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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEVERON JACQUES RATLIFF, Defendant and Appellant.	E032100 (Super.Ct.No. RIF91977) OPINION
THE PEOPLE, Plaintiff and Respondent, v. STAR MONIQUE VANPOOL, Defendant and Appellant.	E033489 (Super.Ct.No. RIF91977) OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed as modified with directions as to Deveron Jacques Ratliff. Affirmed as to Star Monique Vanpool.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant Deveron Jacques Ratliff.

Patrick J. Hennessy, Jr., under appointment by the Court of Appeal, for Defendant and Appellant Star Monique Vanpool.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., Supervising Deputy Attorney General, and Karl T. Terp, Deputy Attorney General, for Plaintiff and Respondent.

This case involves appeals by Deveron Jacques Ratliff and Star Monique Vanpool (hereafter referred to individually by surname or collectively as defendants) from their respective convictions following a joint jury trial[1] for various crimes arising from a series of fights that culminated with the beating and stabbing of Vincent Thomas. Defendants jointly[2] raise numerous claims of error directed at the jury's guilty verdicts. We conclude, as discussed below, that those claims are meritless. Defendant Ratliff alone raises various claims of sentencing error. We agree with defendant Ratliff's claims of sentencing error, the details of which we discuss below. Therefore, we will direct that

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[1] Defendant Ratliff points out that the abstract of judgment filed July 24, 2002, incorrectly indicates that he was convicted by a court trial. We will direct the trial court to correct the abstract to reflect that defendants were convicted by a jury.

[2] We granted the Attorney General's motion to consolidate the appeals for purposes of oral argument and decision.

the judgment be modified, accordingly, and will affirm as modified as to defendant Ratliff. We will affirm the judgment in its entirety as to defendant Vanpool.

FACTUAL AND PROCEDURAL BACKGROUND

The charges in this case stem from three fights that occurred on May 25, 2000, the details of which are set out in the parties' respective briefs. Because those details are not essential to our resolution of the issues defendants raise on appeal we will not recount them. For our purpose, it is sufficient to note that the first fight occurred at Mel's Liquor store where defendant Ratliff pushed Vincent Thomas's friend in the head after the two had exchanged words about the Raymond Street Crips, a gang in which defendant Ratliff was a member. Vincent Thomas then hit defendant Ratliff in the back of the head and a fight between Ratliff's friends and Thomas's friends broke out in the liquor store parking lot. Defendant Vanpool and her friends were also at the liquor store and she participated in the parking lot fight. That fight ended and the two groups went their separate ways. Vincent Thomas and his friends went to Thomas's house and defendants both went to a house on Victor Street.

The second fight took place at the house on Victor Street when Vincent Thomas and his friends arrived and confronted defendant Ratliff. A brawl broke out when Vincent Thomas's brother and one of his friends punched defendant Ratliff and one of his companions. That fight ended when the woman who owned the Victor Street house threatened to call the police.

The third and final fight occurred in a park where the two groups met again. There, Vincent Thomas saw defendant Ratliff holding what appeared to be a gun. When Vincent ran, he was chased and knocked to the ground where he was beaten and stabbed by several people, one of whom Vincent identified as defendant Ratliff. Another witness saw defendant Vanpool stab Vincent several times. After stabbing Vincent, Vanpool drove off in the truck that Vincent's brother, along with Vincent and two others, had driven to the park. The truck belonged to Vincent Thomas's father. Vincent Thomas had five stab wounds -- one on the upper left bicep, two on the buttocks, one of which was deep and considered serious, and three on his legs and thighs. The wounds required sutures.

According to various witnesses, defendant Ratliff was a member of the Raymond Street Crips and while at the Victor Street house had been heard to say, "All you niggas out here in Moreno Valley claimin' Raymond who never been in the hood are gonna get put on the hood or get smoked." (*Sic.*) A witness also heard defendant Ratliff refer to Vincent Thomas and his friends as "busters," a derogatory term that refers to a person who falsely claims to be in a gang. During the fight in the park, defendant Ratliff also was heard to say to Vincent, while the latter was on the ground being beaten and stabbed, not to "claim" Ratliff's hood anymore. Witnesses also testified that while defendant Vanpool was stabbing Vincent Thomas, she was heard to say, "Raymond Crip, whew, whew" and "Don't ever claim Raymond again."

The jury found defendants not guilty of attempted murder (count 1) and guilty of assault with a deadly weapon, a knife, by means likely to produce great bodily injury or death (count 2). The jury also found defendant Vanpool guilty of carjacking (count 3) and defendant Ratliff guilty of being a felon in possession of a firearm (count 4). The jury also found various special allegations to be true, including the allegation, as to both defendants, that they committed counts 2 and 3 for the benefit of a criminal street gang. (Pen. Code, § 186.22, subd. (b)(1).)[3]

Additional facts and procedural details will be discussed below as pertinent to the issues defendants raise on appeal.

DISCUSSION

Defendants individually and jointly raise various claims of error. We first address those claims defendants raise jointly.[4]

1.

RIGHT TO A FAIR TRIAL

Defendants contend that their respective Sixth Amendment rights to a fair trial were violated by a plea agreement between the prosecutor and a key witness, who also was an apparent accomplice, because the agreement required the witness to testify truthfully, which meant in accordance with the witness's prior statement. In addition,

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[3] All further statutory references are to the Penal Code unless indicated otherwise.

[4] Defendants each invoke rule 13(a)(5) of the California Rules of Court and join in each other's issues.

defendants contend the plea bargain was improper because it granted the prosecutor authority to determine whether the witness's testimony was truthful.

The pertinent details are that Eric Thomas (no relation to the victim Vincent Thomas) testified at trial after having entered into a plea agreement with the prosecutor that provided that Eric[5] would plead guilty to one count of assault and admit a gang allegation. The agreement, as recounted by the prosecutor, was that Eric would be released from custody before sentencing and, in exchange, would provide "truthful testimony in the trial against [defendants]. He has represented that a statement that he gave at the bureau of investigation on a videotape was a truthful statement, and he will testify truthfully." If Eric testifies truthfully, the prosecutor stated that he would get "three years of formal probation and he will be sentenced to credit for time served." When the trial court asked who would decide whether Eric's testimony was truthful, the prosecutor answered, "Well, that will have to be the district attorney's office. That will have to be me." Eric's attorney added his understanding that "when we are talking about truthful testimony, I would believe that to mean testimony Mr. Thomas has already given in [*sic*] videotape, so if it's consistent with those statements."

After Eric Thomas testified at trial, counsel for both defendants moved to strike his testimony, asserting that the plea bargain was improper because it required him to testify in accordance with a prior statement and also because the prosecutor was the sole

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[5] We refer to the witness by his first name in order to distinguish him from others involved in this case who also have the surname Thomas.

arbiter of whether his testimony was truthful. Defendants argued that the noted aspects of Eric's plea agreement were improper under *People v. Bittaker* (1989) 48 Cal.3d 1046, and *People v. Medina* (1974) 41 Cal.App.3d 438. The trial court denied defendants' motion to strike Eric Thomas's testimony.

Defendants contend, as they did in the trial court, that Eric Thomas's plea bargain runs afoul of *People v. Bittaker* and *People v. Medina*, in that the agreement required Eric to testify in accordance with his prior statement and made the prosecutor the exclusive judge of whether Eric's testimony was truthful. We disagree.

In *People v. Allen* (1986) 42 Cal.3d 1222, the Supreme Court explained that, "'[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion.' [Citation.] Thus, when the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to police [citation], or that his testimony result in the defendant's conviction [citation], the accomplice's testimony is 'tainted beyond redemption' [citation] and its admission denies the defendant a fair trial. On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid. [Citations.]" (*Id.* at pp. 1251-1252, fn. omitted, citing, among other cases, *People v. Medina*, *supra*, 41 Cal.App.3d at pp. 450, 455.)

The plea bargain with Eric Thomas required him to testify truthfully and therefore comports with *People v. Allen*. The reference to Eric's earlier statement to the police does not render the plea agreement coercive. A plea agreement that requires a witness to testify completely and truthfully, "even if it is clear the prosecutor believes the witness's prior statement to the police is the truth, and deviation from that statement in testimony may result in the withdrawal of the plea offer, does not place such compulsion upon the witness as to violate the defendant's right to a fair trial." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1010.) As set out above, both the prosecutor and Eric Thomas's attorney stated that Eric had represented that his earlier, videotaped statement was the truth. That statement became the standard or benchmark for determining whether Eric's trial testimony was truthful but reference to that statement in the plea agreement did not violate defendants' right to a fair trial. (*Ibid*.)

The fact that the prosecutor would determine whether Eric testified truthfully does not render the plea agreement coercive. In claiming otherwise, defendants rely on *People v. Bittaker*, a case that involved a plea agreement that specified the prosecutor "'shall have authority and discretion to determine whether or not [the witness] testified truthfully and completely'" and, if requested by the witness, a superior court judge "'shall determine whether or not there has been an abuse of such authority and discretion.'" (*People v. Bittaker*, *supra*, 48 Cal.3d at p. 1093.) In reviewing the quoted provision to determine whether the plea agreement compelled the witness to testify in a particular manner and thus violated the defendant's right to a fair trial, the Supreme Court found the

language regarding judicial review "troubling." (*Id*. at p. 1094.) In particular, the court noted that the controlling legal principles "are clear: if [the witness] testified fully and truthfully, he is entitled to the benefit of his bargain; if not, the district attorney has discretion to revoke the bargain. We do not believe they can be altered by contract so as to limit the court to reviewing the district attorney's discretionary finding as to whether [the witness] told the truth." (*Ibid*.) Although the court counseled against including "language in a plea bargain which purports to give the district attorney, and not the court, discretion to determine whether the witness testified truthfully" it nevertheless found that the language did not result in reversible error because the language did not "present[ ] any significant risk of inducing [the witness] to give false or incomplete testimony." (*People v. Bittaker*, *supra*, 48 Cal.3d at p. 1094.)

The same result pertains here. To the extent the district attorney rather than the court was empowered in this case to determine whether Eric's testimony was truthful, nothing in the record suggests that provision posed any significant risk of inducing him to testify falsely or incompletely. The prosecution and defense questioned Eric thoroughly about the events at issue in this case and about the plea agreement. In doing so, they exposed Eric's impetus to testify and also revealed any inconsistencies in his testimony and the earlier statement. Consequently, we must conclude here, as the Supreme Court did in *People v. Bittaker*, that although "troubling" the provision of the agreement that empowered the district attorney to determine whether Eric was telling the truth, if error, did not violate defendants' right to a fair trial.

2.

PROSECUTORIAL MISCONDUCT

Defendants next contend that the prosecutor personally vouched for the truth of Eric Thomas's testimony and in doing so committed misconduct. We disagree.

During closing argument the prosecutor addressed the credibility of various witnesses, including Eric Thomas. In doing so, the prosecutor first recounted CALJIC No. 2.21.1, which addresses witnesses who are willfully false: "A witness willfully false in one material part of his or her testimony is to be distrusted in others. Obviously, right? You may reject the whole testimony of a witness who willfully has testified falsely, who lied, right, as to a material part -- or material point, excuse me, unless from all the evidence you believe the probability of truth favors his or her testimony in other particulars. [¶] Now, this is really kind of worst case scenario. Somebody comes in here and you can say, yes, they absolutely lied to us about this. You can still say, you know what, but given all the other evidence on these other points, I believe them. That's the worst case scenario. [¶] I don't believe the evidence . . . showed Eric Thomas willfully lied, but even if so, this tells you you don't just toss out their testimony. [¶] Okay. So let's look at -- And there's going to be a lot of -- I'm sure defense will talk to you at some length about the deal I cut with Mr. Thomas. They might say, gee, Mr. Markson cut a deal with the defendant. He's the one with the gun. He had a motive to lie. That's fine. I'd argue the same thing, you know. But I believe when you look at all the evidence in this case, especially with respect to the circumstances surrounding the evidence against

him, you'll see he was a lightweight in this case, *and that by no means did I cut a deal with the defendant in this case*." (*Sic.*) (Italics added.)

Defendants contend the emphasized language implies that the prosecutor was aware from his pretrial evaluation of the evidence, that Eric Thomas was a "lightweight" and that defendant was the person guilty of the charged crimes. We do not share defendants' interpretation of the prosecutor's argument. Before addressing the substance of defendants' claim, we first note that neither defendant objected to the prosecutor's argument. Assuming the argument was improper, defendants' failure to object precludes them from raising the prosecutorial misconduct claim on appeal. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 501-502, noting that except in the most extreme case in which an objection would be futile, defendant must object in order to preserve a claim of prosecutorial misconduct for review on appeal.)

But even if this were an extreme case, the prosecutor's statements are not improper. "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her [or his] office behind a witness by offering the impression that she [or he] has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her [or his] comments cannot be

characterized as improper vouching. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 971.)

Viewed in context, it is apparent that the prosecutor was urging the jury to view the evidence presented at trial and to reject the notion, which the prosecutor anticipated would be raised by the defense, that Eric Thomas was an actual perpetrator of the crimes in question.[6] The prosecutor's argument is entirely appropriate and does not constitute improper vouching for the veracity of a witness. Accordingly, we reject defendants' contrary claim.

3.

EVIDENCE THAT WITNESSES HAD BEEN THREATENED

Defendants contend that the trial court abused its discretion by allowing the prosecutor to ask witnesses whether they had been threatened or feared retaliation if they testified against defendants in this case. Defendants claim that the questions were inherently prejudicial and therefore the trial court should have exercised discretion under Evidence Code section 352 to preclude the prosecutor from asking such questions.

The pertinent factual details are that after the fourth prosecution witness had been questioned on direct exam, defendant Vanpool's attorney pointed out to the court that the prosecutor began his direct examination by asking each witness "about intimidation, threats, et cetera." Counsel asserted that there had not been "one shred of evidence that

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[6] We assume the prosecutor misspoke when he used the term defendant and instead meant to say perpetrator.

anybody has been intimidated" and he wondered "if it's gotten to [the] point that the prosecutor is creating the image to the jury that [the defendants] are responsible for some kind of gang retaliation even if there hasn't been a shred of evidence." The trial court expressed the view that the questions were relevant to the credibility of the witnesses' testimony even though each witness had denied any intimidation or threat. The court found that there had been no prejudice at that point.

Defendants contend that the questions regarding threats and intimidation were more prejudicial than probative because the questioning "would serve to prejudice [defendants] in the minds of the jurors." The claim is without merit.

At the outset we note that in raising this claim, defendants have not recounted either the prosecutor's questions or the witnesses' responses to those questions. Defendants apparently would have us assume the questions were asked and that the witnesses testified they had been threatened or intimidated. We are not compelled to engage in such assumptions. Instead, defendants must demonstrate that error occurred in the trial court. (*People v. Justice* (1959) 167 Cal.App.2d 616, 618.) Because defendants have not cited the facts necessary to support their claim, they have not demonstrated error.

Defendants have also failed to specify how the prosecutor's questions might have prejudiced the jurors against defendants.[7] The assertion that such prejudice would occur

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[7] To the extent defendants contend the questions were improper because there was no evidence connecting defendants to the purported threats and intimidation, they are

[footnote continued on next page]

is speculation, unsupported by fact or reason. Accordingly, we must reject defendant's claim that the trial court abused its discretion by allowing the prosecutor to ask witnesses whether they had been threatened or intimidated in an effort to dissuade them from testifying.

4.

SUFFICIENCY OF THE EVIDENCE

Defendant Vanpool challenges the sufficiency of the evidence to support her conviction for carjacking and to support the jury's true findings on the criminal street gang enhancements.

The standard by which we review a challenge to the sufficiency of the evidence is long established and well known. "In reviewing a challenge to the sufficiency of evidence, the reviewing court must determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence

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[footnote continued from previous page]
wrong. Evidence that a witness is afraid to testify is relevant to the witness's credibility and therefore admissible. It is not necessary to show that the defendant is the source of the witness's fear. (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588, citing Evid. Code, § 780; *People v. Warren* (1988) 45 Cal.3d 471, 481; *People v. Malone* (1988) 47 Cal.3d 1, 30; and *People v. Green* (1980) 27 Cal.3d 1, 29-30.)

proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Substantial evidence is "evidence which is reasonable, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

A. Carjacking Conviction

Section 215, subdivision (a) defines carjacking as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear."

Defendant Vanpool contends first that there was no evidence to show that she planned to take the truck at the time she stabbed Vincent Thomas. Next, she argues the evidence was insufficient to show that she took the truck from Vincent Thomas's immediate presence because Vincent was as much as 150 feet from the truck when Vanpool stabbed him. Vanpool contends that theft of the vehicle was a complete afterthought that she considered only after she noticed the keys in the vehicle's ignition.

Although the evidence supports Vanpool's characterization of the events, it also supports the interpretation that she harbored two objectives in stabbing Vincent Thomas -- to punish him for falsely claiming to be a member of the Raymond Street Crips and to take the truck. According to various witnesses, after stabbing Vincent Thomas, Vanpool refused to ride in her coparticipants' car and instead ran directly to the truck and drove

off. From that evidence the jury could reasonably infer that Vanpool stabbed Vincent Thomas in order to take the truck.

The remaining issue is whether the evidence supports an implied finding that defendant Vanpool took the truck from Vincent Thomas's immediate presence. As the trial court instructed the jury, "'Immediate presence' means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property."

The only evidence pertinent to whether the truck was taken from the immediate presence of Vincent Thomas that we have been able to locate in the record is the testimony of Eric Thomas who stated Vincent was about 40 feet from the truck when he was stabbed by Vanpool.[8] That evidence supports the jury's implied finding that the truck was within the immediate presence of Vincent Thomas at the time defendant Vanpool stabbed Vincent and then drove away in that vehicle. Accordingly, we conclude the evidence is sufficient to support the jury's verdict finding defendant Vanpool guilty of carjacking.

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[8] Vanpool contends there was evidence to show that Vincent was 150 feet away from the truck at the time of the stabbing and, therefore, at the time of the carjacking. However, the portion of the record defendant Vanpool cites to support that assertion is a discussion between the court and counsel regarding the admissibility of prison records under section 969b. The Attorney General in turn cites the trial court's comment made in the course of denying defendants' section 1118.1 motion for judgment on the carjacking count, that there was evidence Vincent was 50 yards from the car. However, we have not located that evidence in the record and the parties' have not cited that evidence in their respective briefs.

B. Criminal Street Gang Enhancement

Section 186.22, subdivision (b)(1) authorizes a sentence enhancement when a person "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." Defendant Vanpool contends the evidence in this case does not show that she was a member of a gang or that she committed the crimes in furtherance of the gang's activities. We disagree.

Vanpool notes that the prosecutor did not present expert testimony to establish that the Raymond Street Crips are a criminal street gang as defined in section 186.22, subdivision (f). Vanpool does not cite any authority to support the view that expert testimony is required nor does she develop an argument to support the assertion. "Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion. [Citations.]" (*People v. Ham* (1970) 7 Cal.App.3d 768, 783; *People v. Hardy* (1992) 2 Cal.4th 86, 150.)

Similarly, Vanpool does not cite authority to support her assertion that membership in a gang is an element of the criminal street gang enhancement. In fact, membership in a criminal street gang is not an element. As set out above, and as the trial court instructed the jury, what is required is that the defendant commit a felony "for the benefit of, at the direction of, or in association with" a criminal street gang. Eric Thomas testified, in pertinent part, that defendant Vanpool participated in the stabbing of Vincent

Thomas and while doing so was heard to say that Vincent should never claim "Raymond" again. From that testimony the jury could reasonably infer that Vanpool committed that crime in order to promote the reputation of "Raymond." That inference is sufficient to support the jury's implied finding that Vanpool committed the stabbing "for the benefit" of the Raymond Street Crips.

Likewise, Eric Thomas testified that when Vanpool took the truck, she said, "I'm gonna take this truck. I'm gonna get this motherfucker. I am gonna take his truck." That testimony combined with the testimony regarding Vanpool's statements while stabbing Vincent supports the inference that Vanpool took the truck to punish Vincent for falsely claiming to be a member of the Raymond Street Crips and in doing so acted for the benefit of a criminal street gang.[9]

Accordingly, for the reasons discussed, we must reject defendant Vanpool's challenge to the sufficiency of the evidence to support either the carjacking or the criminal street gang enhancement.

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[9] Although defendant Ratliff joins in the issues raised by defendant Vanpool, his joinder cannot include this sufficiency of the evidence claim. Challenges to the sufficiency of the evidence are fact specific. Because defendant Vanpool and defendant Ratliff committed different criminal acts, and defendant Vanpool only addresses the facts that are relevant to her conduct, her argument does not identify any purported evidentiary deficiency as to defendant Ratliff. Consequently, her discussion does not raise a sufficiency of the evidence claim as to defendant Ratliff.

5.

SENTENCING

Defendant Ratliff raises two claims of sentencing error. We first address his claim that the trial court erred by imposing a 10-year gang enhancement under section 186.22, subdivision (b)(1) rather than the 15-year minimum parole term under subdivision (b)(5).

A. Gang Enhancement

The trial court sentenced defendant Ratliff on count 2, his conviction for assault with a deadly weapon, to 25 years to life in prison, the sentence mandated under the three strikes law. The trial court also imposed a 10-year sentence enhancement on the criminal gang allegation the jury found true in connection with that count. The trial court imposed the 10-year sentence under subdivision (b)(1)(C) of section 186.22, which states in pertinent part, "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 . . . of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (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."

Defendant Ratliff contends that because the trial court sentenced him on count 2 to a term of 25 years to life, the exception in paragraph (5) of section 186.22, subdivision

(b) applies. That exception states, in pertinent part, that "[A]ny 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).) We agree with defendant Ratliff.

Defendant Ratliff was convicted of assault with a deadly weapon, a felony ordinarily punishable by a term of two, three, or four years in prison. (§ 245, subd. (a)(1).) However, when a defendant has two prior serious felony convictions, the punishment for a third felony conviction is specified in section 667, subdivision (e), the penalty provision of the so-called three strikes law. The mandatory third strike sentence for committing the felony of assault with a deadly weapon is a term of 25 years to life in state prison. (§ 667, subd. (e)(2)(A)(ii).) Because defendant Ratliff committed a felony punishable by a sentence of life in prison, the exception in paragraph (5) of section 186.22, subdivision (b) applies. Therefore, the trial court should not have sentenced defendant under subdivision (b)(1) of section 186.22 to a 10-year sentence on the criminal street gang allegation. Instead, the trial court should have specified a minimum parole term of 15 years in accordance with subdivision (b)(5) of section 186.22.

The Attorney General contends, citing *People v. Montes* (2003) 31 Cal.4th 350, that the exception in section 186.22, subdivision (b)(5) only applies when the crime itself is punishable by life in prison and not when the life sentence is the result of an enhancement. In *Montes*, the defendant committed attempted murder for which the trial court sentenced him to seven years in state prison. The trial court also imposed a

consecutive sentence of 25 years to life for a firearm enhancement under section 12022.53, subdivision (d) and a consecutive 10-year term for a criminal street gang enhancement. The defendant argued that the 10-year criminal street gang enhancement sentence was improper because the trial court had sentenced him to life in prison and therefore the proper sentence was the minimum parole term specified in subdivision (b)(5) of section 186.22. In rejecting the defendant's claim, the Supreme Court held that the phrase "'felony punishable by imprisonment in the state prison for life'" as used in section 186.22, subdivision (b)(5) refers to the sentence imposed on the felony alone and without reference to the sentence imposed on a related enhancement. (*People v. Montes*, *supra*, 31 Cal.4th at p. 353.)

Defendant Ratliff's sentence of 25 years to life for committing the crime of assault with a deadly weapon was not the result of a sentence enhancement, as in *People v. Montes*. Rather, that sentence was the result of the three strikes law which the Supreme Court has held "articulates an alternative sentencing scheme for the current offense rather than an enhancement." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.) Under the three strikes sentencing scheme, the sentence for committing the felony of assault with a deadly weapon, having previously been convicted of two serious or violent felonies, is a term of 25 years to life in prison. That sentence constitutes a term of imprisonment for life which, in turn, brought defendant Ratliff within the exception specified in paragraph (5) of section 186.22, subdivision (b). Accordingly, the 10-year sentence enhancement imposed on count 2 shall be stricken and the judgment amended to

specify that defendant Ratliff shall not be eligible for parole until a minimum period of 15 years has elapsed, as set out in section 186.22, subdivision (b)(5).

B. Prior Prison Term Enhancements

Defendant Ratliff contends, and the Attorney General concedes, that the trial court improperly stayed execution of the sentence imposed on two section 667.5, subdivision (b), prior prison term enhancements. A sentence enhancement must either be imposed or stricken. (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1231.) Accordingly, we will direct the trial court to strike each of the stayed section 667.5, subdivision (b) enhancements imposed on count 2.

DISPOSITION

The judgment is affirmed as to defendant Vanpool. The trial court is directed to modify the judgment as to defendant Ratliff by striking the two section 667.5, subdivision (b) enhancements imposed on count 2 and by amending the section 186.22 enhancement from a 10-year prison term under subdivision (b)(1) to a minimum 15-year parole term under subdivision (b)(5). As modified, the judgment as to defendant Ratliff is affirmed. The trial court is further directed to amend the abstract of judgment of defendant Ratliff's sentence to reflect the modified sentence and also to show that defendant Ratliff was convicted by a jury trial and to forward copies of the amended abstract to the appropriate agencies.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Gaut
J.