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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ROCCO and SAMUEL H. CRUZ, Defendants and Appellants.	B229861 (Los Angeles County Super. Ct. Nos. BA361974, BA336264)

APPEAL from judgments of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed as Modified.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant Michael Rocco.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Samuel H. Cruz.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Colleen M. Tiedemann and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts BACKGROUND IIB, III, and DISCUSSION II through IV.

INTRODUCTION

The alternative sentencing scheme of the Three Strikes law applies when "a defendant *has been convicted of a felony* and it has been pled and proved that the defendant has one or more prior felony [strike] convictions." (§§ 1170.12, subds. (a), (c)(1), italics added; see § 667, subd. (e)(1).)[1] In the published portion of this opinion, we hold that a defendant who is convicted of a misdemeanor offense that is sentenced as a felony under section 186.22, subdivision (d), "has been convicted of a felony" within the meaning of the Three Strikes law and is subject to its sentencing scheme if he has one or more prior strikes.

BACKGROUND

I. Charges

Defendants Michael Rocco and Samuel Cruz were jointly tried with a third defendant, Brittany Benavidez (who was acquitted and is not a party to this appeal), on the charge of premeditated attempted murder (§§ 664/187, subd. (a)). Rocco also was charged with possession of a firearm by a felon (count 2, § 12021, subd. (a)(1)). It was further alleged that, in the commission of the attempted murder, a principal personally discharged a firearm causing great bodily injury (§ 12022.53, subds. (d), (c), (b), and (e)(1)) and that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). Cruz was alleged to have suffered a prior strike conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

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[1] All statutory references are to the Penal Code unless otherwise noted.

II. Verdicts and Appeals

A. Defendant Cruz

Cruz admitted the prior strike allegation. The jury acquitted him of attempted murder. However, by stipulation of the parties, the court had instructed the jury on the lesser related offense of, inter alia, simple assault, a violation of section 240, with the allegation under section 186.22, subdivision (d), that the offense was committed for the benefit of a criminal street gang. The jury convicted Cruz of this lesser related offense and found the section 186.22, subdivision (d) allegation to be true. The court sentenced Cruz under section 186.22, subdivision (d), to three years in state prison. Moreover, based on the three year sentence, the court deemed the assault offense to be a felony, and doubled it under the Three Strikes law, for a term of six years.

In addition, the court found Cruz to be in violation of probation (he was on probation for the strike offense, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)) with a gang enhancement (§ 186.22, subd. (b)(1)(A)) and sentenced him to a consecutive term of four years on that offense, based on one-third the mid-term of three years for the offense plus an additional three years for the gang enhancement.

Cruz appeals from the judgments in his two cases. He contends, first, that the trial court erred by doubling the sentence on his assault conviction (§ 240) under the Three Strikes law, because the conviction was for a misdemeanor offense that was only elevated to a felony at sentencing by the trial court's application of section 186.22, subdivision (d). In the published portion of this opinion, we reject this contention. Cruz also contends that in sentencing him on his probation violation, the trial court erred by imposing the full three-year enhancement under section 186.22, subdivision (b)(1)(C). The Attorney General concedes that the

court should have imposed only one-third of the three year enhancement, and in the unpublished portion of our opinion we correct the sentence accordingly.

B. Defendant Rocco

The jury convicted Rocco of attempted murder and possession of a firearm by a felon, finding the gang and firearm allegations true. The court sentenced Rocco to a term of 44 years to life in state prison. He appeals from the judgment, contending that the trial court erred in (1) admitting medical records and (2) imposing the 10 year enhancement under section 186.22, subdivision (b)(1)(C), because the information did not allege that he personally used or discharged a firearm. We find no reversible error and affirm.

III. Evidence

Because appellants do not challenge the sufficiency of the evidence to support the convictions, we do not recount in detail the evidence adduced at trial and instead summarize it as follows.

The prosecution introduced evidence from eyewitnesses who saw a man later identified as Cruz approach the victim, Eli Flores, who was lying on the hood of a car talking on his cellphone. Cruz hit Flores on his shoulder. Another man later identified as Rocco approached Flores at the same time, hit him with a gun, and after Flores fell down, shot him. Cruz and Rocco got into a car driven by a woman later identified as Benavidez, and drove away.

Officers who arrived at the scene saw Flores lying on the ground, with what appeared to several gunshot wounds. Flores was transported to the hospital by ambulance, and he underwent surgery and treatment. The trial court admitted into

evidence Flores's hospital records containing statements by the treating physician that Flores had suffered gunshot wounds to his head and buttocks.

Soon after the shooting the police apprehended Rocco and Cruz at a nearby house where Cruz was known to reside. They found Cruz hiding in a crawl space underneath the house and, after he tried to run away, they arrested him.

Expert opinion evidence was introduced that both Rocco and Cruz were members of the Drifters criminal street gang, whose primary activities were committing graffiti, robberies, car thefts, carjackings, narcotics sales, shootings, attempted murders, and murders. The shooting of Flores occurred in an area claimed by the 18th Street gang, rivals of the Drifters.

Rocco proffered no evidence at trial. Cruz testified on his own behalf. He testified that he had been a member of the Drifters for approximately nine or ten years, and that he had known Rocco for a month or two. On the evening of the incident, Cruz was drinking beer at home. His girlfriend, Benavidez, drove him to get more alcohol. Cruz drank an entire bottle of Bacardi Silver and became "really, really intoxicated." Cruz became angry at Benavidez and left to go on a walk. On his walk, he saw Flores lying on a car. Cruz had known Flores since elementary school and Flores had lived with Cruz's family for a period of time. Approximately two weeks earlier, Cruz and Flores had argued over a woman who was dating a mutual friend but who was "messing around." When Cruz saw Flores on the car, his anger "just came back" and he swung at him but missed. Then he heard a gunshot and ducked. He saw someone he recognized from the neighborhood, but not Rocco, standing in front of Flores. He told the man to stop.

Cruz saw his girlfriend's car in a nearby alley and got inside. Cruz's mother had asked Benavidez to look for him. The shooter jumped in the car as well and told Benavidez to get to the freeway. Cruz told Benavidez to drive them home.

She drove Cruz home, and the shooter got out of the car and ran away. When the police arrived, Cruz hid under the house because he was on probation and knew eyewitnesses had seen him at the scene.

The jury acquitted Cruz of attempted murder and the lesser related offense of assault with force likely to produce great bodily injury, but found him guilty of the lesser related offense of simple assault, a violation of section 240, with the jury further finding true a section 186.22, subdivision (d) allegation.

The jury convicted Rocco of attempted murder and possession of a firearm by a felon. The jury found the gang participation and all firearm allegations true.

DISCUSSION

I. Strike Sentencing of Defendant Cruz

As we have noted, although the assault offense (§ 240) of which Cruz was convicted otherwise generally would have been deemed a misdemeanor, the trial court sentenced Cruz under section 186.22, subdivision (d) (hereafter section 186.22(d))[2], and imposed a felony term of three years in state prison. The court ruled that the assault offense was a felony due to the application of section 186.22(d), and thus doubled the three-year sentence based on Cruz's prior strike conviction.

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[2] Section 186.22(d) provides that "[a]ny person who is convicted of a public offense punishable as a felony or a misdemeanor, which is 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 be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years." For the sake of simplicity, this opinion uses the phrase "to benefit a criminal street gang" as shorthand for offenses that fall within section 186.22(d).

Cruz contends that the trial court erred by doubling his sentence because his current conviction was for a misdemeanor offense that was only elevated to a felony at sentencing by the trial court's application of section 186.22(d). We conclude that it is permissible to apply both the alternative, harsher penalty under section 186.22(d) for an offense committed to benefit a criminal street gang, and to double the sentence under the Three Strikes sentencing provisions for recidivist criminal activity, because each of these penalty provisions targets different criminal conduct. In short, a defendant who is convicted of a misdemeanor offense that is sentenced as a felony under section 186.22(d) "has been convicted of a felony" within the meaning of the Three Strikes law (§§ 1170.12, subds. (a), (c)(1); see § 667, subd. (e)(1)) and is subject to its sentencing scheme if he or she has one or more prior strike convictions.

Cruz's challenge to the doubling of his sentence for assault concerns the interplay of section 186.22(d) and the Three Strikes law, each of which sets forth an alternative sentencing scheme. Section 186.22(d) prescribes an alternate penalty for any person convicted of an offense punishable as a felony or a misdemeanor, when the underlying offense is committed to benefit a criminal street gang. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900 (*Robert L.*)); see *People v. Jones* (2009) 47 Cal.4th 566, 576 (*Jones*).) This section was added pursuant to Proposition 21 on the 2000 ballot, a successful ballot initiative that made numerous changes pertaining to gang-related crimes. (*Jones, supra,* 47 Cal.4th at p. 570; *People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1448 (*Arroyas*).) "'In the case of a voters' initiative statute . . . we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.' Section 186.22(d) enables prosecutors to more severely punish gang-related misdemeanors. This is the very result the

voters intended when passing Proposition 21, not more and not less." (*Robert L.*, *supra*, 30 Cal.4th at p. 909, quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

The Three Strikes law has a different focus: deterring and punishing recidivist conduct, by ensuring longer prison sentences for those who commit a felony and have been previously convicted of serious or violent felony offenses. (*People v. Queen* (2006) 141 Cal.App.4th 838, 843.) The portion of the Three Strikes law applicable to Cruz provides: "(a) Notwithstanding any other provision of law, if a defendant has been convicted of a *felony* and it has been pled and proved that the defendant has one or more prior felony convictions . . . the court shall adhere to each of the following: [¶] . . . [¶] (c)(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." (§§ 1170.12, subds. (a), (c)(1), italics added; see § 667, subd. (e)(1).)

Cruz contends that despite the application of section 186.22(d), his conviction "remained a misdemeanor," albeit one with a felony-like prison sentence of three years. Because the "strike" law is triggered only when there is a current felony conviction, Cruz contends that law is not applicable to his conviction for assault and his sentence should not have been doubled. We disagree.

As Cruz acknowledges, section 186.22(d) sets forth an alternative penalty provision rather than a sentencing enhancement. (*Robert L.*, *supra*, 30 Cal.4th at p. 909.) "'Unlike an enhancement, which provides for an additional term of imprisonment, [a 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.'" (*Jones, supra*, 47 Cal.4th at p. 578.) A felony is statutorily defined as "a crime that is punishable with death [or] by imprisonment in the state prison," as well as crimes punishable by imprisonment in county jail under certain circumstances. (§ 17, subd. (a); *Robert L., supra*, 30 Cal.4th at p. 901.) Therefore, when the trial court sentenced Cruz to state prison, he was sentenced to a felony. (*People v. Stevens* (1996) 48 Cal.App.4th 982, 987 ["The distinction between a misdemeanor and a felony is based upon the punishment prescribed. . . . If a felony punishment is selected by the court, the subsequent petty theft is not merely *punished as* a felony: it *is* a felony."]; see *Robert L., supra*, 30 Cal.4th at p. 906 [noting that "opponents warned that the passage of Proposition 21, section 186.22(d) would turn vandalism *under* $400 (a misdemeanor) into a felony"]; *Arroyas, supra*, 96 Cal.App.4th at pp. 1448-1449 [referring to section 186.22(d) as converting a misdemeanor into a felony].)

People v. Morgan (2011) 194 Cal.App.4th 79 (*Morgan*), is instructive. In that case, the defendant previously had pled guilty to brandishing a hammer (§ 417, subd. (a)(1)), a misdemeanor offense that was elevated to a felony under California's hate crime statute (§ 422.7, subd. (a)). (*Morgan, supra*, 194 Cal.App.4th at p. 81.) Later, the defendant was tried and found guilty of another crime of assault with a deadly weapon. (*Id.* at pp. 81-82.) The trial court found true the allegation that he had suffered a prior conviction (for brandishing a hammer) that qualified as a serious felony, and a strike. Based on its findings, the trial court added a five-year sentence enhancement and doubled the base term for the assault under the Three Strikes law. (*Id.* p. 82.) On appeal, the defendant asserted the misdemeanor brandishing offense that was elevated to a felony under the hate crime statute did not qualify as a prior serious felony. (*Id.* at pp. 82-83.)

The appellate court disagreed, holding that the trial court properly treated this conviction for brandishing a weapon as a felony by virtue of the elevation under the hate crime statute, and properly treated it as a "serious" felony pursuant to section 1192.7, subdivision (c)(23), because the defendant committed the offense while armed with a deadly or dangerous weapon. (*Id.* at p. 86; see also *Stevens, supra*, 48 Cal.App.4th at pp. 984-985 [rejecting contention that Three Strikes law could not be applied to double sentence for petty theft where theft was properly sentenced as a felony under section 666 because defendant had prior theft-related conviction that resulted in incarceration].)[3]

Both *Morgan* and *Stevens* thus constitute authority for considering misdemeanors sentenced as felonies to be "felonies" for purposes of the Three Strikes law. Cruz cites to no authority to the contrary.

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[3] *Morgan* properly distinguished our decision in *People v. Ulloa* (2009) 175 Cal.App.4th 405 (*Ulloa*). In *Ulloa*, we held that a prior conviction for a misdemeanor offense that was punished as a felony under section 186.22(d) does not qualify as a prior serious felony under section 1192.7, subdivision (c)(28), which provides that a serious felony includes "any felony offense, which would also constitute a felony violation of Section 186.22." (*Ulloa, supra*, 175 Cal.App.4th at p. 413.) Therefore, the prior conviction could not be used to impose a five-year enhancement on the current conviction under section 667, subdivision (a), and could not be treated as a prior strike under the Three Strikes law. As *Morgan* pointed out, in *Ulloa*, the same conduct that justified the elevation of the prior misdemeanor to a felony – conduct to benefit a criminal gang under section 186.22(d) – also was the basis for the trial court's determination that the felony was "serious" under section 1192.7, subdivision (c)(28). By contrast, in *Morgan*, "the conduct that made the prior conviction a felony (interfering with the victim's civil rights under section 422.7), [was] different from the conduct making that felony a serious felony (personally using a dangerous or deadly weapon under § 1192.7(c)(23))." (*Morgan, supra*, 194 Cal.App.4th at p. 86.) This distinction – further discussed below – is crucial.

Of course, *Ulloa* did not address the question before us today: whether a current conviction of a misdemeanor sentenced as a felony under section 186.22(d) should be treated as a felony for purposes of applying Three Strikes sentencing scheme to that current conviction.

Although not cited by either the Attorney General or Cruz, the Supreme Court's decision in *Jones* likewise reinforces the correctness of the trial court's decision doubling Cruz's sentence after elevating his assault conviction to a felony. In *Jones*, the defendant was convicted of the felony offense of shooting at an inhabited dwelling (§ 246), punishable by a life sentence pursuant to section 186.22, subdivision (b)(4), because it was found to have been committed to benefit a criminal street gang. (*Jones, supra*, 47 Cal.4th at p. 571.) The trial court further imposed an additional 20-year prison term under the sentence enhancement provision of section 12022.53, subdivision (c), which prescribes an increased sentence for using a firearm in the commission of "[a]ny felony punishable by death or *imprisonment* in the state prison *for life*." (*Jones, supra*, 47 Cal.4th at p. 571, citing § 12022.53, subd. (a)(17), italics added.) At issue on appeal was whether the defendant committed a "felony punishable by" life imprisonment and thus was correctly sentenced to an additional 20–year prison term under section 12022.53, subdivision (c). (*Jones, supra*, 47 Cal.4th at pp. 571-572, citing § 12022.53, subd. (a)(17).)

The defendant argued that it amounted to impermissible "bootstrapping" for the trial court both to apply section 186.22 to raise the underlying offense into a more serious category, and then to use the new category to impose an enhancement it could not have applied to the original, underlying offense. (*Jones, supra*, 47 Cal.4th at p. 574.) The Supreme Court rejected this argument, focusing on the fact that the section 186.22 alternative penalty and the section 12022.53 enhancement "appear in separate statutes enacted at different times" and target different conduct – activity to benefit a criminal gang, and gun use in the commission of a particularly serious crime, respectively. (*Jones, supra*, 47 Cal.4th at p. 575.) On this basis, the court distinguished *People v. Briceno* (2004) 34 Cal.4th 451, 465

(*Briceno*), which held that a misdemeanor sentenced as a felony under section 186.22(d), may not be "'bootstrap[ped]'" into the enhancement provision for felonies in subdivision (b)(1) "'as a means of applying a double dose of harsher punishment'" for gang activity, as well as *Arroyas, supra*, 96 Cal.App.4th at page 1445, which similarly held that when a defendant commits a misdemeanor that is punished as a felony under section 186.22(d), he is not subject to the additional enhancements of section 186.22, subdivision (b)(1). (*Jones, supra*, at pp. 573-574.) The *Jones* court concluded that "both *Briceno* and *Arroyas* considered the interplay between two statutory provisions that impose penalties for committing a crime to benefit a criminal street gang, and each concluded that the California electorate, which enacted those provisions through an initiative measure, did not intend to apply both provisions to the same crime." (*Jones, supra*, 47 Cal.4th at p. 575; see *Morgan, supra*, 194 Cal.App.4th at pp. 86-87 [finding that "the vice of bootstrapping the same conduct to increase a defendant's punishment under different statutes" was not present in that case].)

As in *Jones*, and in contrast to *Briceno* and *Arroyas*, the two alternative penalty provisions the trial court applied to Cruz are not found in the same statute, and do not target the same conduct. Section 186.22(d) targets crimes committed for the benefit of a gang, while the Three Strikes sentencing provisions target recidivist conduct and would not be triggered had Cruz not suffered a previous conviction for a serious felony. We therefore reject Cruz's argument that the sentence imposed by the trial court exceeds the penalty that voters wished to impose on defendants who committed misdemeanors to benefit criminal street gangs. Rather, the sentence correctly reflects the will of the voters and the Legislature, expressed at different times, to both punish gang-related crimes more severely, and to sentence recidivists to lengthier prison sentences. We thus hold

that a defendant who is convicted of a misdemeanor offense that is sentenced as a felony under section 186.22(d), "has been convicted of a felony" within the meaning of the Three Strikes law and is subject to its sentencing scheme if he has one or more prior strike convictions. Cruz's sentence in case No. BA361974 was proper.

II. Consecutive Term Imposed on Cruz

Cruz contends that in sentencing him for his prior offense in case No. BA336264, the trial court erred by imposing a full three-year sentence enhancement under section 186.22, subdivision (b)(1)(A). Cruz contends, and the Attorney General concedes, that the enhancement under section 186.22, subdivision (b)(1)(A) should have been only one-third of three years, or one year, not three full years. We agree.

Section 1170.1, subdivision (a) provides: "[W]hen any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed . . . , the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements . . . . The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include *one-third of the term imposed for any specific enhancements* applicable to those subordinate offenses." (§ 1170.1, subd.

(a), italics added; see *People v. Felix* (2000) 22 Cal.4th 651, 655.) The term "specific enhancements" includes enhancements under section 186.22. (§ 1170.11.)

The trial court correctly imposed a sentence of one-third of the middle term for the assault, but erroneously imposed the full middle term of three years under the section 186.22, subdivision (b)(1)(A) enhancement. Under section 1170.1, the court should only have imposed one-third of the middle term for the enhancement, or one year.

III. Admissibility Of Victim's Hospital Records

Rocco contends that the trial court erred in admitting three pages of hospital records for the victim, Eli Flores, under the business records exception to the hearsay rule. The records constituted the primary evidence at trial that Flores was shot in the head two times, as well as being shot in the buttocks. Rocco takes issue with the admission of the treating physician's statements that Flores was shot in the head, evidence which Rocco contends was critical to the jury's findings both that Flores had suffered great bodily injury and that Rocco intended to kill him.

A. Background

Over the objection of Rocco's counsel, the trial court admitted hospital records that were created on September 12, 2009 by the physician who treated Flores at the emergency room after the shooting. The treating physician was not called as a witness. Flores was ordered to appear at trial but failed to do so, and efforts to locate him were unsuccessful.

The hospital records list "[m]ultiple gunshot wounds" as Flores's "chief complaint." Under the heading "history of present illness," the physician wrote as

follows: "The patient is a 23-year-old male who apparently sustained gunshot wounds to the head x2 and into his right buttock. The patient is only complaining of abdominal pain. The patient states that it is painful lying flat because his abdomen hurts. The patient is not complaining [of] any head pain. There is no loss of consciousness. The patient is not complaining of neck pain or any other complaints." In the notes regarding the physical examination of the "HEENT" (presumably an abbreviation for head, eyes, ears, nose and throat), the physician wrote: "There is a gunshot wound to the mid anterior left parietal scalp, another gunshot wound to the right posterior superior occipital scalp. No active bleeding. No crepitus. No brain matter is noted." The notes recording the physical examination of the pelvis state that "[t]here is a gunshot wound to the right lateral buttock. No active bleeding." Under the heading "Impression," the report states: "Gunshot wound to the head. It appears to be through-and-through the scalp with no traumatic brain injury. Gunshot wound to the buttock appears to have transabdominal path."

B. Discussion

Evidence Code section 1271, the business records exception, provides that evidence of a writing made as the record of "an act, condition, or event" is not made inadmissible by the hearsay rule if the following four conditions are met: (1) the writing was made in the regular course of a business; (2) it was made at or near the time of the event; (3) the custodian or another qualified witness testifies about the writing's identity and mode of preparation; and (4) "[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271, subd. (d).)

A trial court's decision to admit evidence under the business records exception to the hearsay rule is reviewed for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 308.) When discretionary power is vested in the trial court, the exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Rocco concedes that properly authenticated hospital records are business records (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742), and he does not challenge whether the prosecution laid a sufficient foundation for the introduction of Flores's hospital records. Rather, he contends that the hospital record of the treating physician's opinions regarding the cause of Flores's head wounds, do not record "an act, condition, or event," and thus are not admissible under the business records exception. (Evid. Code, § 1271.)

Rocco chiefly relies on *People v. Reyes* (1974) 12 Cal.3d 486, in which the defendant argued that the trial court erred in excluding the murder victim's psychiatric records recording a diagnosis of "alcoholism with sexual psychopathy." (*Id.* at p. 502.) The defendant wanted these records admitted to support his defense that the victim made a homosexual advance towards him, provoking the defendant to the point that he killed him. (*Ibid.*) The California Supreme Court found that the trial court did not abuse its discretion in excluding the records because "[t]he psychiatrist's opinion that the victim suffered from a sexual psychopathology was merely an opinion, not an act, condition or event within the meaning of the statute." (*Id.* at p. 503.) The court noted that "'"a conclusion is neither an act, condition or event; it may or may not be based upon conditions, acts or events observed by the person drawing the conclusion; it may or may not be founded

upon sound reason; the person who has formed the conclusion recorded may or may not be qualified to form it and testify to it. Whether the conclusion is based upon observation of an act, condition or event or upon sound reason or whether the person forming it is qualified to form it and testify to it can only be established by the examination of that party under oath. . . . It is true that some diagnoses are a statement of a fact or condition, for example, a diagnosis that a man has suffered a compound fracture of the femur is a record of what the person making the diagnosis has seen but this is not true where the diagnosis is but the reasoning of the person making it arrived at from the consideration of many different factors."' [Citations.]" (*Ibid.*) A psychiatric diagnosis, in particular, is "based upon the thought process of the psychiatrist expressing the conclusion," rather than a record of what the physician has seen, and is not admissible under the business records exception to the hearsay rule. (*Ibid.*)

Seizing on the physician's statement that the victim "*apparently* sustained gunshot wounds to the head x2 and into his right buttock," Rocco contends that the statements in the records that the victim received two gunshot wounds to the head constituted his opinion, not a statement of fact. He contends that the basis for that opinion, and the question of whether the physician was qualified to form such an opinion and testify to it, could only be established by examination at trial.

People v. Beeler (1995) 9 Cal.4th 953, is directly on point. In that case, our Supreme Court examined the admissibility of an autopsy report indicating that the cause of the victim's death was a bullet wound to the heart. (*Id.* at p. 980.) Distinguishing *Reyes*, the court held that the examining physician's conclusion regarding the cause of death was not inadmissible opinion. Rather, the physician's conclusion "was based on his *direct observation* and is no different in kind from a diagnosis of a broken femur." (*Id.* at p. 981, italics added.) The court concluded

that all the following conclusions constituted "observed facts," as opposed to opinion: "(1) 'There is an entrance gunshot wound of the posterior left chest [i.e., the back]. . . .' (2) 'This is a distant gunshot wound entrance. . . .' (3) The shot pierced the heart. (4) 'The direction of the [bullet] track is forwards, up 45 degrees and left to right 10 degrees.'" (*Ibid.*) Each of these conclusions, as well as the overall conclusion regarding the cause of death, was deemed admissible under Evidence Code section 1271. (*Ibid.*)

Rocco characterizes the relevant discussion in *Beeler* as *dicta*. He argues that the Supreme Court ruled that the objection to the admissibility of the autopsy report had been waived below, and that its subsequent discussion of the business records exception is therefore not binding. We disagree. Although the court found that the defendant waived his objection to the fact that the autopsy report contained medical opinions, the court noted that the defendant *had* preserved his objection to the admission of the autopsy report on the ground it was not subject to the business record exception under Evidence Code section 1271. (*Beeler*, *supra*, 9 Cal.4th at p. 980.) The court then proceeded to squarely address the matter of whether the autopsy report contained a diagnosis that was a statement of fact or condition as opposed to a medical opinion. (*Id.* at pp. 980-981.) Therefore, *Beeler* is controlling.

The treating physician in the instant case made statements regarding the gunshot wounds to the victim that are materially indistinguishable from the statements in *Beeler* that the Supreme Court characterized as "observed facts" as opposed to opinions. Although the doctor began the report by stating that the victim "apparently sustained gunshot wounds to the head x2 and into his right buttock," a choice of words that Rocco says reveals that the doctor was recording only a tentative conclusion, he went on to record that his physical examination

revealed that "[t]here is a gunshot wound to the mid anterior left parietal scalp" and "another gunshot wound to the right posterior superior occipital scalp." These statements are no different from his statement that "[t]here is a gunshot wound to the right lateral buttock." All of them are diagnoses based not on layers of reasoning and opinion, but rather on the physician's direct observation of the wounds.

The physician's factual statements in the hospital records noting that Flores suffered gunshot wounds to the head and the buttocks are not at all like the diagnosis in *Reyes* that the victim suffered from alcoholism and sexual psychopathy, which, like most psychiatric diagnoses, reflected "the reasoning or thought process of the psychiatrist rendering the opinion, and as such cannot be deemed to be the record 'of an act, condition or event.'" (*People v. Young* (1987) 189 Cal.App.3d 891, 912 ["The records in the instant case were psychiatric records, which tend to be opinions, rather than the record 'of an act, condition or event' which is admissible under Evidence Code section 1271."]; see *People v. O'Tremba* (1970) 4 Cal.App.3d 524, 528-529.) Under *Beeler*, we conclude that the trial court did not abuse its discretion in admitting the victim's hospital records.[4]

IV. Ten-Year Gang Enhancement

Rocco also challenges the trial court's imposition of a ten-year enhancement to his sentence under section 186.22, subdivision (b)(1)(C) (which applies to

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[4] Rocco appears to assert that the purported error in admitting the medical records violated his Sixth Amendment right to confrontation, citing, inter alia, *Crawford v. Washington* (2004) 541 U.S. 36. However, he fails to support the point with relevant argument and therefore we deem it forfeited. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

defendants who commit violent felonies to further the aims of street gangs) in addition to a firearms enhancement pursuant to section 12022.53, subdivision (d). Section 12022.53, subdivision (e)(2) provides that an enhancement for participation in a criminal street gang pursuant to section 186.22, subdivision (b)(1)(C) shall *not* be imposed in addition to a firearms enhancement pursuant to section 12022.53 "unless the person personally used or personally discharged a firearm in the commission of the offense." (§ 12022.53, subd. (e)(2); see *People v. Brookfield* (2009) 47 Cal.4th 583, 590.) Stated another way, when another principal in the offense uses or discharges a firearm but the defendant does not, both sentencing enhancements may not be applied. (*People v. Brookfield, supra,* 47 Cal.4th at p. 590.) Rocco contends that the information in this case failed to allege that he personally used or discharged a firearm in committing the attempted murder, and thus the trial court erred in imposing a ten-year gang enhancement in addition to the firearm enhancement.

"A defendant has a due process right to fair notice of the allegations that will be invoked to increase the punishment for his or her crimes." (*People v. Houston* (Aug. 2, 2012) 54 Cal.4th 1186, 1227 (*Houston*).) Section 12022.53, subdivision (j) further provides that, "[f]or the penalties in this section to apply, the existence of any fact required under subdivisions (b), (c), or (d) shall be alleged in the [information] and either admitted by the defendant in open court or found to be true by the trier of fact." Section 1170.1, subdivision (e), similarly requires that "[a]ll enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

It is not disputed that in this case the body of the information pleads only that a *principal* used and intentionally discharged a firearm in the commission of the offense, causing great bodily injury, and does not include an allegation that

Rocco personally used or discharged a firearm. Nevertheless, the Attorney General argues that the personal discharge of a firearm by Rocco was adequately pled by the "information summary" section of the charging document, which references in shorthand a sentencing enhancement under section 186.22, subdivision (b)(1)(C), with an effect of "+10 Yrs.," as well as an enhancement under section 12022.53, subdivision (d), with an effect of "+25 Y-Life." We need not decide whether the information summary was sufficient to put Rocco on notice of the sentencing enhancements sought by the prosecution, because, based on our Supreme Court's recent opinion in *Houston*, we find that Rocco has forfeited the contention that the enhancements were not properly pled in the information. Rocco had ample opportunity at trial to object based on the failure of the information to plead personal use or discharge of a firearm by him, but he failed to do so.

In *Houston*, the defendant was charged with ten counts of attempted murder. (*Houston, supra,* 54 Cal.4th at p. 1191.) The charging indictment failed to allege that the attempted murders were willful, deliberate, and premeditated, an allegation that, if found true, would support a sentence of life imprisonment for each count. (*Id.* at p. 1225.) Despite the deficiency in the indictment, the defendant was sentenced to life in prison on each count. He appealed.

The Supreme Court found that the defendant had forfeited his claim based on the deficient indictment because he had received adequate notice of the potential sentence he faced and yet failed to object in the trial court. (*Houston, supra*, 54 Cal.4th at p. 1227.) First, "[d]uring the defense's presentation of its case, the trial court expressly noted that defendant, if convicted, would be sentenced to life imprisonment, and the court asked the parties to say if there was a problem with the proposed jury instructions and verdict forms. One week later, the court said the attempted murder verdict form would include deliberate and

premeditated attempted murder as a special finding. At the close of evidence, the trial court instructed the jury to determine whether the attempted murders were willful, deliberate, and premeditated, and indicated that a special finding on this question appeared on the verdict form." (*Id.* at p. 1227.) The defense did not object at any point. Ultimately, the jury's verdict included the express finding that the attempted murders were willful, deliberate, and premeditated. (*Id.* at p. 1229.)

Houston compels us to find a similar forfeiture by Rocco in this case. Even setting aside the reference to the sentencing enhancements in the information summary, the defense received ample notice both before and during the trial that the prosecution was seeking imposition of both the gang participation enhancement and the firearms enhancement, which necessarily would require the prosecution to prove that Rocco personally discharged the firearm during the shooting of Flores. At the preliminary hearing, the trial court stated its conclusion that there was sufficient cause to believe that Rocco was guilty of "the special allegations under Penal Code sections 12022.53 and 186.22(b)(1)." Then at trial, before the defense rested its case, the court held a jury instruction conference which was off the record. On the record, the court listed the pattern jury instructions that it planned to give, including both CALCRIM No. 3150, regarding the defendant's personal use of a firearm and intentional discharge causing injury or death, and CALCRIM No. 1401, regarding crimes committed for the benefit of a criminal street gang. Rocco's counsel made no objection on the record. At the conclusion of trial, the court gave both those instructions. Again, Rocco's counsel did not object.

In addition, the verdict form requested both a jury finding on the gang participation allegation and findings on the firearm allegations. Specifically, the form asked the jury for findings on the allegations that (1) in committing the attempted murder, Rocco "personally and intentionally discharged a firearm, A

HANDGUN, which proximately caused great bodily injury to ELI FLORES within the meaning of Penal Code section 12022.53(d) and (e)(1)"; (2) that in the commission of the offense Rocco personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1); and (3) that in the commission of the offense he personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e). Just as the defendant in *Houston* registered no objection to the verdict forms, there is no indication that Rocco objected to the verdict forms in this case.[5]

Further, as in *Houston*, where the jury made an express finding that the attempted murders were willful, deliberate, and premeditated (*Houston*, *supra*, 54 Cal.4th at p. 1229), in this case the jury made express findings that Rocco had personally used and discharged a firearm in committing the attempted murder. Given that Rocco had notice that the prosecution would seek both the gang and firearm enhancements and failed to object despite numerous opportunities below, and given that the jury expressly found the allegations regarding his personal use of a firearm to be true, Rocco cannot complain now that the trial court sentenced him under both enhancements in spite of deficient allegations in the information.

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[5] After the trial concluded, the defense filed a sentencing memorandum asserting for the first time that, although the gang allegation under section 186.22 was found true, "additional time cannot be imposed per PC 12022.53(2) [*sic*]". However, the memorandum did not refer to the failure of the information to allege Rocco's personal use of a firearm, and Rocco's counsel did not argue the point at the sentencing hearing. Moreover, any objection at the sentencing phase would have been untimely, where Rocco's counsel failed to object at trial to the jury instructions and verdict forms regarding Rocco's personal discharge of the firearm in the commission of the attempted murder, and where the jury already had expressly found that Rocco personally discharged the gun. It should be noted that the prosecution's sentencing memorandum argued that both the gang participation and the firearm sentencing enhancements should be imposed based on the jury's findings.

Rocco's reliance on *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), is misplaced. In *Mancebo*, the trial court imposed a sentence based on the alternative, harsher sentencing scheme under section 667.61 (also known as the "One Strike" law) that is applicable to defendants convicted of certain forcible sex offenses. (*Mancebo, supra*, 27 Cal.4th at p. 738.) In addition, the court applied a sentence enhancement under section 12022.5, subdivision (a), for the personal use of a firearm in the commission of the offenses. (*Ibid.*) Under section 667.61, unless the defendant has previously committed one of seven specified offenses, the prosecution must prove that the current offense was committed under particular circumstances, such as multiple victims, gun use, kidnapping, or binding, and any such circumstance forming the basis for the One Strike sentencing must be pled and proved to the trier of fact or admitted by the defendant in open court. (§ 667.61, subds. (a), (e), former subd. (i); see *Mancebo*, 27 Cal.4th at pp. 741-742.)

The jury in *Mancebo* had found true the special circumstances of gun use and kidnapping against one victim, and gun use and tying or binding against another victim. The trial court realized at the sentencing phase that it could not rely on the gun use circumstance both to support the One Strike sentencing and to support the gun use enhancement under section 12022.5. (See § 667.61, subd. (f); *Mancebo, supra,* 27 Cal.4th at pp. 738, 742.) The trial court thus substituted the "multiple victim" circumstance for the gun use circumstance in sentencing under the One Strike Law, even though the multiple victim circumstance was not pled in the information, was not expressly found by the jury, and was not admitted by the defendant. (*Mancebo, supra*, 27 Cal.4th at p. 738.) Not until the sentencing phase did the defendant receive any notice that the prosecution would seek to invoke the multiple victim circumstance to increase the defendant's sentence. (*Id.* at p. 743.)

The Supreme Court held that the trial court's substitution of the unpled multiple victim circumstance as a basis for imposing the One Strike sentence violated the express pleading provisions of the One Strike law. (*Id.* at p. 743.)

In *Mancebo*, no jury instructions or verdict forms referenced the "multiple victim" circumstance; accordingly, the defendant had no opportunity to object prior to sentencing to reliance on this circumstance for sentencing purposes. This lack of notice, and the failure of the government to secure a special finding by the jury on the special "multiple victim" circumstance, set *Mancebo* apart from both *Houston* and the case at bar. (Cf. *People v. Botello* (2010) 183 Cal.App.4th 1014, 1029 [finding trial court erred in imposing sentence enhancement under § 12022.53, subd. (e)(1), where the prosecution failed to plead subd. (e)(1), failed to ensure jury findings under that provision, and failed to raise the provision at sentencing].)

In sum, we conclude that Rocco forfeited the contention that the sentence enhancements were not properly pled in the information.

DISPOSITION

Cruz's sentence for the section 186.22 enhancement in case No. BA336264 is modified to one year (one-third of the midterm of three years). The clerk of the superior court is directed to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation. Otherwise the judgment as to Cruz is affirmed. The judgment as to Rocco is affirmed in full.

CERTIFIED FOR PARTIAL PUBLICATION

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.