see *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1237-1239) and otherwise shall affirm the judgment.

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[1] The count was renumbered count 4 for the purpose of jury deliberation.

[2] A prior prison allegation was bifurcated, and the allegation was later dismissed. Unless otherwise noted, all further statutory references are to the Penal Code.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

John Lovejoy, an "absolutely loved" member of the Culver City Boys gang and Diablo clique, was shot to death about 1:30 a.m. on November 11, 2001. In Lovejoy's pocket was a personal phone book with a list of numbers, including one listed as "Sophan," appellant's first name, with a pager number. Within hours, at about 4 a.m. a member of Lovejoy's gang and clique shot and killed a Santa Monica 13 (*sic*) gang member within a block of the instant shooting. A third shooting occurred about 5 a.m., with Daniel Lal, not a gang member, as the now-paralyzed victim of Culver City Boys retaliation. Andrew Gonzalez, a known Venice 13 gang member, was shot at about 1:30 in the afternoon by the Culver City Gang. The Venice 13 gang is the most violent rival of the Culver City Boys, both of which are primarily Hispanic.[3]

Then, about 8:40 p.m. on the same day, the shooting involved in the case at bench occurred in the heart of Venice 13 territory, at 6th and Broadway. The victim was coming out of an alleyway. Two men drove by in a Honda owned by appellant and shot victim Carlos Gonzales, who died of multiple gunshot wounds.

Appellant was identified as the passenger by a neighbor, a nurse who lived near 6th and Broadway in Venice with her young grandchildren. The nurse heard four to six gunshots and told her grandchildren to fall on the floor "as usual;" they did so. The nurse then looked outside from the second story and saw a car on the wrong side of the street, with two people in the front seat. The passenger was sitting in the door window and after about five minutes lowered himself back into the car. He wiggled and struggled to get back into the car.[4]

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[3] Appellant is the only member of the Diablo clique of Asian descent; according to an officer familiar with the Culver City gang, no one else in the clique resembles appellant. Moreover, a person of a different ethnicity would have to "put in more work" in order to get respect of the gang.

[4] The nurse testified that although the night was dark, the lighting conditions were "very light" with white lights on the street. However, photographs of the crime scene and

The nurse testified that the passenger was wearing a very dark shirt; he had short shaven hair and, asked his ethnicity, testified he was "Asian, Hispanic" and not African-American.[5] He had something shiny in his hands and was pointing it on top of the hood of the car. Looking on the ground near the driver's side, she saw a familiar person hurt and unsuccessfully trying to get up but falling down 6 or 7 feet from the car; given the shots she had heard, she assumed he had been shot. The nurse took a towel from her home and told a man passing by to apply direct pressure to the bleeding.

The nurse was shown a six-pack at the police station the next day and identified appellant as the passenger in the car. She wrote "The haircut looks like No. 5. As I could see from the back, haircut appears very short cut."[6] She looked at the photograph and testified the haircut and coloring were significant, the shape of his head was the same, and it looked exactly like the person she saw that evening.[7] Recognizing his hair had since grown out, she identified appellant at trial. She also positively identified the car, a Honda, which she testified stayed at the scene for six or seven minutes in all and moved

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testimony by officers established that they are not white lights but are sodium vapor lights, with an orange glow.

[5] She thought she reported his ethnicity as Asian or Latino, but after reading her written statement testified she had not. She did not know what the other person in the front seat looked like or whether there were other people in the automobile. Appellant's booking photo, in which he appears to be a dark-skinned Hispanic, showed him wearing a dark shirt.

[6] A gang officer looking at the photograph could not tell who it was.

[7] On cross-examination, she testified that appellant was the only person in the six-pack with a shaved head. She could not testify that appellant was the same person she saw that night, only that "he appears to look like that person based on the haircut that was shaved and the shape of his head, which is unusual." She recognized, as did another neighbor and police, that shaved heads are "not uncommon" in that neighborhood.

toward her slowly, at an impound lot the next day[8] and testified the car was "identical" to the car she saw involved in the murder.

Another neighbor identified the car as looking "familiar" to the car involved in the shooting.[9] The second neighbor ran out after she heard gunshots, 15 feet from the car, and saw the victim, whom she knew, fall down; she called police. She also identified the black Honda and testified it was going towards California Street. She could not see the driver or the passenger and, contrary to the nurse, testified the car was present only a minute or two from the time she heard the gunshots. In addition, she did not see anybody sitting in the window of the passenger side struggling to get in.[10] The nurse called 911. The operator told her other calls had been received.

Tagging of "V13" and "Venice" were right across the street from the crime scene and were common in the area. A fence painted with "Venice 13" was on the west side of the street between Broadway Alley and Broadway Avenue.[11] One officer testified he had made over 250 arrests in his three years of patrolling the Oakwood area.[12]

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[8] The night of the shooting, she reported it was a Toyota or Honda-shaped car. She viewed several Hondas that night.

[9] Further, she testified she did not want to be in court and people in her neighborhood do not like to get involved when they see a drive-by. She came "maybe to stop the violence." An officer who patrols the area for gang activity agreed that people in the area are usually "not very" cooperative when there is a shooting. Police agreed with that assessment, the most common reason being that people are scared.

[10] However, when she got to the victim's location, the car had already made a stop at the stop sign.

[11] An officer testified the wall was tagged the night of Lovejoy's murder, indicated taking credit for the murder, and was like a "slap in the face" to a Culver Boy gang member. When Lovejoy was killed, the officer predicted a busy weekend because of the anticipated payback.

[12] Not one arrest was of a Culver City Boys gang member selling or buying drugs in that area or of a Culver City Boys gang member for any reason. The officer testified "They just don't come over there. They stay on their area . . . unless they're looking for trouble." Another officer assigned to a gang investigative unit in the area, who testified

Appellant's pager was left at the scene,[13] and he later returned to retrieve it about 4 p.m. the same day. On November 12 about 4 a.m., an officer patrolling the area observed a vehicle matching the description of a car reported at roll call as having been involved in the shooting earlier that night. The black Honda Accord was traveling at a very low speed, about five miles an hour, and the two male occupants were hunched down. The car, first seen about a block from 6th and Broadway Court, was heading towards the crime scene. The car did not stop at a stop sign, turned, and began to accelerate rapidly, failing to stop at Lincoln Boulevard. Soon thereafter, the officers following the vehicle turned on their overhead lights and audible siren; the Honda began to accelerate as if not intending to stop and abruptly made a left hand turn, colliding with a curb. The vehicle then had difficulty maneuvering, and items were thrown from the right passenger area.[14] Police continued the pursuit as the Honda swerved back and forth from eastbound and westbound lanes of travel. The car experienced mechanical failure, and the pursuing officers conducted a high-risk felony traffic stop.

Appellant, the driver, was searched; and narcotics were found in his sock.[15] He was wearing an empty pager holder that fit the pager found at the scene, which was

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the drugs found on appellant were in an amount possessed for sale rather than personal use, also had never arrested a Culver City Boy in the Venice/Oakwood area, territory claimed by another gang. The two gangs in the area are V13 and Venice Shoreline Crips. If a Culver City Boy sold drugs in the area, he would be killed or at least shot at.

[13] Officer Griffin responded to the area in less than a minute after receiving a radio call. The victim was in the alley with another man applying pressure to his wounds. The officer found multiple shell casings littering the ground and the pager about twenty feet south of where the victim lay, about five feet from the curb.

[14] Other officers found a blue steel semiautomatic pistol, which was stipulated not to be the type of gun used in the subject shooting; an identification with the last name of Valenciana (appellant's passenger); a set of black cloth gloves; and a white towel.

[15] Three bindles of various controlled substances were found in his left sock. There was a stipulation regarding testimony about the content of the bindles, methamphetamine and powder and rock cocaine. Appellant did not appear to be under the influence.

registered to appellant; there was no pager on appellant's person or in the car, but he had a cell phone. The pager number matched the number found on a list of numbers in victim Lovejoy's pocket; "Sophan" was written by the number. When an officer called that number, the pager recovered from the crime scene responded.[16] Appellant and his passenger both had shaved heads.

The cell phone appellant was carrying had been used to call the pager three times within about an hour and a half following the shooting.[17] The phone was registered to one Oscar Larios, whose family belongs to the Culver City gang. Appellant was wearing a black sweatshirt when booked. Appellant's passenger Valenciana was also arrested; his hair was longer than appellant's, and he was chubby while appellant is very lean.[18]

The trial court denied appellant's 1118 motion as to all counts. The defense presented no evidence.

Counsel and the court had a chambers conference and "essentially approved all of the instructions that the court" gave to the jury. The court gave counsel an opportunity to make a record of any instructions objected to or requested and rejected by the court. The prosecutor had added "assault with a deadly weapon" to instruction 17.42.2 regarding the 186.22, subdivision (b), gang enhancement relating to defining a pattern of criminal gang activity. Thus, it was intended for the instruction regarding predicate crimes to be narrowed to "what's applicable," murder, robbery, assault with a deadly weapon, and narcotics sales. The defense did not contest any instruction raised as error on appeal, instead observing that the prosecutor's changes were "fine."

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[16] It was stipulated that after 6 p.m. on November 11, none of the pages was returned by the cell phone.

[17] That is a method used to attempt to find one's pager.

[18] Furthermore, Valenciana was light while appellant's skin color was described as dark.

After the initial jury instructions were given, the court realized it needed to add a specific intent instruction relating to the gang enhancement. The prosecutor added that regarding the evading count, a lesser offense of misdemeanor evading (Veh. Code § 2800.1) should be given, which meant that a part of the instruction that had been deleted should be given. The court decided that misdemeanor possession must also be given. When the jury returned from lunch and before deliberations began, the court gave clarifications, including that the crime of misdemeanor evading should be added to the felony evading instruction.

The defense argued that the People did not prove identity of the shooter. Counsel discredited the testimony of the nurse and emphasized that incoming calls on the pager were not returned from 6 p.m. to 10 p.m. As to the evading count, the defense argued that appellant "was evading, not because he had just shot someone, based upon the evidence, because he had a bunch of drugs on him. He's a drug addict and he was driving the car, his car."[19] Counsel also questioned whether the driving was "willful and wanton." Moreover, he asked the jury to believe that the drugs were possessed for personal use, not for sale.[20]

During their deliberations, the jury asked for a readback of the testimony of certain witnesses regarding the pager. At the time of sentencing, the prosecutor noted that one of the female witnesses had been threatened. When appellant spoke to the court after the victim's aunt berated his actions, he stated he knew the victim for years, went to high school with him, spent jail time with him, and would never do anything to harm him.

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[19] The People accurately responded that there was no evidence appellant was a drug addict.

[20] He also argued that his client might have been in the area to buy drugs even if it was not Culver City Boys territory.

CONTENTIONS ON APPEAL

Appellant contends: 1. There was insufficient evidence to support the "primary activities" element of the gang allegation. 2. The trial court committed jurisdictional sentencing error in imposing a determinate term on the gang allegation. 3. There was insufficient evidence to support the allegation that a principal in the drug crimes was armed. 4. The trial court committed prejudicial error on count 3 (felony evasion) in giving conflicting instructions on intent.[21]

DISCUSSION

1. Substantial evidence supports the "primary activities" element of the gang allegation.

Appellant challenges the sufficiency of the evidence to support a finding the truth of the gang allegation, specifically the element regarding the "primary activities" of the group. The instructions given included the following definitions regarding felonies committed for the benefit of street gangs pursuant to section 186, subdivision (b)(1) (CALJIC No. 17.42.2):

"'Criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, (1) having as one of *its primary activities the commission of one or more of the following criminal acts, robbery, attempted murder and murder*, (2) having a common name or common identifying sign or symbol and (3) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. (Italics added . See Pen. Code, § 186.22, subd. (f); italics added.)

"'Pattern of criminal gang activity' means the commission of or conviction of two or more of the following crimes, namely*, murder, robbery, assault with a deadly weapon and narcotic sales*, provided at least one of those crimes occurred after September 26,

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[21] Respondent contends appellant waived this contention and that any error was harmless.

1988, and the last of those crimes occurred within three years after a prior offense, and the crimes were committed on separate occasions, or by two or more persons."[22]

Officer Gerald Gibson testified regarding the nature of the Culver City Boys gang. He was aware of Culver City Boys gang members committing the following crimes: "Everything. Murder, robbery, assault with deadly weapons, attempt murders, narcotics sales. They pretty much run the gamut, everything from vandalism to murder." When asked "Would you say these crimes are one of Culver City's primary activities?" he asked the prosecutor to repeat the question. He was then asked "Would you say these crimes are the primary activities of the Culver City Boys?" to which he replied "Yes, to continually engage in a pattern of criminal conduct."[23]

The officer detailed the several shootings following the killing of John Lovejoy and opined the shooting of Carlos Gonzalez was committed for the benefit of the Culver City gang as retaliation for the murder of John Lovejoy. Thus appellant, in Officer Gibson's opinion, had the specific intent to benefit Culver City Boys in retaliation for the murder of a very loved member of his gang.[24]

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[22] While the enumerated offenses are the same for both prongs, the statute does not require that the crimes used to prove the "primary activities" be the same as those used to demonstrate the gang's "pattern of criminal activity." Moreover, as our Supreme Court held in *People v. Gardeley* (1996) 14 Cal.4th 605, 625, footnote 12, "the 'two or more' statutorily enumerated offenses that establish the 'pattern of criminal gang activity' described in section 186.22, subdivision (e) need not be 'gang related.'"

In the case at bench, the People relied on evidence that specific gang members were convicted of possession of narcotics for sale and of assault with a deadly weapon. While those crimes could have been potential "primary activities" under the statute (§ 186.22, subds. (e)(1) & (e)(4)), the prosecutor did not object to the instruction, which listed only robbery, attempted murder, and murder. Nevertheless, as we explain, substantial evidence supports the allegation.

[23] Appellant argues that the officer's "yes" answer was equivocal and, if the prosecutor wanted a more specific answer, should have asked for it.

[24] In support of the gang allegation, Officer Gibson further testified as to a certified conviction of Michael Baiz, a Culver City Boys gang member then in prison for

"'In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. . . . ' (*People v. Kraft* (2000) 23 Cal.4th 978, 1053 [99 Cal.Rptr.2d 1, 5 P.3d 68], citations omitted; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Appeal, § 147, p. 394.)" (*People v. Sales* (2004) 116 Cal.App.4th 741, 746.)

Concerned with the issue of the trial court's failure to instruct properly on the gang statute, our Supreme Court in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324, explained the parameters of section 186.22: "[E]vidence of either past or present criminal acts listed in subdivision (e) of section 186.22 is admissible to establish the statutorily required primary activities of the alleged criminal street gang. Would such evidence alone be sufficient to prove the group's primary activities? Not necessarily. The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. (See Webster's Internat. Dict. (2d ed. 1942) p. 1963 [defining 'primary'].) That definition would necessarily exclude the occasional commission of those crimes by the group's members. As the Court of Appeal cautioned in *People v. Gamez* (1991) 235 Cal.App.3d 957, 970-971 [286 Cal.Rptr. 894], disapproved on another point in *Gardeley*, *supra*, 14 Cal.4th 605, 624, footnote 10: 'Though members of the Los Angeles Police Department may commit an enumerated offense while on duty, the commission of crime is not a *primary activity* of the department. Section 186.22

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possession of narcotics for sale and Jason Williams, a member of the same gang then on parole for an assault with a deadly weapon.

. . . requires that one of the primary activities of the group or association itself be the commission of [specified] crime [s] . . . . Similarly, environmental activists or any other group engaged in civil disobedience could not be considered a criminal street gang under the statutory definition unless one of the primary activities of the group was the commission of one of the [25] enumerated crimes found within the statute.'

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in *Gardeley*, *supra*, 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. (*Gardeley*, *supra*, at p. 620.)"

Officer Gibson's testimony provides substantial evidence of the primary activities of the Culver City Boys gang. He had been a police officer for seven years, a gang officer for three, and in his current assignment for two years and a couple of months. He was assigned to CLEAR, Community Law Enforcement and Recovery, where the Culver City Boys, Venice 13, and Venice Shoreline Crips were the three targeted gangs. For three years his work weeks were spent working on those three gangs and for the past 20 months, most of his work was with the Culver City Boys gang. He contacted them on a daily basis and, as stated above, was personally aware of crimes committed by that gang: "Everything. Murder, robbery, assault with deadly weapons attempt murders, narcotics sales. They pretty much run the gamut, everything from vandalism to murder."

Given his background and expertise and the context of the question, his affirmative answer to the next question, "Would you say these crimes are the primary

activities of the Culver City Boys," is sufficient to prove that prong of the 186.22 allegation, even if followed by "to continually engage in a pattern of criminal conduct."[25]

2. The trial court committed error in imposing a determinate term on the gang allegation.

Appellant contends that the trial court erred by imposing a determinate 10-year term for the gang enhancement under section 186.22, subdivision (b)(1), instead of imposing a 15-year minimum parole eligibility under section 186.22, subdivision (b)(5). The parties concede that the appellate courts have reached various results on this question, with Division 5 of this court supporting respondent's position (*People v. Herrera* (*Herrera II*) (2001) 88 Cal.App.4th 1353, 1364-1365, and other courts agreeing with appellant (see *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1237-1239; *People v. Harper* (2003) 109 Cal.App.4th 520, 527; *People v. Herrera* (*Herrera I*) (1999) 70 Cal.App.4th 1456, 1465, *People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486.)

Our Supreme Court, deciding the different issue that "section 186.22(b)(5) applies only where the felony by its own terms provides for a life sentence," not where a life sentence results because of a firearm enhancement, (*People v. Montes* (2003) 31 Cal.4th 350, 352), previously noted the split in authority but did not resolve it. (*Id.* at p. 361, fn.

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[25] *People v. Perez* (2004) 118 Cal.App.4th 151 [finding on a gang allegation stricken by appellate court for absence of proof], relied upon by appellant in a letter brief following submission of the case, is distinguishable. Division Two of this court in *Perez*, *id*. at page 160, held that even if defendant's gang "was responsible for the shootings of Asians on February 16 and 18, as well as the shooting of [the attempted murder victim in *Perez*], such evidence of the retaliatory shootings of a few individuals over of period of less than a week, together with a beating six years earlier, was insufficient to establish that 'the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute.' (*People v. Sengpadychith* [(2001)] 26 Cal.4th [316,] 324.)" (Italics in original.) By testifying that certain enumerated offenses were the "primary activities of the Culver City Boys" gang, Officer Gibson, qualified as an expert regarding the local gangs with whom he worked, supplied the evidence missing in *Perez*. Elaboration of his testimony may well have been preferable, but the necessary element of the criminal street gang allegation was established in the case at bench.

15.) The court has since granted review in two cases to resolve this conflict (*People v. Lopez* B161668, S119294) and *People v. Vo* (2003) 111 Cal.App.4th 321 (grant and hold S119234 on November 25, 2003.)

We agree with the analysis in *People v. Johnson*, *supra*, 109 Cal.App.4th 1230, 1237-1239, which Division Six of this court summarizes as follows: "Section 186.22, subdivision (b) establishes alternative methods for punishing offenders who have committed felonies for the benefit of a criminal street gang. For most felonies punishable by a determinate term, the sentence will be enhanced by a term of years under section 186.22, subdivision (b)(1). But when the defendant has been convicted of a felony that already carries a life sentence, there is no specific enhancement for a term of years. Instead, section 186.22, subdivision (b)(5) requires that the defendant serve a minimum of 15 calendar years before being considered for parole. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [109 Cal.Rptr.2d 851, 27 P.3d 739].) *The 15-year minimum parole eligibility period of section 186.22, subdivision (b)(5) applies to all life sentences without qualification, and is imposed in lieu of the determinate enhancement under subdivision (b)(1), not in addition to it*. [Citation.]" (Italics added.) Therefore, the additional ten years imposed by the trial court in the case at bench must be stricken.

3. There was sufficient evidence to support the allegation that a principal in the drug crimes was armed.

Allegations that a principal was armed with a firearm, a handgun, pursuant to Penal Code section 12022, subdivision (d), were charged as to counts 1 and 2, possession for sale of the drugs found in appellant's sock, i.e., that a principal was armed with a firearm "during the commission of the above offense and that [defendant], not personally armed, knew that a principal was personally armed with a firearm."[26] The jury was

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[26] During a break in closing argument, looking at verdict forms, the court asked if simple possession should also have a principal armed allegation. The prosecutor replied in the negative.

instructed to decide if a principal "in that crime was armed with a firearm *at the time of the commission of the crimes*."[27] (Italics added.)

The prosecution argued that the allegation was true in that Valenciana threw a gun (whether his or appellant's) out of the car when appellant was possessing narcotics for sale. The prosecutor described the jury's decision as finding whether Valenciana threw out the gun that was retrieved by the officers. The verdict forms for counts 1 and 2 stated the jury found true that "a principal was armed with a firearm during the commission of the above offense and that defendant, Sophan Pok, not personally armed, knew that a

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[27] The jury was instructed in terms of section 12022, subdivision (a), which is slightly different than the charged enhancement, subdivision (d), found true by the jury ["Notwithstanding the enhancement set forth in subdivision (a), any person who is not personally armed with a firearm who, knowing that another principal is personally armed with a firearm, is a principal in the commission of an offense or attempted offense specified in subdivision (c), shall be punished by an additional and consecutive term of imprisonment in the state prison for one, two, or three years."]

Penal Code sections 12022, subdivisions (a)(1) and (a)(2), provide:

"(a)(1) Except as provided in subdivisions (c) and (d), any person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless the arming is an element of that offense. This additional term shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.

"(2) Except as provided in subdivision (c), and notwithstanding subdivision (d), if the firearm is an assault weapon, as defined in Section 12276 or Section 12276.1, or a machinegun, as defined in Section 12200, the additional and consecutive term described in this subdivision shall be three years whether or not the arming is an element of the offense of which the person was convicted. The additional term provided in this paragraph shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with an assault weapon or machinegun whether or not the person is personally armed with an assault weapon or machinegun."

principal was personally armed with a firearm with[in] the meaning of Penal Code Section 12022(d) . . . ."

In *People v. Paul* (1998) 18 Cal.4th 698, 705, our Supreme Court held that a finding "a principal was armed in the commission of the charged substantive offense adequately establishes that another person who was jointly charged with the substantive offense and who also is found to have been a principal in the charged substantive offense is subject to the armed-principal enhancement specified under section 12022, subdivision (a)(1) . . . ." Moreover, because drug possession is a continuing offense, "a person may be armed in the commission of a continuing drug offense at any time during the offense, not only at the time of arrest or search." (*People v. Bland* (1995) 10 Cal.4th 991, 1006, conc. opn of Werdegar, J.[defendant was in police car when drugs and firearms were found in his bedroom].)

As appellant points out, there is no evidence Pok personally possessed the gun when he possessed baggies, in which case appellant concedes the principal armed enhancement would apply (*People v. Bland*, *supra*, 10 Cal.4th 991, 999; *People v. Bradford* (1995) 38 Cal.App.4th 1733, 1739 [defendant's loaded shotguns were found in his cabin in a compound dedicated to the cultivation of marijuana].) The charging allegation states that appellant was "not personally armed" for the purpose of the principal-armed enhancement. Rather, the evidence is that Valenciana possessed the gun and threw it from the vehicle. Appellant contends that, given the prosecution's theory of the Culver City Boys' mission in enemy gang territory, Valenciana's possession of the firearm cannot be imputed to Pok as possession "at the time of the commission of" the drug crimes.

In making its argument that appellant was returning to the scene of the crime in *order to retrieve his pager*, the prosecutor vehemently argued that members of the Culver City Boys gang would not be entering enemy territory to sell drugs. There was evidence that gangs respected territorial boundaries for that purpose, if only because they realized the extreme danger of trying to sell drugs in another gang's territory.

Even accepting that Pok was not in enemy gang territory, going to sell the drugs he possessed for sale in his socks, the drugs did not magically appear in his socks when he entered the area to retrieve his pager. A reasonable inference is that defendant possessed the drugs for sale before he entered that area and, similarly, that Valenciana was armed before they entered the area and the firearm was available for use in the possession for sale. We conclude that substantial evidence supports the section 12022 allegation.

4. If the trial court committed error in giving conflicting instructions on intent regarding count 3 (felony evasion), error if any was not prejudicial.

Appellant contends that the trial court's instructions regarding count 3, felony evading a pursuing peace officer, were conflicting, erroneous, and prejudicial. The court instructed the jury with CALJIC No. 3.30 [evading an officer in court 3 and the lesser crime of simple possession required only a *general* criminal intent] and with CALJIC No. 12.85 [felony evading required proof of the "specific intent to evade"].

In its oral instructions, having already given the general intent instructions, including CALJIC No. 3.30, which it said governed the evading charge, the court halted after beginning to give instructions on Vehicle Code section 2800.1, misdemeanor evasion; held a hearing without the reporter; and then told the jury that this crime has "been charged as a felony. I want to make sure that the language in this instruction is accurate."[28] The court then gave the correct instruction on section 2800.2, requiring specific intent to evade. The prosecutor's argument on felony evading informed the jury that specific intent to evade was required.

Respondent agrees that Vehicle Code section 2800.2 is a specific intent crime and thus it was error to instruct the jury regarding general intent as to count 3. However,

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[28] However, in giving the initial instructions on section 2800.2, the trial court is reported to have instructed: "A person is guilty of a violation of Vehicle Code section 2800.1, subdivision (a), (*sic*) a misdemeanor, if the person, while operating a motor vehicle and with the specific intent to evade . . . ."

respondent argues that appellant waived this contention by failing to object to the jury instructions as given or requesting clarifying instructions and by not objecting on the ground of denial of due process and that in any event any error was harmless.

As in *People v. Petznick* (2003) 114 Cal.App.4th 663, 679, footnote 2, "The Attorney General argues that the error urged here was waived by counsel's failure to object below. [Citation.] An appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant are affected. (§§ 1259, 1469.) Since the error affects the defendant's substantial rights we consider the merits."[29]

First, we consider the trial court's oral explanation of the intent instructions to clarify the apparent conflict between the nature of the intent required for felony evading. Second, even if the requirement of specific intent were not clear, "Given the strength of the facts against appellant, we conclude beyond a reasonable doubt the result in the trial below would not be different absent the conflicting instructions regarding whether or not appellant had to have a specific intent or general criminal intent to be found guilty of [felony evading.]" (*People v. Dollar* (1991) 228 Cal.App.3d 1335, 1344.)[30]

Appellant's argument that he may not have harbored specific intent because of his state of panic ignores the reality of the sequence of events. When first observed by the

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[29] Penal Code section 1259 provides in part that the "appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." The waiver argument is thus somewhat circular under Penal Code section 1259; for, if there was error, the substantial rights of the defendant were affected and no objection is necessary. (See also *People v. Easley* (1983) 34 Cal.3d 858, 875, fn. 2 [allowing review of appeal absent objection to instructions]; *People v. Barraza* (1979) 23 Cal.3d 675, 683-684.)

[30] Even removing an element of the offense from the jury's consideration is subject to *Chapman* v. *California* (1967) 386 U.S. 18, analysis for prejudicial error and is not error per se. (*People v. Flood* (1998)18 Cal.4th 470, 507.)

officers, appellant's vehicle was going "at a very low speed, . . . about five miles an hour" and the occupants were hunched down below the window. Following observation of several traffic violations, the officers ran a wants and warrants check and then turned on their overhead rotating red and blue lights and audible siren. The officers were in uniform in a marked vehicle. (Cf. *People v. Shakhvaladyan* (2004) 117 Cal.App.4th 232, 237-238 [no substantial evidence that a siren was sounded or that officer wore a uniform; conviction for evading reversed and the count ordered dismissed].)

The vehicle appellant was driving went three to four street blocks and "began to accelerate away from [the police] as if it was not intending to stop" and then made an abrupt left-hand turn, at which point it collided with the northeast curb. The vehicle sustained some front-end damage, front left damage to the wheel, and had "difficulty maneuvering as it swerved back and forth." During the pursuit, there were no attempts to slow down or comply with the lights and siren. After the collision, the passenger discarded several items and articles of clothing as the vehicle proceeded another long block, and then began to swerve back and forth from the eastbound and westbound lanes. The car stopped only because of mechanical failure. The evidence demonstrated a clear and unambiguous intent to evade. Thus, error if any was harmless under either *Chapman* v. *California* (1967) 386 U.S. 18 or *People* v. *Watson* (1956) 46 Cal.2d 818, 836.

DISPOSITION

The sentence is modified to delete the 10-year term that is based on the true finding under section 186.22, subdivision (b). As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

BOLAND, J.

FLIER, J.