Filed 10/25/06 P. v. Jones CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL LAQUINN JONES,

Defendant and Appellant.

F047448

(Super. Ct. No. 2671154-3, 1912707-7 & 658557-4)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez, Judge.

Candace Hale, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Brian Alvarez and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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In a nonjury trial the court found appellant guilty of shooting at an inhabited dwelling (Pen. Code, § 246; count 3), unlawful possession of a firearm (Pen. Code, § 12021, subd. (c)(1)); count 4) and street terrorism (Pen. Code, § 186.22, subd. (a);

count 5).[1] The court denied appellant's motion for a new trial, and sentenced him as follows: 7 years on the section 246, plus 15 years to life on a special allegation and finding that the crime was committed in association with a criminal street gang (§ 186.22, subd. (b)(4)(B)),[2] plus 20 years on a special allegation and finding that appellant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), plus 10 years (imposed and stayed) on a special allegation and finding that appellant personally used a firearm (§ 12022.5, subd. (a)); 3 years on the section 12021 subdivision (c)(1), plus 3 years on a special allegation and finding the crime was committed in association with a criminal street gang (§ 186.22, subd. (b)(1)), all to be served concurrently with the sentence on the section 246; and 3 years on the section 186.22, subdivision (a), stayed pursuant to section 654. This amounted to a total determinate term of 27 years plus an indeterminate term of 15 years to life.

APPELLANT'S CONTENTIONS

On this appeal Jones contends: (1) he was denied effective assistance of counsel because his trial counsel "failed to investigate and present crucial exculpatory evidence in a timely way"; (2) the court erred in imposing the 7 years on the section 246 count 3 conviction because the section 186.22, subdivision (b)(4)(B) term of 15 years to life he also received on that count is an alternative sentencing provision and not an enhancement; (3) the court erred in imposing the 20-year section 12022.53, subdivision (c) enhancement because this enhancement was inapplicable to appellant's section 246

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 At appellant's sentencing hearing the court described the 15 years to life it imposed on the section 186.22, subdivision (b)(4)(B) allegation as an "enhancement." The abstract of judgment also describes the 15 years to life imposed under section 186.22, subdivision (b)(4) as an "enhancement." As we explain in part II of this opinion, the 15 years to life should have been imposed not as an enhancement but as the penalty for the count 3 section 246 conviction itself, instead of the seven year term the court imposed on that count.

conviction; and (4) if imposition of the 20-year section 12022.53 enhancement was not error, then appellant's 10-year section 12022.5, subdivision (a) enhancement (which was imposed but stayed) for personal use of a firearm must be stricken.

Respondent concedes that appellant's second and fourth contentions are correct, but asserts that appellant has made no showing that he was denied effective assistance of counsel. Respondent further contends that the 20-year section 12022.53, subdivision (c) enhancement was lawful and was properly imposed. As we shall explain, we reject appellant's contention that the record on this appeal shows he was denied the effective assistance of counsel. We also reject his contentions that he should not have received the 20-year section 12022.53, subdivision (c) firearm enhancement. We will direct the superior court to strike the seven-year portion of appellant's section 246 (count 3) sentence and will remand the matter to the superior court for resentencing.

FACTS

After members of one gang (the East Lane Six Deuce Diamond Crips, or simply "East Lane") exchanged words with a member of another gang (the Hoover Crips) outside of an apartment complex, one of the East Lane gang members fired several shots. No one was struck by any of the bullets, but one of the bullets passed through the living room window and into the inner wall of one of the apartments. Fragments of wall fell onto the hair of a 14-year-old girl who was sitting on a couch in the living room of that apartment. Appellant Daniel Jones, whose gang moniker was "D-Loc," was tried without a jury and convicted of assault with a semiautomatic firearm (§ 245, subd. (b)), discharging a firearm at an inhabited dwelling house (§ 246) and other crimes. Witnesses Demont Wilson and Elizabeth Brown both identified appellant as the shooter. Demont Wilson testified that appellant had been only four or five feet away from him just prior to the shooting.

Appellant moved for a new trial on the ground of newly discovered evidence. The evidence was statements from two witnesses: Samuel "Trigger" Miles, one of the East

Lane gang members who was present at the incident, and Lamont Wilson, the Hoover Crip.[3] Both men had refused to cooperate with the police investigation prior to the trial. Both men said appellant was not the shooter, but would not say who the shooter was. Miles said he knew who the shooter was. Lamont Wilson claimed he did not know the shooter's name but had "seen him, uh, last weekend as a matter of fact" and said that if he saw the shooter again he could identify the shooter. Miles was charged along with appellant. He entered a plea to charges of assault with a firearm and street gang terrorism, and received a two year sentence. Miles denied that he was the shooter.

The court granted appellant's motion for a new trial. Appellant had a second nonjury trial before the same judge who had presided at the first trial. At appellant's second trail Demont Wilson again identified appellant as the shooter. Elizabeth Brown recanted her identification of appellant as the shooter, but Officer Danny Kim testified that on the night of the shooting Brown identified appellant as the shooter. Appellant did not call Miles as a witness at the second trial, apparently believing that Miles's testimony would hurt more than it would help. The prosecution was apparently of the same view and called Miles as a prosecution witness at the second trial. Miles testified that someone known as "Elijah" was with him at the apartments and had a gun. Miles denied that he saw Elijah fire the gun, but said that "[i]t could have been" Elijah who fired the gun. The prosecution presented evidence that prior to the second trial Miles had identified Elijah Cruz as the shooter. The prosecution also presented undisputed evidence that Elijah Cruz had been in custody at the time of the shooting, and that Cruz was now deceased. Lamont Wilson did testify. He and a defense investigator were the only defense witnesses called at the second trial. Lamont Wilson denied that East Lane gang member "Baby James" Batten had been present at the incident, even though Batten (like Miles)

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[3] Lamont Wilson was Demont Wilson's younger brother.

had already been convicted of assault with a firearm and street gang terrorism for his role in the incident. Lamont Wilson said the shooter was someone he knew as "MacDre" and that MacDre looked nothing like appellant. Lamont Wilson testified that he had not cooperated at all with the police.

The judge at appellant's second trial found appellant guilty of shooting at an inhabited dwelling (§ 246; count 3), unlawful possession of a firearm (§ 2021, subd. (c)(1); count 4) and street terrorism (§ 186.22, subd. (a); count 5.) On count 3, the court also found true special allegations that appellant personally used a firearm (§ 12022.5, subd. (a)(1)), that appellant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and that appellant committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)(B)). The court also found true a special allegation that the count 4 crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The court acquitted appellant of assault with a semiautomatic firearm (§ 245, subd. (b); count 1) and of assault with a firearm (§ 245, subd. (a)(2)); count 2), apparently due to doubt about who or what appellant was shooting at. (Counts 1 and 2 alleged assaults upon Lamont Wilson's brother Demont Wilson, who was also present.)

Appellant then once again moved for a new trial on the ground of newly discovered evidence. This time appellant presented declarations of three persons (and the transcript of a statement taken from one of them) who stated that key prosecution witness Demont Wilson had been inside one of the apartments at the time the shooting had occurred outside. Notably absent from the three declarations and the statement was any information whatsoever as to why these three individuals had not given this information to either the prosecution or the defense at any earlier time. The court denied this second motion for a new trial.

I.

APPELLANT HAS DEMONSTRATED NO DENIAL OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Appellant's second motion for a new trial (after the second trial) presented declarations of three persons (Charles Clay, James Batten and Lynn Chapman), all of whom asserted that Demont Wilson was inside the apartment at the time of the shooting. His motion argued that because Demont Wilson was inside the apartment, Demont could not have seen who was shooting, and thus Demont's identification of appellant as the shooter could be discredited with testimony from Clay, Batten and Chapman. Appellant asserts that the "failure" of his trial counsel to present this evidence at his second trial denied appellant of his right to the effective assistance of counsel. As we shall explain, he has shown no such denial of that right.

A. The Right to Effective Assistance of Counsel

The Sixth Amendment to the U.S. Constitution states in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense." The Fourteenth Amendment states in pertinent part that "[n]o State shall … deprive any person of life, liberty, or property, without due process of law …." The court in *Gideon v. Wainwright* (1963) 372 U.S. 335 held that the Sixth Amendment's right to counsel is one of the "fundamental rights" made obligatory upon the states by the Fourteenth Amendment's guarantee of due process. (*Gideon v. Wainwright*, *supra*, 372 U.S. at p. 342.) The law pertaining to a defendant's claim of a denial of effective assistance of counsel is well established:

> "'Every person accused of a criminal offense is entitled to constitutionally adequate legal assistance.' (*People v. Pope* (1979) 23 Cal.3d 412, 424 [152 Cal.Rptr.732, 590 P.2d 859, 2 A.L.R.4th 1] (*Pope*); see also *People v. Ledesma* (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 729 P.2d 839] (*Ledesma*).) To establish a claim of inadequate assistance, a defendant must show counsel's representation was 'deficient' in that it 'fell below an objective standard of reasonableness.… [¶] … under prevailing

professional norms.' ([*Strickland v. Washington* (1984) 466 U.S. 668], 688 [104 S.Ct. at pp. 2063-2065]; *In re Jones* (1996) 13 Cal.4th 552, 561 [54 Cal.Rptr.2d 52, 917 P.2d 1175].) In addition, a defendant is required to show he or she was prejudiced by counsel's deficient representation. (*Strickland*, *supra*, 466 U.S. at p. 688 [104 S.Ct. at pp. 2064-2065]; *Ledesma*, *supra*, 43 Cal.3d at p. 217.) In determining prejudice, we inquire whether there is a reasonable probability that, but for counsel's deficiencies, the result would have been more favorable to the defendant. (*Strickland*, *supra*, 466 U.S. at p. 687 [104 S.Ct. at p. 2064]; *In re Sixto* (1989) 48 Cal.3d 1247, 1257 [259 Cal.Rptr. 491, 774 P.2d 164].)

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' (*Strickland*, *supra*, 466 U.S. at p. 689 [104 S.Ct. at p. 2065]; *In re Jones*, *supra*, 13 Cal.4th at p. 561), and we accord great deference to counsel's tactical decisions. (*In re Fields* (1990) 51 Cal.3d 1063, 1069-1070 [275 Cal.Rptr. 384, 800 P.2d 862] (*Fields*).) Were it otherwise, appellate courts would be required to engage in the '"perilous process"' of second-guessing counsel's trial strategy. (*Pope*, *supra*, 23 Cal.3d at p. 426.) Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' (*People v. Fosselman* (1983) 33 Cal.3d 572, 581 [189 Cal.Rptr. 855, 659 P.2d 1144] (*Fosselman*); see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264 [62 Cal.Rptr.2d 437, 933 P.2d 1134]; *People v. Avena* (1966) 13 Cal.4th 394, 418 [53 Cal.Rptr.2d 301, 916 P.2d 1000] (*Avena*).)" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980; in accord, see also *People v. Anderson* (2001) 25 Cal.4th 543, 569.)

B. No Denial of The Right Appears in The Record on Appeal

Appellant argues that the record on appeal affirmatively discloses that counsel had no rational tactical purpose for not presenting testimony from these witnesses. (*People v. Fosselman*, *supra*, 33 Cal.3d at p. 581; *People v. Frye*, *supra*, 18 Cal.4th at pp. 979-980.) We disagree. The record on appeal does not affirmatively disclose that this "exculpatory evidence" ever existed prior to trial – i.e., that any of these witnesses were willing to testify at trial to the things they have now said in their post-trial declarations. None of the three declarants even attempts to explain why he or she did not come forward and

offer the information to either the prosecution or the defense at some point prior to appellant's second trial (or prior to the first trial, for that matter). None denies knowing, prior to trial, that appellant was criminally charged. None denies knowing that appellant was tried twice. None attempts to explain how the defense suddenly obtained their statements after appellant was found guilty at his second trial. None denies having been asked by police or by investigators, prior to trial, if they knew anything about the shooting. The record on appeal is equally as consistent with one view – that the three declarants made up their post-trial statements after appellant was convicted in order to help him obtain yet another new trial – as it is with the explanation that appellant asks us to glean from the appellate record – i.e., that appellant's trial counsel failed to investigate and failed to discover exculpatory information that was available for the asking.

Appellant seizes upon a written statement made by appellant's trial counsel in which he told the court that "[t]he three witness … were unknown to me at the time of either the first trial or the second trial of this matter." Appellant contends that Gray and Batten were expressly mentioned in a police report provided to the defense, and that Gray and Batten's post-trial declarations thus affirmatively show a failure of trial counsel to properly investigate prior to trial. But after the district attorney's opposition to the motion pointed out that Gray and Batten were mentioned in the original police "incident report" provided to the defense in discovery, and that Batten was one of three defendants charged as a result of the shooting (along with appellant and Samuel "Trigger" Miles) and had pleaded guilty to charges stemming from the incident, trial counsel explained his statement at the hearing on appellant's motion for a new trial. Appellant's trial counsel told the court "the information that we are getting is somewhat different as far as information that we previously had from the witnesses" and "I did not quarrel with the fact that the witnesses were in the reports and known, but the statements that we got from these witnesses are different from the statements that have been made previously." Trial

counsel also told the court "[k]nowing who the witnesses are and knowing what they're going to say are two different subjects as far as I am concerned."

No one appears to contend that Chapman was mentioned in any police reports. Appellant does not explain how the record on appeal demonstrates that trial counsel should have been aware of Chapman's existence, or of her supposed willingness to testify that she was in the apartment with Demont Wilson when the shot or shots were fired. Certainly her own declaration provides no such explanation. Possibly this is one reason why appellant raises no contention on this appeal that the court erred in denying his motion for a new trial. (See *People v. Delgado* (1993) 5 Cal.4th 312, 328.) A witness at appellant's second trial, DeOcean Williams, was asked who was in her apartment (#102) at the time of or shortly after the shooting. She mentioned nine persons. These were herself, her sisters Jamie and Lakesha, her two small children, Jessica Flores, Demetria Wilson, Lamont Wilson and (after shots were fired) Demont Wilson. When Demont Wilson testified about who was there he mentioned seven of these nine persons (all but the sisters Jamie and Lakesha). No witness at trial mentioned the name Lynn Chapman. Nothing in the record on this appeal demonstrates that appellant's trial counsel fell below an objective standard of reasonableness in not presenting her as a witness. Nor is it even clear, from this record, that trial counsel would have called Chapman as a witness at trial even if he had known prior to trial of the assertions she now makes in her declaration. She would have had to undergo cross-examination, and would have had to convince the trier of fact that she was really at the scene even though other witnesses, who the court found credible, did not place her at the scene. "[I]n the absence of an explanation in the record, appellate courts should not speculate that trial counsel's failure to present a particular defense resulted from incompetence. To justify relief, appellant must be able to point to something in the record showing that counsel had no satisfactory rationale for what was done or not done." (*People v. Pope*, *supra*, 23 Cal.3d at p. 426, fn. 16.) Appellant has made no such showing on this appeal.

II.

THE SENTENCE FOR THE SECTION 246 CONVICTION

Under section 246 the crime of willfully discharging a firearm at an inhabited dwelling house "shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year." The court imposed a seven-year term for this crime.

Under section 186.22, subdivision (b)(4), however, a section 246 violation "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, shall upon conviction … be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: (A) … (B) Imprisonment in the state prison for 15 years …." The court also imposed a 15-years-to-life sentence under section 186.22, subdivision (b)(4).[4]

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[4] Subdivision (b) of section 186.22 figures prominently in this appeal. (See also part III of this opinion below.) It states: "(b)(1) Except as provided in paragraphs (4) and (5), any person who is 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion. [¶] (B) If the felony is a serous felony, s defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years. [¶] (2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1). [¶] (3) the court shall order the imposition of the middle term of the sentence

Appellant contends, and respondent correctly concedes, that appellant should not have received the seven-year term because section 186.22, subdivision (b)(4) is not an enhancement but rather is an alternate penalty provision applicable under the circumstances it describes. "[S]ection 186.22, subdivision (b)(4) … is an alternate penalty provision because it … 'sets forth an *alternate* penalty for the underlying felony itself, when the [trier of fact] has determined that the defendant has satisfied the conditions specified in the statute.' [Citation.]" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6; see also *People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7: "Section 186.22(b)(1), because it adds an additional term of imprisonment to the base term of the underlying felony offense, is a sentence enhancement. … Section 186.22, subdivision (b)(4) is an alternate penalty provision that provides for an indeterminate life sentence for certain underlying felony offenses that are gang related. [Citation.]")

Thus, the court should not have imposed the 7-year term called for by section 246.

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enhancement, unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its choice of sentencing enhancements on the record at the time of the sentencing. [¶] (4) Any person who is convicted of a felony enumerated in this paragraph 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, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph. [¶] (B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55. [¶] (C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1. [¶] (5) Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served."

The appropriately penalty was the 15-years-to life called for by the alternate penalty provision found in section 186.22, subdivision (b)(4).

III.

THE SECTION 12022.53 ENHANCEMENT WAS PROPERLY IMPOSED

Section 12022.53 provides for sentence enhancements for persons who, in the commission of certain specified crimes, personally use a firearm (§ 12022.53, subd. (b)), personally and intentionally discharge a firearm (§ 12022.53, subd. (c)), or personally and intentionally discharge a firearm and proximately cause great bodily injury or death to any person other than an accomplice (§ 12022.53, subd. (d).)[5] The enhancements are an additional and consecutive term of 10 years (§ 12022.53, subd. (b)), 20 years (§ 12022.53, subd. (c)) and 25 years to life (§ 12022.53, subd. (d)), respectively. Appellant received a subdivision (c) enhancement of 20 years for personally and intentionally discharging a firearm in the commission of his section 246 offense of maliciously and willfully discharging a firearm at an inhabited dwelling house.

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[5] Section 12022.53 states in pertinent part: "(a) This section applies to the following felonies: … (17) Any felony punishable by death or imprisonment in the state prison for life.… (b) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply. [¶] (c) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years. [¶] (d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

A. The Parties' Contentions

Appellant contends that the court erred in imposing the section 12022.53, subdivision (c) enhancement. His argument is as follows. Subdivision (c) states:

> "Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony intentionally and personally discharged a firearm, shall be punished by a term of imprisonment of 20 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony."

There are 18 felonies or categories of felonies "specified in subdivision (a)." (§ 12022.53, subd. (c).) They are numbered (a)(1) through (a)(18). The felonies specified in subdivision (a) at (a)(1) through (a)(16) are listed by statute number. None of these 16 subdivisions lists section 246. Subdivision (a)(18) makes the section applicable to "[a]ny attempt to commit a crime listed in this subdivision other than an assault." (§ 12022.53, subd. (a)(18).) Appellant was not convicted of an attempt to commit any crime, and thus subdivision (a)(18) does not qualify appellant for a section 12022.53 enhancement. This leaves subdivision (a)(17). Subdivision (a)(17) makes section 12022.53 applicable to "[a]ny felony punishable by death or by imprisonment in the state prison for life." (§ 1202.53, subd. (a)(17).) Appellant argues that section 246, by its own express terms, provides that a violation of section 246 "shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year." (§ 246.) A violation of section 246 is therefore not, according to appellant, a "felony punishable by death or imprisonment in the state prison for life." (§ 12022.53, subd. (a)(17).)

Respondent counters that appellant's section 246 violation is a "felony punishable by … imprisonment in the state prison for life" (§ 12022.53, subd. (a)(17)) and that appellant will in fact receive a term of 15 years to life on his conviction of that felony. (See part II of this opinion, *supra*.) Respondent argues that appellant's section 246

violation is a "felony punishable by … imprisonment in the state prison for life" (§ 12022.5, subd. (a)(17)) because under section 186.22, subdivision (b)(4) a "felony violation of Section 246" (§ 186.22, subd. (b)(4)(B)) is punishable by "an indeterminate term of life imprisonment" with a specified minimum term (here, 15 years) when the crime is "committed for the benefit of, at the direction of, and or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(4).) The section 186.22, subdivision (b) circumstances making appellant's section 246 violation punishable by imprisonment in the state prison for life were pleaded and proven here. Respondent disagrees with appellant's contention that every section 246 violation must subject the violator to a possible life sentence in order for a section 246 violation to be a "felony punishable by … imprisonment in the state prison for life." (§ 12022.53, subd. (a)(17).)

B. <u>Construction of a Criminal Statute</u>

> """In construing the relevant provisions of … any statute, we strive to ascertain and effectuate the Legislature's intent." [Citations.]' 'We begin by examining the words of the [statute]; if the statutory language is not ambiguous, then we presume the Legislature meant what it said, and the plain meaning of the language governs. [Citations.] If, however, the statutory language lacks clarity, we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such situations, we strive to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statute['s] general purposes. [citation.] We will avoid any interpretation that would lead to absurd consequences. [Citation.]' (*People v. Walker* (2002) 29 Cal.4th 577, 581.)" (*People v. Montes*, *supra*, 31 Cal.4th at p. 356.)

C. <u>Appellant's Section 246 Violation Is a "Felony Punishable By … Imprisonment In The State Prison For Life" Within The Meaning Of Section 12022.53, Subdivision (a)(17)</u>

In *People v. Florez* (2005) 132 Cal.App.4th 314, just as in the case presently before us, the defendant was convicted of discharging a firearm at an inhabited dwelling

in violation of section 246 and was also found to have committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)). He thus received a life sentence with a minimum indeterminate term. (*Ibid.*) In *Flores* the sentencing court limited the defendant's presentence conduct credits to 15 percent of the actual number of days he spent in presentence custody. The defendant challenged that limitation on appeal. The 15 percent limitation appears in section 2933.1. Subdivision (a) of section 2933.1 states that the limitation applies to "any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5." (§ 2933.1, subd. (a).) One of the felony offenses listed in subdivision (c) of section 667.5 is "[a]ny felony punishable by death or imprisonment in the state prison for life." (§ 667.5, subd. (c)(7).) *Florez* held that the 15 percent limitation was applicable. "Because the underlying felony conviction (discharging a firearm at an inhabited dwelling in violation of section 246) 'is itself punishable by life imprisonment' [citation], it is a felony offense within the meaning of paragraph (7) of section 667.5(c)." (*People v. Florez*, *supra*, 132 Cal.App.4th at p. 320.) *Florez* asserts that the provisions of section 186.22, subdivision (b)(4) created "new life-term gang-related felony offenses." (*Florez*, *supra*, 132 Cal.App.4th at p. 319.)

We think the rationale of *Florez* applies equally to this case. We realize that the phrase "[a]ny felony punishable by death or imprisonment in the state prison for life" interpreted in *Florez* appears in section 667.5, and the identical phrase before us in this case appears in a different statute, section 12022.53. We have no reason to believe, however, that the Legislature's 1997 use of this phrase in enacting section 12022.53 was intended to mean anything different than the meaning ascribed to it when the Legislature placed it in section 667.5, section (c) 20 years earlier.[6] (See *People v. Caudillo* (1978) 21

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[6] "Any felony punishable by death or imprisonment in the state prison for life" has been listed as a section 667.5, subdivision (c) violent felony since 1977. (See Stats. 1977, ch. 165, § 13.) Section 667.5 was enacted to provide for enhanced prison terms for felons who have previously served prison terms. (See Stats. 1976, ch. 1139, § 268.) The

Cal.3d 562, 575, 585-586, fn. 5 (Legislature intended same meaning of the term "great bodily injury" placed into three separate criminal statutes calling for increased punishment when victim of burglary (§ 461), robbery (§ 213) or rape (§ 264) suffered great bodily injury).)

Appellant relies on *People v. Montes* (2003) 31 Cal.4th 350. In *Montes* the defendant was convicted of attempted murder. One of the crimes qualifying a person for a section 12022.53 enhancement is "Section 187 (murder)." (§ 12022.53, subd. (a)(1).) Another is an "attempt to commit a crime listed in this subdivision other than an assault." (§ 12022.53, subd. (a)(18).) The crime of attempted murder thus qualifies a person for a section 12022.53 enhancement. In *Montes* the circumstances of the defendant's crime of attempted murder met the requirements of section 12022.53, subdivision (d) and the trial court thus imposed "an additional and consecutive term of imprisonment in the state prison for 25 years to life." (§ 12022.53, subd. (d).) The defendant's sentence consisted of 7 years for the attempted murder, plus a consecutive 10 years for a section 186.22, subdivision (b)(1)(C) criminal street gang enhancement, plus the 25 years to life section 12022.53, subdivision (d) firearm enhancement. Section 186.22, subdivision (b)(1)(C) provides for a criminal street gang enhancement of 10 years "[i]f the felony is a violent felony, as defined in subdivision (c) of Section 667.5."[7] Attempted murder is a violent

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legislation provided for longer enhancements for those whose current felony was one of the violent felonies listed in subdivision (c) of the statute. Section 12022.53 was enacted in 1997 as the Sandy Peters Memorial Act. (Stats. 1997, ch. 503, § 2.) Section 1 of that legislation stated "[t]he Legislature finds and declares that substantially longer prison sentences must be imposed on felons who u se firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime." (Stats. 1997, ch. 503, § 1.) Just as section 667.5 provides for a longer prison term for a previously incarcerated repeat felon who commits a "felony punishable by death or imprisonment in the sate prison for life," section 12022.53 provides for a longer prison term for a felon who uses a gun in the commission of such a felony.

[7] See footnote 4, *supra*.

felony as defined in section 667.5, subdivision (c). (See § 667.5, subd. (c)(12).) The Court of Appeal in *Montes* was of the view that the section 186.22, subdivision (b)(1)(C) enhancement was inapplicable. The Court of Appeal struck the 10-year section 186.22, subdivision (b)(1)(C) enhancement and instead imposed a 15-year minimum parole eligibility date applicable, with some exceptions, to "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life." (§ 186.22, subdivision (b)(5).) Under section 664, the defendant's crime of attempted murder was punishable by "imprisonment in the state prison for five, seven, or nine years." (§ 664, subd. (a); see also *People v. Montes*, *supra*, 31 Cal.4th at pp. 352-353.) The California Supreme Court held that the trial court had correctly sentenced the defendant. It held that the Court of Appeal erred in concluding that the section 12022.53, subdivision (d) 25 years to life enhancement made appellant's crime of attempted murder a "felony punishable by imprisonment in the state prison for life" within the meaning of section 186.22, subdivision (b)(5). The California Supreme Court held that "section 186.22(b)(5) applies only where the felony by its own terms provides for a life sentence." (*People v. Montes*, *supra*, 31 Cal.4th at p. 352.)

Appellant's argument is that because *Montes* held the words "felony punishable by imprisonment in the state prison for life" in section 186.22, subdivision (b)(5) to mean a felony which "by its own terms provides for a life sentence" (*Montes, supra*, 31 Cal.4th at p. 352), we should construe the words "[a]ny felony punishable by death or imprisonment in the state prison for life" in section 12022.53, subdivision (a)(17) to mean any felony which, "by its own terms, provides for" a sentence of death or imprisonment in the state prison for life without regard to any other alternative sentencing provision bearing on the facts of the particular statutory violation.

Again, we have no reason to believe that the Legislature intended the section 12022.53 language "[a]ny felony punishable by … imprisonment in the state prison for life" to have a meaning different from the Legislature's earlier use of the phrase "a felony

punishable by imprisonment in the state prison for life" in section 186.22, subdivision (b)(5).[8] It appears to us, however, that appellant's crime is a felony which "by its own terms provides for a life sentence." (*People v. Montes*, *supra*, 31 Cal.4th at p. 352.) We disagree with appellant's argument that his crime is not such a felony.

In *Montes* the court framed the issue before it as follows:

> "Penal Code section 186.22, subdivision (b)(5) (section 186.22(b)(5)) provides that a defendant who commits 'a felony punishable by imprisonment in the state prison for life' for the benefit of a criminal street gang 'shall not be paroled until a minimum of 15 calendar years have been served.' We granted review to determine whether this provision applies (a) if the defendant commits a felony which, together with the Penal Code section 12022.53, subdivision (d) (section 12022.53(d)) enhancement results in a life term, of (b) only if the defendant commits a felony that, by its own terms, provides for a life sentence." (*People v. Montes*, *supra*, 31 Cal.4th at p. 352.)

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[8] Section 12022.53 was enacted to provide for a longer prison sentences for persons who use a gun in the commission of certain specified crimes, including a "felony punishable by … imprisonment in the state prison for life." (§ 12022.53, subdivision (a)(17). See footnote 6, *supra*. Section 186.22 is part of the Street Terrorism Enforcement and Protection Act (or 'STEP Act," § 186.20 et seq.). The STEP Act in part provides for longer sentences for persons who commit felonies "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." (§ 186.22, subd. (b).)

Since at least 1993 the STEP Act has included in subdivision (b) of section 186.22 a clause stating "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." (§ 186.22, subd. (b)(5); see also *People v. Montes*, *supra*, 31 Cal.4th at pp. 355-356, fn. 6.) In March of 2000 the voters of California passed Proposition 21, an initiative statute which made changes to various laws pertaining to the treatment of juvenile offenders and gang-related offenders. Although the measure amended portions of section 186.22 to provide for harsher penalties for gang-related offenses, it made no change to the wording of the above-quoted clause. Just as the STEP Act stiffened sentences for gang-related crimes, the Sandy Peters Act (§ 12022.53) stiffened sentences for crimes committed with firearms.

In *Montez* our Supreme Court concluded the Court of Appeal erred because it "looked to a different section of the Penal Code (§ 12022.53, subd. (d)) not incorporated in the language of the felony provision itself …." (*People v. Montes*, *supra*, 31 Cal.App.4th at pp. 358-359.)

We conclude *Montes* is distinguishable from the instant case. The provision in question here does not add a separate, additional penalty. Rather, it provides a different penalty for the criminal violation itself, much as section 190 does for a violation of 187 or as section 461 does for a violation of section 459.

In *Montes*, the defendant's consecutive term of 25 years to life was imposed for a section 12022.53, subdivision (d) firearm enhancement. (*People v. Montes*, *supra*, 31 Cal.4th at p. 353.) "A sentence enhancement is 'an additional term of imprisonment added to the base term.'" (*People v. Jefferson* (1999) 21 Cal.4th 86, 101.) In *Jefferson*, the court construed the meaning of the term "punishment for the current felony conviction" appearing in section 667, subdivision (e)(1) of California's three strikes law. The court stated:

> "Section 667(e)(1) of the Three Strikes law requires the 'minimum term for an indeterminate term' to be 'twice the term otherwise provided as punishment for the *current felony conviction*." (Italics added.) Unlike an enhancement, which provides for an *additional term* of imprisonment, the 15-year minimum term in section 1866.22(b)(4) sets forth an *alternate* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute. Thus, section 186.22(b)(4) establishes the punishment for the 'current felony conviction' within the meaning of section 667(e)(1), and it is subject to sentence-doubling under section 667(e)(1)." (*People v. Jefferson*, *supra*, 21 cal.4th at p. 101.)

Jefferson appears to instruct us that a sentence imposed under an alternate penalty provision is a "penalty for the underlying felony itself" (*People v. Jefferson*, *supra*, 21 cal.4th at p. 101), as opposed to a penalty imposed as a sentence enhancement. There is no question that section 186.22, subdivision (b)(4) "is an alternate penalty provision that

provides for an indeterminate life sentence for certain underlying felony offenses that are gang related." (*People v. Briceno* (2004) 34 Cal.4th 451, fn. 7 at p. 460; see also *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6.) "[A]n alternate penalty provision … 'sets forth an alternate penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute.'" (*Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 900, fn. 6.) The defendant in *Montes* received "seven years for attempted murder … plus a consecutive term of 25 years to life for the firearm enhancement (§12022.53(d)." (*People v. Montes*, *supra*, 31 Cal.4th at p. 353.) In the present case, however, appellant's appropriate sentence for his section 246 violation is the 15 years to life called for by section 186.22, subdivision (b)(4)(B). This is his "penalty for the underlying felony itself." (*People v. Jefferson*, *supra*, 21 cal.4th at p. 101; *Robert L. v. Superior Court*, supra, 30 Cal.4th at p. 900, fn. 6.) Indeed, the only sentence appellant can properly receive for the felony he committed is the penalty called for by section 186.22, subdivision (b)(4)(B). Appellant's felony thus appears to us to be a "felony punishable by … imprisonment in the state prison for life" (§ 12022.53, subd. (a)(17)) and a "felony that, by its own terms, provides for a life sentence." (*People v. Montes*, *supra*, 31 Cal.4th at p. 352.)

IV.

THE SECTION 12022.5(A) ENHANCEMENT MUST BE STRICKEN

The court imposed and stayed a 10-year section 12022.5, subdivision (a) firearm use enhancement on the count 3 section 246 conviction. Section 12022.53, subdivision (f) states in pertinent part that "[a]n enhancement involving a firearm specified in … Section 12022.5 … shall not be imposed on a person in addition to an enhancement imposed pursuant to this section." (§ 12022.53, subd. (f).) Appellant contends, and respondent correctly concedes, that if the section 12022.53, subdivision (c) enhancement was properly imposed, then the section 12022.5, subdivision (a) enhancement was erroneous and should not have been imposed at all. As we have explained in part III

above, the section 12022.53, subdivision (c) enhancement was properly imposed. Thus, the section 12022.5, subdivision (a) enhancement must be stricken.

DISPOSITION

The seven-year sentence imposed on the section 246 conviction is ordered stricken. The 10-year section 12022.5, subdivision (a) enhancement is ordered stricken. The 15 years to life imposed by the court as an "enhancement" is ordered stricken. On remand, the court shall impose the 15 years to life called for by section 186.22, subdivision (b)(4) as a penalty for the section 246 count 3 conviction itself. (See part II of this opinion, *supra*.) The matter is remanded to the trial court for resentencing in accordance with the views expressed in this opinion.

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Ardaiz, P.J.

WE CONCUR:

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Levy, J.

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Dawson, J.