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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.

DARA YIN,

Defendant and Appellant.

B171170

(Los Angeles County
Super. Ct. No. NA053759)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Arthur R. Jean, Jr., Judge. Affirmed as modified.

Edward H. Schulman, 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, Assistant Attorney General, William T. Harter, Carl N. Henry and Juliet H. Swoboda, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Dara Yin challenges his murder, attempted murder, and shooting at an occupied motor vehicle convictions on the grounds the trial court erred by denying his continuance request to attempt to raise money to retain counsel; insufficient evidence supports the jury's gang-related murder special circumstance and gang enhancement findings; gun use enhancements were improperly imposed upon him; the "drive-by" special circumstance violates the Eighth Amendment; the trial court erred by failing to instruct the jury, sua sponte, that appellant was required to personally premeditate and deliberate in order for the jury to find attempted murders were premeditated and deliberated and that appellant could be convicted of assault with a deadly weapon as a lesser offense included within attempted murder; Penal Code section 654,¹ the merger doctrine, and section 12022.53, subdivision (j) bar enhancement of his sentence of life without parole under section 12022.53; the trial court erroneously applied minimum parole eligibility dates under the gang enhancement statute; and the abstract of judgment erroneously includes fines the court did not impose.

We conclude the trial court did not abuse its discretion by denying appellant a continuance to attempt to raise money to retain counsel. Ample evidence supports the jury's findings on the gang enhancement allegations and the gang-related murder special circumstance. Section 12022.53 enhancements were correctly imposed upon appellant because the jury properly found gang enhancement allegations against him to be true. The "drive-by" special circumstance does not violate the Eighth Amendment, as a special circumstance need not differ from elements of the underlying offense. The trial court did not commit instructional error because an attempted murder may be found to have been premeditated and deliberated without personal premeditation or deliberation by the defendant, and assault with a deadly weapon was not a lesser offense included in the

¹ All further code references are to the Penal Code.

attempted murder charges. Section 12022.53, subdivision (j) bars enhancing appellant's sentence of life without parole under section 12022.53. Additionally, the judgment must be modified by eliminating references to minimum parole eligibility periods, which are inapplicable, and fines not imposed by the trial court.

BACKGROUND AND PROCEDURAL HISTORY

Appellant was the front-seat passenger in a car driven by Thaisan Nguon. The rear seat passengers were Thaisan's brother Thailee Nguon and Choeun Mean. All four belonged to the Crazy Brother Clan ("CBC") gang in Long Beach. They stared harshly at Vutha Tea and Sattia Nin in the parking lot of the Department of Motor Vehicles ("DMV") office in Long Beach. After Tea and Nin collected their friend Sina Mao, who had business at the DMV, they drove out of the parking lot. Thaisan pulled his car in behind Tea's car and followed it. He accelerated to draw beside Tea's car, and Thailee fired a gun at Tea's car. Tea was fatally wounded by a gunshot wound to the head. Mao was also shot in the head, but survived with brain damage and other permanent injuries. Nin was not wounded.

A jury convicted appellant of first degree murder with special circumstances, two counts of attempted murder, and shooting at an occupied motor vehicle. With respect to the murder charge, the jury found two special circumstance allegations true: (1) the murder was committed by means of firing a gun from a motor vehicle; and (2) appellant intentionally aided and abetted the murder while he was an active participant in a criminal street gang, and the murder was carried out to further the gang's activities. The jury also found true three gun-use allegations pertaining to the murder charge: a principal personally and intentionally fired a gun, causing death; a principal personally and intentionally fired a gun; and a principal used a gun. The jury found that both attempted murders were willful, deliberate, and premeditated. With respect to the attempted murder of Mao, the jury found a principal personally and intentionally fired a gun, causing great bodily injury; a principal personally and intentionally fired a gun; and a principal used a gun. With respect to the attempted murder of Nin, the jury found a

principal personally and intentionally fired a gun and a principal used a gun. The jury also found that all of the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang.

On the murder conviction, the trial court sentenced appellant to life in prison without the possibility of parole, plus 25 years for discharging a gun, causing death (§ 12022.53, subd. (d)). The court imposed consecutive terms of life plus 25 years on each of the attempted murders.

DISCUSSION

1. The trial court did not abuse its discretion by denying appellant a continuance to attempt to raise money to retain counsel.

Bar panel attorney Charles Patton was appointed to represent appellant throughout the pretrial and trial proceedings. He represented appellant at his March 25, 2003 preliminary hearing and thereafter. Trial was originally scheduled to commence on May 19, 2003, but was continued until August 11, 2003. On August 11, defense counsel requested a continuance, and appellant informed the court that his family was attempting to hire an attorney. He asked the court for a delay of three to six months “to gather some funds.” The court informed appellant that if he could retain counsel in a timely fashion, his motion would be granted, but if not, the trial would commence on September 3.

On September 3, 2003, the trial was trailed, and on September 4, a jury was empanelled. On September 5, the prosecution began presenting its case. At the end of the day, appellant asked to speak to the court outside the presence of the prosecutor. The court conducted a *Marsden*² hearing, at which appellant complained his attorney was not representing him to the best of his abilities. Appellant stated he wanted a new attorney. The court denied the motion. The next court day, September 8, 2003, appellant told the court he was convinced Patton was not adequately representing him, and his family had retained Rebecca Wilson. Appellant asked for “an extension” to substitute Wilson for

² *People v. Marsden* (1970) 2 Cal.3d 118.

Patton. The court informed appellant his request for substitution was untimely and noted that Wilson was not present in court. The court further noted that Patton was adequately representing appellant. The court added that if appellant had made his motion a month earlier, it would have been granted. Appellant stated, "I did ask you a month ago." The court did not remember such a request.

Appellant contends the court's August 11, 2003 refusal to grant him a continuance to retain counsel was unreasonable and violated due process.

The right to the effective assistance of counsel encompasses the right to retain counsel of one's own choice. (*People v. Courts* (1985) 37 Cal.3d 784, 790.) Trial courts must make all reasonable efforts to ensure that a defendant financially able to retain an attorney can be represented by his or her chosen attorney. Once retained, counsel must be given a reasonable time to prepare the defense. Generally, the granting of a continuance is within the discretion of the trial court. (*Ibid.*) However, trial courts should link continuances to an assertion of the right to retained counsel to the fullest extent consistent with effective judicial administration. (*Id.* at p. 791.) Nonetheless, the right of the accused and the prosecution to an expeditious disposition imposes a duty on the court to expedite criminal trials to the greatest degree consistent with the ends of justice. (§ 1050; *People v. Lucev* (1986) 188 Cal.App.3d 551, 557.) A continuance may be denied if the accused is unjustifiably dilatory in obtaining counsel or if he arbitrarily chooses to substitute counsel at the time of trial. (*People v. Courts, supra*, 37 Cal.3d at pp. 790-791.)

On August 11, 2003, appellant admittedly did not have the funds to retain an attorney. His request that day was not to substitute retained for appointed counsel, but for a continuance of several months to attempt to raise the money necessary to retain private counsel. It appears he neither had made any arrangement with an attorney to substitute into the case nor had any idea whom he would attempt to retain. His request was therefore quite different than a request to substitute retained counsel for appointed counsel coupled with a request for a continuance to allow new counsel to prepare for

trial. Appellant merely sought to delay his trial for exploratory purposes, with no showing of any probability that the exploration would be successful. Moreover, further delay would have been necessary if appellant's family were able to raise money to retain counsel and found an attorney willing to represent appellant, as that attorney would require an opportunity to prepare for trial. Thus, appellant's request on August 11 was effectively one for an open-ended continuance for a speculative purpose. The court did not abuse its discretion by denying the requested exploratory continuance.

2. Sufficient evidence supports the jury's findings on the gang enhancement allegations and the gang-related murder special circumstance.

Section 190.2, subdivision (a)(22) provides for a sentence of death or life in prison without possibility of parole where "[t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang."

Section 186.22, subdivision (b)(1) provides a sentence enhancement for anyone convicted of a felony "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." Subdivision (f) of section 186.22 defines "criminal street gang" as an "ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in ... subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Subdivision (e) lists numerous crimes, including homicide, attempted homicide, and shooting at an occupied vehicle.

Appellant contends the evidence was insufficient to support either the gang-related special circumstance or the jury's findings on the section 186.22, subdivision (b)(1)

enhancements. He argues the evidence did not show the shooting was gang-related or inspired, but instead was just an episode of individual, macho behavior, similar to road rage.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the jury's finding on the special circumstance and gang enhancement allegations, so that a reasonable jury could find it true beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Nin testified that he and Tea drove to the DMV to pick up Mao, who needed a ride from there. Nin noticed a light blue Camry right behind them. The driver and front-seat passenger in the Camry were "mad dogging" Nin, i.e., staring at him as if they had a problem with him. Nin responded by throwing his hands up with his palms facing upward. The Camry's driver appeared to say something as he looked at Nin. Tea and Nin parked and went into the DMV and waited for Mao to finish his business. They were in the building for 20 or 30 minutes. When they emerged from the building, Nin did not see the Camry. They all got into Tea's car and drove out of the parking lot. The blue Camry pulled out onto the street behind Tea's car. The same men were inside it. Nin saw the driver put on a black beanie and the front-seat passenger reach under the seat. Tea turned onto Pacific Coast Highway and the Camry followed. Tea ran a yellow light, but the Camry also ran the light and pulled alongside the passenger side of Tea's car. The driver looked at the people in Tea's car and lifted his head upward, as if to say, "what's up[?]" Nin saw a revolver in the hands of the passenger seated behind the driver of the Camry. Nin told his companions to duck and two shots were fired. Tea's car jerked and pulled over. Nin saw that Tea had been shot in the head. Mao also was slumped over onto the emergency brake. The Camry stopped and backed up. Nin saw the Camry's back doors open and the passengers' feet emerge. Nin jumped out of Tea's car and got behind it. The Camry drove away.

Nin described the driver and passengers of the Camry to the police. From multiple photographic arrays, he identified Thaisan as the driver, Thailee as the shooter, and

appellant as the front-seat passenger. At trial, Nin identified appellant as the front-seat passenger in the Camry. At a prior court proceeding, he identified the Camry's driver and the remaining two passengers in court. He knew the driver from school and knew he was a CBC member who was called "Lelo." Nin had also seen appellant previously at Mao's house. Appellant was a friend of Mao's younger brother.

Mao testified that he saw the light blue Camry slowly circling in the DMV parking lot. While parking spaces were available, the Camry did not park. Mao recognized all four of the people in the Camry: Thaisan was the driver, appellant was the front-seat passenger, and Thailee and Mean were in the back seat. They were looking at Tea and Nin. Mao told Tea and Nin to come inside the DMV and wait with him. They waited inside for 20 to 25 minutes. When they looked outside and it appeared the Camry had left, Mao and his friends thought it was safe to leave. However, as they drove down the street, the Camry pulled in behind them. The same four people were in it. The Camry kept changing lanes and followed Tea's car when he turned. Mao saw that Thailee had a gun. When the Camry pulled alongside Tea's car, Thailee fired the gun at Tea's car.

Mao also identified Thaisan and Thailee and appellant from photographic arrays and identified appellant in court as the front-seat passenger. He confirmed that his younger brother associated with appellant, and appellant had been to his family's home on several occasions.

Long Beach Police Detective Onorio Galvan testified as a prosecution expert on Asian gangs in Long Beach. He testified that Thaisan, Thailee and Mean had each admitted to him that they were members of CBC. Appellant admitted being a member of CBC to a different police officer when he was arrested in this case. Appellant also had CBC and Crazy Brother Clan tattoos on his body and had been contacted by the police numerous times while in the company of other known CBC members.

None of the three victims were known gang members, but a gang database entry made more than one year after the charged crimes reported that Mao may have been an associate of the Exotic Foreign Creation Cartel gang. Nin denied he was or ever had

been a gang member. Some of his friends associated with gangs or tagging crews. However, neither Tea nor Mao was a gang member.

Galvan testified that respect was “the main thing” to gang members. If someone showed disrespect to a gang member, the member would have to take revenge or he would lose respect within his gang. Also, if someone showed disrespect to the gang itself, the gang would have to avenge itself or it would lose respect. Given hypotheticals based upon Nin’s testimony regarding the events in the DMV parking lot, Galvan testified that it would be “a problem” if four CBC members stared harshly at someone in a car and the person responded by throwing up his hands as if to say “What’s up?” If the gang members perceived that gesture as a sign of disrespect, they would have to do something about it or lose respect individually and for their gang. Similarly, simply returning the harsh stare of the gang members would be viewed as disrespect. If the gang members followed the offending person and shot him, the gang members would gain respect and enhance the intimidating image of their gang.

Defense expert Dr. Lewis Yablonsky testified that in his opinion, the shooting was not committed for the benefit of the CBC gang, but was instead a “kind of a macho interaction between two groups of individuals.” Conduct that benefited a gang usually occurred in more definitive gang circumstances with a certain level of planning and knowledge of the other individuals and the neighborhood they came from. He thought the crimes in this case were a spontaneous explosion where the individuals came at each other as individuals, not gangs. He did not see that anyone would benefit from the kind of “really stupid, senseless behavior” exhibited in this case. He analogized the charged crimes to road rage.

Viewing this evidence in the light most favorable to the jury’s findings, substantial evidence supports the gang enhancement and gang-related special circumstance findings. It was undisputed that all four men in the Camry belonged to the CBC gang. Their presence together in the car and their behavior as a group strongly support an inference that the subsequent shooting was committed to further the activities of the gang, for the

benefit of, at the direction of, or in association with the gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. From their first moment of contact with the Tea and Nin, appellant and his companions indicated that they wanted a group confrontation with them. Appellant and Thaisan, at least, “mad dogged” the victims. Thaisan slowly drove in circles around the DMV parking lot before the victims went inside the building. Appellant’s entire group then waited for 20 to 30 minutes while the victims were inside the DMV office. Appellant’s group also apparently purposely concealed themselves to induce the victims to leave the office. Appellant’s group then doggedly followed the victims, even running a light to avoid losing them. Immediately prior to the shooting, Thaisan put on his cap, appellant reached under his seat, Thaisan gestured with his head at the victims, and Thaillee aimed the gun at them. Clearly, the pursuit and attack were a group effort in which appellant, Thaisan and Thaillee cooperated. After the shooting, Thaisan backed his car toward Tea’s stopped car, and Thaillee and Mean began to get out of Thaisan’s car, perhaps to continue the attack.

Although one or more members of appellant’s group may have had personal reasons for wanting to attack the victims, the record does not indicate the existence of those reasons. The only motive for the attack supported by the record was revenge for the perceived disrespect caused by Nin’s reaction to the group’s mad dogging at the DMV. Thaisan’s head gesture immediately prior to the shooting supports the revenge motive, as it could be interpreted as a signal that Thaisan’s group was about to triumph over Tea, Mao and Nin. Given the triviality of any slight inherent in Nin’s original gesture, Galvan’s expert testimony regarding the importance of respect in gang culture, the absence of any apparent unifying factor other than gang membership among the members of appellant’s group, and the absence of any other apparent motive for the attack, the jury could reasonably infer that appellant’s group attacked the victims to preserve or earn respect for their gang and for themselves as members of their gang. Galvan’s expert testimony provided a plausible explanation for why and how such

coordinated conduct by gang members would benefit the gang and their own gang standing.

Appellant's reliance upon the defense expert's conflicting interpretation of the motivations for the attack essentially asks this court to reweigh the evidence. The determination whether the attack was gang-motivated was a question for the jury. The jury apparently accepted Galvan's interpretation. The evidence of the assailants' common gang membership, and their coordinated conduct in the group effort of confronting, stalking and attacking the victims amply supports the jury's findings on the gang enhancements and the gang-related special circumstance.

3. Section 12022.53, subdivisions (a) through (d) enhancements were properly imposed upon appellant.

Section 12022.53, subdivisions (a) through (d) establish enhancements for the personal use of a gun in the commission of a crime under specified circumstances. Section 12022.53, subdivision (e)(1) extends those enhancements to an accomplice who did not personally use a gun if the accomplice is found to have violated section 186.22, subdivision (b).

Relying upon the same sufficiency of evidence arguments discussed in the preceding section, appellant contends section 12022.53 enhancements were improperly imposed upon him because there was no finding he personally used a gun. For the reasons discussed in the preceding section, appellant's argument has no merit. The jury properly found he violated section 186.22, subdivision (b)(1), and section 12022.53, subdivisions (b) through (e). The trial court therefore properly imposed the section 12022.53 gun-use enhancements upon appellant.

4. The "drive-by" special circumstance does not violate the Eighth Amendment.

Appellant contends the "drive-by" special circumstance violates the Eighth Amendment because it fails to meaningfully distinguish between persons deserving "special circumstance punishment" from those who do not because its elements are

identical to those establishing liability for first degree “drive-by murder.”

The special circumstance at issue applies where “the murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death.” (§ 190.2, subd. (a)(21).) Section 189 provides that a murder perpetrated “by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death” constitutes first degree murder.

The elements of “drive-by murder” and the “drive-by” special circumstance are identical. However, first degree murder liability and special circumstance findings may be based upon common elements without offending the Eighth Amendment. (*People v. Catlin* (2001) 26 Cal.4th 81, 158; *People v. Marshall* (1990) 50 Cal.3d 907, 945-946.)

Moreover, appellant was not sentenced to death. The Eighth Amendment requirement that states employ clear and objective standards to meaningfully distinguish between the few cases in which death is imposed and the many cases in which it is not imposed has never been extended to apply to defendants not sentenced to death. (*Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906.)

5. An attempted murder may be found to have been premeditated and deliberated without personal premeditation or deliberation by the defendant.

Appellant contends the trial court erred by failing to instruct the jury, sua sponte, that in order to find the attempted murders to be premeditated and deliberated, it must find that appellant personally acted with premeditation and deliberation. However, an aider and abettor need not personally premeditate and deliberate an attempted murder in order for the crime to be found to have been committed with premeditation and deliberation under section 664, subdivision (a). (*People v. Lee* (2003) 31 Cal.4th 613, 616.) Accordingly, it would have been error for the court to instruct as appellant now argues it should have.

6. Assault with a deadly weapon was not a lesser included offense of

attempted murder.

Appellant contends that the trial court was required to instruct, sua sponte, on assault with a deadly weapon as a lesser included offense of attempted murder because the gun-use enhancement allegations made use of a deadly weapon part of the attempted murder charge.

A trial court must instruct sua sponte on a lesser included offense where there is evidence that, if believed by the trier of fact, would absolve the defendant of the greater offense, but not of the lesser. (*People v. Memro* (1995) 11 Cal.4th 786, 871.)

An offense is necessarily included in another if either the statutory elements of the greater offense or the facts alleged in the accusatory pleading include all of the elements of the lesser offense, so that the greater offense cannot be committed without also committing the lesser. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988.) Enhancements, however, may not be considered in determining whether one offense is necessarily included in another. (*People v. Wolcott* (1983) 34 Cal.3d 92, 101.)

Appellant concedes that assault with a deadly weapon is not a lesser offense included within attempted murder under the statutory elements test. His contention that it is included under the pleading test necessarily relies upon incorporation of the firearm enhancement allegations into the pleading of the offense. This incorporation is expressly prohibited by *People v. Wolcott, supra*, 34 Cal.3d at p. 101, which we are required to follow, despite appellant's criticism of that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

7. Section 12022.53, subdivision (j) bars enhancing appellant's sentence of life without parole under section 12022.53.

Appellant challenges the section 12022.53 enhancement on the murder count on several grounds. We consider his contention that section 12022.53, subdivision (j) precludes application of the enhancement because the life without parole sentence imposed for the offense is a greater penalty and longer term of imprisonment. Respondent argues subdivision (j) applies only to other firearm-use or discharge

enhancements. We recently upheld a contention identical to appellant's in *People v. Shabazz* (2004) 118 Cal.App.4th 1458. For the reasons set forth in that case, we conclude the 25-year-to-life enhancement imposed on count 1 under authority of section 12022.53 must be stricken.

Section 12022.53, subdivision (j) provides, in pertinent part, that "When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment."

In construing a statute, we attempt to determine the intent of the Legislature. (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) In determining that intent, we first examine the words of the statute. (*Ibid.*) The words used in a statute are construed in accordance with their usual or ordinary meaning. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) However, where the statutory language is unambiguous, we have no occasion to resort to principles of statutory construction. (*People v. Coronado, supra*, 12 Cal.4th at p. 151.)

The language of the pertinent sentence in section 12022.53, subdivision (j) is unambiguous and is not susceptible of respondent's interpretation. The sentence does not provide for imposition of a section 12022.53 enhancement unless another firearm-use or discharge enhancement provides for a greater penalty or a longer term of imprisonment. It instead precludes imposition of a section 12022.53 enhancement where "a greater penalty or a longer term of imprisonment" is provided by "another provision of law," without qualification of the type or source of the greater penalty, longer term, or other provision of law. To interpret subdivision (j) as respondent urges would require rewriting it to add qualifying language. This we may not do. (*Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 381.)

In *People v. Chiu* (2003) 113 Cal.App.4th 1260, the court construed subdivision (j) in accordance with the interpretation urged by respondent. It held that "[w]hen one of

those three enhancements for firearm use or discharge has been properly charged and found true, the court shall impose the applicable punishment under subdivision (b), (c), or (d), unless another provision of law provides for a greater penalty or a longer term of imprisonment *for that firearm use or discharge*, in line with that subject. The ‘greater penalty’ part of subdivision (j) ensures that the ‘[n]otwithstanding any other provision of law’ language in subdivisions (b) through (d) does not inadvertently supersede a law that would impose an even *greater* punishment on a defendant for employing a firearm in committing one of the enumerated crimes.” (*Id.* at p. 1264 [italics in original].) The court thereby effectively modified the pertinent sentence from subdivision (j) to read “[w]hen an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment for that firearm use or discharge.” We do not think that such an amendment can be fairly, or logically, imposed on subdivision (j).

If the Legislature intended to limit the application of the second sentence of subdivision (j) to enhancements, it could have done so easily by referring to enhancements. Subdivision (f) of section 12022.53 specifically addresses a number of enhancements, and sets forth their relationship to enhancements under section 12022.53.³ Thus, when the Legislature intended to refer to enhancements in section 12022.53, it did so expressly. However, the reference in the second sentence of subdivision (j) is to

³ Subdivision (f) provides: “Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).”

“another provision of law,” not to enhancements. The Legislature’s choice of the broader language in subdivision (j) indicates it did not intend to limit the scope of the second sentence in subdivision (j) to greater penalties or longer terms provided only by other enhancement provisions.

In light of the foregoing, we need not consider appellant’s alternative arguments that the enhancement on count 1 is barred by section 654 or merger.

8. The judgment must be modified to eliminate all references to sentencing pursuant to section 186.22, subdivision (b)(5).

When pronouncing sentence, the trial court stated that minimum parole eligibility dates of 15 years would apply to counts 2 and 3 as a result of the gang enhancements.

Appellant contends, and respondent concedes, that minimum parole eligibility periods were inapplicable to appellant. Although a minimum parole eligibility date normally flows from imposition of a section 186.22, subdivision (b) enhancement (§ 186.22, subd. (b)(5)), section 12022.53, subdivision. (e)(2) precludes imposition of the section 186.22 enhancement in this case. Section 12022.53, subdivision (e)(2) provides that no gang enhancement may be imposed in addition to a section 12022.53 enhancement unless the person personally used or fired a gun in the commission of the crimes. Appellant’s sentence on counts 2 and 3 was enhanced under section 12022.53, subdivision (e) and it was neither alleged nor found that he personally used or fired a gun in the commission of the crimes. Accordingly, neither a gang enhancement nor the accompanying minimum parole eligibility period could properly be imposed upon appellant for counts 2 and 3.

Although the abstract of judgment does not refer to a section 186.22 enhancement or a minimum parole eligibility period regarding either count 2 or 3, the clerk’s minute order states that with respect to counts 2 and 3 appellant was “sentenced pursuant to section 186.22 (b)(5) of the Penal Code.” In an abundance of caution, we modify the judgment to vacate these references to sentencing pursuant to section 186.22, subdivision (b)(5).

9. Restitution and parole revocation fines were not imposed by the court and must be stricken from the judgment.

The abstract of judgment and clerk's minute order reflect imposition of restitution and parole revocation fines of \$200 each. Appellant contends, and respondent concedes, that the trial court did not actually impose such fines. Accordingly, the fines should be stricken from the judgment and the abstract of judgment amended.

DISPOSITION

The judgment is hereby modified by (1) striking the 25-year-to-life enhancement imposed on count 1 under authority of section 12022.53, (2) striking all references to sentencing under section 186.22, subdivision (b)(5) in regard to counts 2 and 3, and (3) striking all references to a restitution fine and parole revocation fine. The trial court is ordered to issue an amended abstract of judgment embodying these modifications. In all other respects, the judgment is affirmed.

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BOLAND, J.

We concur:

COOPER, P. J.

RUBIN, J.