Filed 12/2/08

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS OCHOA GARCIA, Defendant and Appellant.	B205182 (Los Angeles County Super. Ct. No. GA064463) ORDER MODIFYING OPINION [CHANGE IN JUDGMENT]

THE COURT:*

It is ordered that the opinion filed herein on November 4, 2008, be modified as follows:

On page 2, line 5, insert a period after "subd. (a)" and delete the period outside the parenthesis.

On page 15, delete the entire first paragraph and replace with the following text:

Defendant has also been convicted of grand theft in counts 5 and 8 and unlawful taking of an automobile in counts 6 and 9. Each of these counts is a serious felony because defendant was found to have personally used a firearm in its commission. (§ 1192.7, subd. (c)(8).) The trial court shall proceed in the same manner as in counts 1

---

* Pursuant to rule 8.1110(b) of the California Rules of Court, parts I, II, III (A)-(B), IV are certified for publication.

and 2 when deciding to strike or impose the three prior prison term enhancements. (§ 667.5, subd. (b).)

By contrast, count 3 is not a serious felony. No section 12022.53 or 12022.5 firearm use findings were returned as to count 3. Section 12021, subdivision (a) is not listed in section 1192.7, subdivision (c). Thus, count 3 is not a serious felony. (*People v. Prieto* (2003) 30 Cal.4th 226, 276; compare *People v. Briceno* (2004) 34 Cal.4th 451, 465 [§ 12021, subd. (a) is a serious felony when it is enhanced pursuant to § 186.22, subd. (b)(1).) Therefore, no section 667, subdivision (a)(1) five-year prior conviction enhancement applies to count 3. The section 667, subdivision (a)(1) five-year prior conviction enhancement only applies when the current offense is a serious felony listed in section 1192.7, subdivision (c). (*People v. Briceno, supra,* 34 Cal.4th at p. 458; *People v. Neely* (2004) 124 Cal.App.4th 1258, 1262.) Accordingly, all of the five section 667.5, subdivision (b) one-year enhancements apply to count 3. Once the remittitur issues, the trial court is to exercise its discretion to impose or strike all or some of the five section 667.5, subdivision (b) enhancements as to count 3.

On page 21, caption, delete "Part III (C)" and insert "Parts III (C)-(D)"

On page 22, lines 10-11, delete "(*People v. Prieto* (2008) 30 Cal.4th 226, 261;" and insert "(*People v. Prieto, supra,* 30 Cal.4th at p. 261;"

On page 28, after line 7, insert the following text:

4. Verdict form issues

Upon close review of the record, we discovered an error in the verdict form related to the prior conviction allegations. We asked the parties to brief the issue of how to reconcile a difference between the section 667, subdivision (a)(1) prior serious felony enhancement allegations set forth in the amended information and those included in the

verdict form. More specifically, the amended information alleges the prior serious felony convictions relate to counts 1, 2, 4, 5, 6, 7, 8, and 9, but the verdict form states: "We, the jury in the above entitled action, find the allegation that, as to *Counts 1 and 2*, the said Defendant, Carlos Ochoa Garcia, Jr., has suffered the following prior convictions, to wit: [¶] a violation of Penal Code section 211 on or about March 28, 1988 in the State of California, Los Angeles County Superior Court case number A965651, to be: True. [¶] a violation of Penal Code section 211 on or about October 28, 1993 in the State of California, Los Angeles County Superior Court case number BA083282, to be: True." (Italics added.) The trial court sentenced defendant on the assumption that the prior serious felony enhancements applied to all but count 3.

There are two bodies of law related to such technical errors. In *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1439-1440, our colleagues in Division Seven of this appellate district synthesized one body of law: "Section 1158 requires that '[w]henever the fact of a previous conviction . . . is charged in an accusatory pleading . . . the judge . . . must . . . *find* whether or not he has suffered such previous conviction. The . . . finding . . . *may* be "I find the charge of previous conviction true" . . .' (Italics added.) . . . [¶] When no words are used and the trier of fact fails to make a finding the effect is the same as a finding of 'not true.' (*People v. Eppinger* (1895) 109 Cal. 294.)" As can be noted, here the jury limited its "prior convictions" finding to counts 1 and 2.

However, the jury also found that each of the five section 667.5 prior prison term allegations were true. In order to find the prior prison term enhancement allegations were true, the jury also was required to conclude that the prior prison term resulted from a conviction. The controlling authority is that discussed in *People v. Paul* (1998) 18 Cal.4th 698, 710, and *People v. Marshall* (1996) 13 Cal.4th 799, 850-852. Here, the jurors implicitly found as to all nine counts defendant was convicted and served five prior prison terms for the alleged offenses. The prior prison term allegations include the two prior serious felony convictions.

In *People v. Marshall, supra,* 13 Cal.4th at pages 850-852, the defendant was charged with two murders and a multiple-murder special circumstance was alleged. The jurors found the defendant guilty of the two murders. However, the trial court refused to give a special circumstance instruction. The trial court ruled that if the jury found the defendant guilty of the two first degree murders, the multiple murder special circumstance allegation was established without any further finding. The jury did find the defendant guilty of two first degree murders. Our Supreme Court found the failure to provide the instruction or special finding was a trial error rather than a structural defect. In *Marshall,* our Supreme Court concluded that the error was harmless beyond a reasonable doubt because it had no effect on the outcome of the trial. (*Ibid.*) In *People v. Paul, supra,* 18 Cal.4th at pages 707-708, a separate verdict form found that a principal was armed in the commission of the charged offenses. The defendant in *Paul* argued that the verdict form did not specify that it related to him. Rather, the defendant asserted the finding applied to the codefendant. However, the California Supreme Court held: "A verdict should be read in light of the charging instrument and the plea entered by the defendant. (*People v. Tilley* (1901) 135 Cal. 61, 62; *People v. Mercado* (1922) 59 Cal.App. 69, 74.) . . . In addition, the form of the verdict generally is immaterial, so long as the intention of the jury to convict clearly may be seen. [Citations.]" (*People v. Paul, supra,* 18 Cal.4th at pp. 706-707; see also *People v. Bolin* (1998) 18 Cal.4th 297, 331 ["'[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]'"; *People v. Lamb* (1999) 76 Cal.App.4th 664, 676 [a defendant is not entitled to reversal based on nonprejudicial defects in form]; *People v. Carr* (1988) 204 Cal.App.3d 774, 780, fn. 7 ["defendant not entitled to have enhancements stricken based on typographical error denominating prior conviction under wrong statute number"].) In *Paul,* our Supreme Court held, "[T]he jury did not omit the special verdicts or findings required by statute, and the trial court did not, in sentencing

defendant upon the enhancement allegations, supply a special finding or verdict . . . ." (*People v. Paul, supra*, 18 Cal.4th at p. 710.)

Our Supreme Court's analysis in *Paul* and *Marshall* is analogous here. The amended information alleged the section 667, subdivision (a) prior serious convictions applied to every count but count 3. The jurors' true findings as to those two prior serious felony convictions, when viewed in conjunction with their implied findings that defendant was convicted of five felonies and served five prison terms as to all nine counts, could therefore be used by the trial court in imposing the section 667, subdivision (a)(1) enhancements as to counts 1, 2, 4, 5, 6, 7, 8, and 9.

On page 28, delete subheading "4. Calculation of sentences" and replace it with "5. Calculation of sentences"

On page 29, delete the entire second and third paragraphs and replace with the following text:

As to count 5, the January 19, 2006 grand theft of the Astro van from Ms. Velez-Jimenez, defendant received a sentence of 45 years to life which was stayed pursuant to section 654, subdivision (a). The sentence as imposed consists of 25 years to life pursuant to sections 667, subdivisions (b) through (i) and 1170.12 plus 10 additional years for firearm use and 10 years for the two prior serious felony convictions. (§ 667, subd. (a)(1).) As with the other indeterminate serious felony sentences, the trial court must decide whether to strike or impose all or any of the three remaining one-year section 667.5, subdivision (b) prior prison term enhancements. The maximum term defendant can receive is 48 years to life. As ordered by the trial court, the count 5 sentence is stayed pursuant to section 654, subdivision (a).

As to count 6, the Vehicle Code section 10851, subdivision (a) violation arising from the January 19, 2006 carjacking of Ms. Velez-Jimenez, the trial court imposed a 45-year-to-life sentence. The calculations as to the counts 5 and 6 sentences are the same as

to the offense itself, the firearm use enhancement, and the prior serious felony convictions. The trial court must decide whether to strike or impose all or any of the three one-year section 667.5, subdivision (b) enhancements. The maximum term defendant may receive on count 6 is 48 years to life. The count 6 sentence must be stayed pursuant to section 654, subdivision (a).

On page 30, delete the first and second paragraphs in their entirety and insert the following text:

As to count 8, the grand theft of an automobile arising from the January 24, 2006 carjacking of Ms. Ochoa-Garcia, a 45-year-to-life sentence was imposed, consisting of 25 years to life pursuant to sections 667, subdivisions (b) through (i) and 1170.12 plus 10 years for firearm use and 10 years for the prior serious felony convictions. (§ 667, subd. (a)(1).) As with the other felonies, the trial court must decide whether to strike or impose any or all of the three one-year section 667.5, subdivision (b) enhancements. The maximum sentence on count 8 is 48 years to life. As ordered by the trial court, the sentence as finally calculated must be stayed pursuant to section 654, subdivision (a).

As to count 9, the Vehicle Code section 10851, subdivision (a) violation arising from the January 24, 2006 carjacking of Ms. Ochoa-Garcia, the trial court imposed a 45-year-to-life sentence which was stayed pursuant to section 654, subdivision (a). As in the case of count 8, defendant received 25 years to life pursuant to sections 667, subdivisions (b) through (i) and 1170.12 plus 10 years for firearm use and 10 additional years for the prior serious felony convictions. (§ 667, subd. (a)(1).) The trial court must decide whether to strike or impose any or all of the three one-year section 667.5, subdivision (b) enhancements. The maximum sentence defendant may receive on count 9 is 48 years to life. As ordered by the trial court, once the count 9 sentence is finally calculated, it must be stayed pursuant to section 654, subdivision (a).

On page 31, under “Disposition,” line 3, delete the reference to “(E)(4)” and insert “(D)(4).”

This modification order changes the judgment.

---

*TURNER, P.J. ARMSTRONG, J. KRIEGLER, J.