

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ELISEO GERMAN and
PEDRO HERNANDEZ,

Defendants and Appellants.

B182673

(Los Angeles County
Super. Ct. No. BA265029)

APPEAL from judgments of the Superior Court for Los Angeles County, Rand S. Rubin, Judge. Affirmed as Modified.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Pedro Hernandez.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant Eliseo German.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Joseph P. Lee and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Pedro Hernandez and Eliseo German, along with co-defendant Danny Banchon,¹ were convicted of assault with force likely to result in great bodily injury, a violation of Penal Code section 245, subdivision (a)(1).² The jury found that all defendants committed the assault for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1), and found that German and Banchon personally inflicted great bodily injury on the victim within the meaning of section 12022.7, subdivision (a). Hernandez was sentenced to a prison term of six years, and German was sentenced to a prison term of 26 years. Hernandez and German appeal. We affirm.

BACKGROUND

During the early morning hours of May 12, 2004, Lawrence Brodbar, who worked in the Los Angeles Times warehouse on Westmoreland Avenue near Cosmopolitan Street in Los Angeles, saw a homeless man, Charles Burst, run into the warehouse yelling, “Call the police.” Two men ran in after Burst and started hitting him with sticks. A third man also came into the warehouse, bleeding and yelling that Burst tried to rob him and had stabbed him. Brodbar went back into his office and called 911. When he came out of his office he saw the first two men dragging Burst out of the warehouse. Brodbar could not identify any of the men involved in the incident.

¹ Banchon is not a party to this appeal. Counsel for German informed us at oral argument that Banchon filed a late appeal, and asked us to consider Banchon’s arguments to the extent they are applicable to German. Because we do not have Banchon’s appeal before us, we are unable to do so. Therefore we decline German’s request.

² Further undesignated statutory references are to the Penal Code.

Sergeant Eddie Solomon was the first police officer to arrive at the scene in response to the 911 call. As he drove north on Westmoreland, he saw a male Hispanic, whom he identified as German, walking south on Westmoreland. When Solomon asked him what was happening, German changed direction and started walking north, where he met up with another man, whom Solomon identified as Hernandez, wearing a bloody T-shirt. Solomon continued to follow Hernandez. He tried to determine whether Hernandez was a victim or a suspect, and whether he needed assistance. When Hernandez continued to walk away, Solomon got out of his patrol car and grabbed Hernandez's T-shirt. Hernandez lowered his head to slip out of the T-shirt, and walked away. Solomon eventually was able to detain Hernandez with the assistance of a security guard. Solomon then called for an ambulance to take Hernandez to the hospital, where he stayed for eight days.

In the meantime, Officer Carlos Diaz and his partner responded to the scene and saw Burst, bleeding from his head, sitting on the sidewalk on Cosmopolitan near Westmoreland, near a makeshift tent. Diaz asked Burst what happened to him. Burst told him that he was asleep in his tent when three male Hispanic "gangsters" started tearing down his tent and hitting him with broken bottles and wooden sticks. He told the officer that he grabbed a knife that he keeps in his tent, stabbed one of the men, and ran across the street to the warehouse to plead for help. He said that the men chased after him, continued to hit him, and then dragged him outside into the street. Diaz looked around the area where Burst was sitting and saw two wooden sticks on the ground, one of which had nails or screws sticking out of it. Diaz secured the sticks and accompanied Burst in an ambulance to the hospital. Blood was found on the nails or screws. D.N.A. testing showed that the blood matched Burst's blood.

Officer Marco Oropeza and his partner also responded to the scene. When they arrived they saw two male Hispanics running in their direction. When the

officers got out of their patrol car and identified themselves, the men started to run away. The officers chased after them and Oropeza saw them run into the Los Angeles Times warehouse. The officers secured the building and called for backup to help search the building. Eventually, Oropeza found the two men, identified as German and Banchon, hiding in the rafters. When German and Banchon came down from the rafters, German was not wearing a shirt, and Banchon was not wearing shoes or socks. Oropeza then climbed into the rafters and recovered a shirt, a pair of shoes, and a pair of socks, all of which had blood stains on them.

Officer Iris Santin also responded to the scene and interviewed Abel and Victor Godinez, who worked in the warehouse. Abel told Santin that he saw two people, who appeared to be nervous and looking for a rear exit, enter the warehouse. He field identified German and Banchon as the two people he saw. Victor told Santin that he saw two male Hispanics run into the warehouse. He said they appeared to be nervous and sweating, and were looking for a place to hide.

Officer Fernando Prieto interviewed Burst in the hospital on the day of the incident. Burst told Prieto that he was attacked by three male Hispanics. He said he was asleep in his tent when he was awakened by someone entering his tent. One of the men yelled at him and hit him in the head with a bottle, and then all three men started hitting him with sticks and other objects. He told Prieto that, fearing for his safety, he grabbed a knife and stabbed one of the men. He was able to break away and ran to the warehouse, where he was beaten again and then dragged outside. Prieto asked Burst whether he knew the men. Burst said he knew they were Rockwood gang members from seeing them in the area and knowing that the area was Rockwood territory. But Burst told Prieto that he would not identify anyone in court and wanted to “drop the whole thing.” Prieto observed that Burst appeared to have puncture wounds on his hands and arms, among other injuries.

Hernandez, German, and Banchon were charged by information with attempted premeditated murder in violation of section 664/187, subdivision (a), and assault by means likely to produce great bodily injury in violation of section 245, subdivision (a)(1). As to both counts, it was alleged that all three defendants personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a), and that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(A)). In addition, the information alleged that Hernandez and German had prior felony convictions and prison terms.

At trial, Burst gave a description of the events that was different than the description he gave to Officers Diaz and Prieto. He testified at trial that he was asleep in his tent in the early morning hours of May 12 when he heard loud noises that sounded like someone was trying to knock over his tent. He came out of his tent with his knife and saw two men. One of the men, whom Burst identified as Banchon,³ made a sudden move and Burst stabbed the other man, who was larger and closer to Burst. Banchon then hit Burst once in the head and Burst lost his coordination. The two men “took off” and Burst walked over to the Los Angeles Times warehouse because he was bleeding and thought he needed help. He asked the man who was working at the warehouse to call the police. While Burst was in the warehouse, Banchon returned with another man (not the man Burst stabbed) and did “plastic surgery” on Burst, kicking and hitting him, possibly with sticks or other objects. The third man also came into the warehouse, but he did not participate in the beating; Burst stated that that man never touched him. At some

³ Burst said that he “presumed” the man was Banchon because Banchon was the smallest of the three defendants.

point, Banchon and the other man partially dragged him out of the warehouse and ran away when the police arrived.

Burst testified that he did not remember having any conversation with a police officer at the scene, or with Prieto at the hospital. When questioned about specific statements that Diaz and Prieto reported Burst made to them, Burst said that he either did not make them or did not remember making them and probably did not make them. He specifically denied telling any officer or detective that he knew the area was Rockwood gang territory, and said that he never knew there were any gangs in the neighborhood. But Burst also testified that sometime between the incident and the trial, a male Hispanic who drove a black S.U.V. approached and asked him about the incident, and Burst believed he was a Rockwood gang member. Burst contended at trial, however, that no one ever threatened him about his testimony.

Abel and Victor Godinez also testified at trial and denied making some or all of the statements Officer Santin reported they made. In fact, Victor denied seeing anything or speaking to any police officer at the time of the incident. Although both men testified that no one threatened them about their testimony, they admitted they were aware of some graffiti that was written on the side of the warehouse shortly before the trial started. The graffiti said, “watch your back in court, all of you.” Abel admitted that he felt threatened by the graffiti, but Victor said he was not afraid to testify.

The jury acquitted all three defendants of attempted murder and of attempted voluntary manslaughter as a lesser included offense. It found all three guilty of the assault count, and found the gang allegation to be true. It also found that German and Banchon personally inflicted great bodily injury on Burst, but found that allegation not to be true as to Hernandez. The trial court found the section 667.5,

subdivision (b) allegation as to Hernandez not to be true, and German admitted the prior conviction and prior prison term allegations.

The court sentenced Hernandez to the midterm of three years on the assault count and the midterm of three years on the section 186.22, subdivision (b)(1)(A) gang enhancement, for a total of six years. The court sentenced German to a total of 26 years, computed as follows: the upper term of four years, doubled under the Three Strikes law (§§ 1170.12, subs. (a)-(d); 667, subs. (b)-(i)), plus three years for the great bodily injury enhancement (§ 12022.7, subd. (a)), 10 years for the section 186.22, subdivision (b)(1)(C) gang enhancement, and five years for his prior serious felony conviction (§ 667, subd. (a)(1)). Both defendants filed timely notices of appeal from the judgment.

DISCUSSION

On appeal, Hernandez challenges the sufficiency of the evidence to support his assault conviction and the gang enhancement, and challenges two evidentiary rulings. German also challenges the sufficiency of the evidence to support the gang enhancement and the two evidentiary rulings, and also contends that the great bodily injury enhancement must be stayed under section 654 and/or because there was improper dual use of facts.

A. *Sufficiency of the Evidence*

When a conviction or factual finding is challenged on sufficiency of the evidence grounds, we apply the substantial evidence standard of review: “we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] “[I]f the

verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder.” [Citation.]” (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

Hernandez contends there was no substantial evidence of his participation in the assault on Burst, either as a direct perpetrator or as an aider or abettor, nor was there evidence that he had the specific intent to promote, further, or assist in the criminal conduct of gang members apart from the offense for which he was convicted. German contends there was no substantial evidence that the assault was committed for the benefit of a criminal street gang, or that he had the necessary specific intent required under section 186.22. None of defendants' contentions prevails.

1. *Hernandez's assault conviction*

Hernandez contends there was *no* evidence that he participated in the assault on Burst, either as a direct perpetrator or as an aider or abettor. Despite this contention, he concedes that Officers Diaz and Prieto testified that Burst told them that he had been attacked by *three* male Hispanic gangsters, one of whom he stabbed. He argues, however, that the officers' testimony and the prosecution's theory that Burst changed his story out of fear “makes no sense” because Burst testified that German and Banchon beat him while he was defenseless. According to Hernandez, Burst would not have given this testimony had he been in fear of gang retaliation.

In essence, Hernandez challenges Diaz's and Prieto's credibility. But as a reviewing court we have no power to judge the credibility of witnesses or resolve conflicts in the evidence. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) Clearly, the jury believed the officers' testimony that Burst told them that all three men participated in the initial attack at Burst's tent and that all three men hit him

with sticks and other objects. Moreover, this version of the incident (rather than Burst's version at trial, in which he said that he was hit only once in the initial attack, by Banchon, with a broken bottle) was supported by other evidence. That evidence includes the two sticks Diaz found at the location of the initial attack (as opposed to inside or just outside the warehouse), evidence that one of those sticks had nails or screws sticking out from it with blood stains that matched Burst's D.N.A. profile, and Prieto's testimony that he observed what appeared to be puncture wounds on Burst's hands and arms.

The fact that Hernandez was stabbed, and presumably incapacitated, immediately after the initial assault began does not diminish his criminal liability for assault with force likely to produce great bodily injury. Even if he was unable to complete the crime, Diaz's and Prieto's testimony constitutes substantial evidence that Hernandez joined with German and Banchon initially to attack Burst. Thus there is sufficient evidence to support his conviction for assault as an aider and abettor. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039 ["The doctrine . . . that one may be liable when he or she aids the perpetrator of an offense, knowing of the perpetrator's unlawful purpose and intending, by his or her act of aid, to commit, encourage, or facilitate commission of the offense, 'snares all who intentionally contribute to the accomplishment of a crime in the net of criminal liability defined by the crime, even though the actor does not personally engage in all of the elements of the crime'"].)

2. *Gang enhancement*

Hernandez contends there was no evidence that he had the specific intent to promote, further, or assist in the criminal conduct of gang members apart from the offense for which he was convicted. German joins in Hernandez's argument, and

also contends there was no substantial evidence that the assault was committed for the benefit of a criminal street gang. Neither contention is correct.

To support the allegation under section 186.22, subdivision (b)(1) that the assault “was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members,” the prosecution presented expert witness testimony by Officer Romeo Tamparong. Tamparong had been assigned to the Rampart Division gang unit for one and a half years at the time of trial, and had worked in patrol in the Rampart Division for four years prior to that assignment. He was familiar with the Rockwood Street Locos gang, and identified all three defendants as admitted members of that gang. He also identified photographs of Hernandez and German and noted that each of them had Rockwood gang tattoos. He described the history of the Rockwood gang, the kinds of crimes the gang commits, and how the gang holds on to its territories by committing violent crimes and instilling fear in the community.

The prosecutor presented Tamparong with a “hypothetical,” asking him to assume that: a homeless person is asleep in his tent in Rockwood gang territory when three gang members start tearing up the tent; the homeless man gets hit in the head by one of the gang members and stabs one of them; the homeless man runs across the street to a building, yelling for help; two of the gang members chase after him and continue to beat him, while the third gang member, who was stabbed, follows them and yells that “this guy just stabbed me, this guy just robbed me”; the gang members then drag the homeless man out of the building and continue to beat him until the police arrive; the stabbed gang member runs from a police officer who is trying to help him, while the other two gang members run into the building, remove their bloody clothing, and hide. The prosecutor asked Tamparong whether, in his opinion, the attack as described was committed for the benefit of a

criminal street gang. Tamparong responded that it was. He explained that an unprovoked attack on a homeless person sleeping in the gang's stronghold shows other transients and the community that the gang can commit crimes at any time, and creates an atmosphere of fear and intimidation.

German contends on appeal that Tamparong's expert opinion testimony was insufficient evidence to support the jury's finding that the assault on Burst was committed for the benefit of a criminal street gang because there were no facts to support Tamparong's opinion. Not so. The prosecutor's "hypothetical" was based upon evidence presented at trial and thus provided an appropriate basis for expert opinion testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Based upon his training and experience, Tamparong explained how a crime such as the one described would benefit a gang: it created an atmosphere of intimidation, which Tamparong explained was critical to the gang's hold on its territory. From this expert testimony, the jury reasonably could conclude that the assault in this case was committed for the benefit of a criminal street gang. (*Id.* at p. 619.)

Relying upon a Ninth Circuit case, *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, German and Hernandez also contend there was insufficient evidence to support the jury's finding that they had the "specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) They argue that, under the majority opinion in *Garcia*, the prosecution was required to show that they had the specific intent to promote, further, or assist in gang-related criminal conduct *other than the crime for which the defendant is on trial*. (*Garcia v. Carey, supra*, 395 F.3d at p. 1103.)

As we recently explained in *People v. Romero* (June 1, 2006, B185902) ___ Cal.App.4th ___, the *Garcia* court's interpretation of section 186.22, subdivision (b)(1) is contrary the statute's plain language, and we decline to follow it. (See *People v. Burnett* (2003) 110 Cal.App.4th 868, 882; *Oxborrow v. Eikenberry* (9th

Cir. 1989) 877 F.2d 1395, 1399.) The statute requires that the prosecution prove that the defendant had the specific intent to promote, further, or assist in *any* criminal conduct by gang members, which may include the conduct at issue at trial.

In the instant case, the prosecution presented evidence that Hernandez and German, who were admitted gang members, joined with Banchon, also an admitted gang member, to commit an unprovoked attack on Burst. From this evidence, it can reasonably be inferred that Hernandez and German intended to assist criminal conduct by gang members. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

B. *Evidentiary Rulings*

Hernandez and German contend the trial court improperly granted the prosecution's motion to exclude testimony by Vicki Edwards, a witness Hernandez sought to call, and improperly admitted evidence of graffiti that appeared on the wall of the Los Angeles Times warehouse shortly before the trial began. We find no abuse of discretion as to either ruling.

1. Exclusion of Vicki Edwards' testimony

Defendants' theory at trial was that Burst was the aggressor in this incident, that Hernandez did not participate in any way in the assault on Burst, and that German and Banchon acted in self defense. Banchon and Hernandez testified at trial that the incident at issue started when they were attacked by Burst without any provocation, and Banchon and German fought with Burst to try to disarm him after he stabbed Hernandez.

Banchon testified that he and Hernandez were on the sidewalk near Burst's tent, arguing with raised voices, when Burst appeared "out of nowhere" and stabbed Hernandez for no apparent reason. He said that Burst then started

swinging the knife at him, so he picked up a stick and used it to try to dislodge the knife from Burst's hand. When he was unsuccessful, German came over and started hitting Burst until Burst fell and dropped the knife. German then dragged Burst to move him away from the knife. Hernandez's testimony was consistent with Banchon's. He also testified that he never hit Burst, and never had any intention to hit Burst.

After Hernandez testified, his attorney informed the court and prosecutor that he wanted to call a homeless person he had just located, Vicki Edwards, to testify regarding Burst's character. The attorney explained that he expected her to testify that Burst was very aggressive toward people who came near his tent and had pulled a knife on someone else who had come near it. He also expected her to testify that she had no problems with Rockwood gang members, and that gang members had given her food, money, and cigarettes. The prosecutor objected, in part on the ground of late discovery.

Edwards testified outside the presence of the jury at an Evidence Code 402 hearing. During the course of Edwards' testimony, it became clear that much of what she purportedly knew about Burst's conduct was based upon hearsay. The only incidents regarding Burst that she actually observed involved a few incidents when Burst used racial epithets and told her or her friends to "get the hell out of here" when they walked near his tent while talking. When Hernandez's attorney sought to question Edwards regarding her experiences with Rockwood gang members, the prosecutor objected on relevance grounds. Hernandez's attorney explained that the testimony was relevant to show that the homeless people are not intimidated by the Rockwood gang. The court sustained the objection.

In ruling on the prosecution's motion to exclude Edwards' testimony, the court noted that Edwards had only a couple of encounters with Burst, and the only conduct she observed was that Burst would "say stuff." The court also noted that,

to the extent Hernandez intended to call Edwards to testify regarding witness intimidation, the prosecution was not given notice and therefore had no notice to find homeless people in the area who *are* intimidated by Rockwood gang members.⁴ The court expressed concern that if Edwards testified, it would have to continue the trial for at least a week to allow the prosecution to locate rebuttal witnesses. The court also found that Edwards' proposed testimony was only slightly relevant, had little probative value, and would be confusing and tend to distract the jury from what actually happened on the day in question. Therefore, the court granted the prosecution's motion to exclude Edwards' testimony.

On appeal, Hernandez contends the testimony regarding Burst's conduct was relevant and critical to Hernandez's defense because it supported Banchon's and Hernandez's testimony that Burst attacked them without provocation. German argues that, for the same reason, the testimony regarding Burst's conduct was relevant to show that the assault was not gang related because it was not instigated by defendants. Therefore, they argue that the court abused its discretion in excluding that testimony. We disagree.

The trial court has broad discretion to exclude evidence it determines has little probative value and would require an undue consumption of time or create a danger of confusing the issues or misleading the jury. (Evid. Code, § 352; *People v. Ayala* (2000) 24 Cal.4th 243, 282.) On appeal, we must defer to the trial court's determination unless it appears the court "exercised its discretion "in an arbitrary, capricious or patently absurd manner."'" (*People v. Frye* (1998) 18 Cal.4th 894,

⁴ The prosecutor stated that if Edwards testified, she would have to bring in as witnesses homeless people, or officers who interviewed homeless people in the area, to testify that they are intimidated by Rockwood gang members. She estimated she would need about a week to find and interview those witnesses.

948.) Edwards testified that she had only a couple of encounters with Burst, and that he was verbally aggressive. She had no direct knowledge that Burst ever physically attacked anyone without provocation. Therefore, her testimony was, at best, only marginally relevant to support Hernandez's testimony that Burst attacked him without provocation. The trial court reasonably could find that the risk that the presentation of the testimony would unduly consume time or would confuse the jury outweighed this very slight relevance.

With regard to Edwards' testimony that she was not intimidated by Rockwood gang members, Hernandez argues on appeal that the testimony was relevant to show that the assault was not gang related. He offers no explanation as to how the fact that a homeless person is not generally intimidated by gang members tends to show that a violent attack by three gang members on another homeless person is not gang related. Indeed, whether or not Edwards is intimidated by Rockwood gang members is irrelevant to the issue of whether the assault in this case was gang related. Therefore, the testimony was properly excluded.

2. *Admission of graffiti evidence*

Over defense objections, the prosecution introduced evidence of some graffiti -- "watch your back in court, all of you" -- that appeared on the side of the Los Angeles Times warehouse shortly before trial began. Although there was no evidence that any of the defendants was responsible for the graffiti, the gang expert, Officer Tamparong, testified that in his opinion, the Rockwood gang wrote the graffiti because it was in Rockwood territory. He also testified that he believed the graffiti related to this case based upon its location and content. The court found that evidence regarding the graffiti was relevant to explain why a witness's

trial testimony is different than the story he initially told the police and also is relevant to the gang allegation.

In his argument on appeal, which German joins, Hernandez concedes that the graffiti was relevant both to explain witnesses' changed stories and to support the gang allegation, but he argues that admission of the evidence in this case was erroneous because there was no evidence that the graffiti was attributable to any of the defendants.⁵ His argument fails.

To the extent the evidence was admitted to explain the changed stories by some of the witnesses, the prosecution did not have to connect the graffiti to defendants. As the Supreme Court has explained, when evidence of a threat made to a witness is offered to explain why the witness's testimony has changed, "[i]t is not necessarily the source of the threat -- but its existence -- that is relevant to the witness's credibility." (*People v. Burgener* (2003) 29 Cal.4th 833, 870.)

To the extent the evidence was admitted to support the gang allegation, there was expert witness testimony that linked the graffiti to the Rockwood gang. Thus, even in the absence of evidence that *defendants* were responsible for the graffiti, the graffiti evidence, along with Tamparong's testimony, tended to show that the crime itself was related to the Rockwood gang. Therefore, the court did not err in admitting the graffiti evidence.

⁵ Hernandez also contends the trial court improperly admitted the evidence because it was not revealed to defendants until after the trial began. But the record shows that the prosecutor informed defense counsel about the graffiti as soon as she learned of it and turned over photographs of it and her investigating officer's notes as soon as she received them.

C. Great Bodily Injury Enhancement

The jury found that German personally inflicted great bodily injury upon Burst. Based on this finding, the trial court imposed a three year sentence enhancement under section 12022.7, subdivision (a). That same jury finding also made German's conviction for assault a violent felony under section 667.5, subdivision (c)(8). And because his conviction was for a violent felony, which the jury found was committed for the benefit of a criminal street gang, the court also imposed a 10-year sentence enhancement under section 186.22, subdivision (b)(1)(C), rather than a two, three, or four-year enhancement under section 186.22, subdivision (b)(1)(A).

German contends the imposition of the sentence enhancements under both section 186.22, subdivision (b)(1)(C), and section 12022.7, subdivision (a) was improper under section 654, which provides that an act or omission may not be punished under more than one provision of law. He argues that because the great bodily injury finding was based upon a single act and a single victim, that finding cannot be used to impose more than one sentence enhancement. The People do not dispute German's contention that the great bodily injury finding was used to impose both enhancements, and that the finding was based upon a single act and a single victim. Instead, the People contend that section 654 does not apply to enhancements, and therefore the imposition of both enhancements was proper.

As both parties acknowledge, there is a split of authority as to whether section 654 applies to statutory sentence enhancements. This issue currently is pending before the California Supreme Court in *People v. Sloan*, review granted June 8, 2005, S132605, and *People v. Izaguirre*, review granted June 8, 2005, S132980. Without adding to the debate, we align ourselves with those courts that have held that section 654 applies sentence enhancements. (See *People v. Reeves* (2001) 91 Cal.App.4th 14, 55-56, and cases therein cited.) Therefore, we order the

three-year enhancement under section 12022.7, subdivision (a) stayed pursuant to section 654.

DISPOSITION

The three-year enhancement imposed against defendant German under section 12022.7, subdivision (a), is stayed pursuant to section 654. The trial court is ordered to prepare an amended abstract of judgment reflecting this modification. As so modified, the judgment against defendant German is affirmed. The judgment against defendant Hernandez is affirmed in full.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

HASTINGS, J.*

*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.