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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MASON W. DUBON et al., Defendants and Appellants.	B276791 (Los Angeles County Super. Ct. No. BA436574)

APPEALS from judgments of the Superior Court of Los Angeles County, Edmund W. Clarke, Jr., Judge. Affirmed and remanded with directions.

Maggie Shrout, under appointment by the Court of Appeal, for Defendant and Appellant Mason W. Dubon.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant Luis A. Hernandez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Ilana Herscovitz Reid, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Mason Dubon and Luis Hernandez of assault by means of force likely to produce great bodily injury (Penal Code, § 245, subd. (a)(4))[1] and two counts of dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)). The jury found true the allegations that Dubon and Hernandez personally inflicted great bodily injury on Victor Cisneros (§ 12022.7, subd. (a)) and that they committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)). Dubon and Hernandez challenge their convictions on several grounds, including that the trial court failed to instruct the jury on the great bodily injury enhancement under section 12022.7, subdivision (a), and that counsel for each of them provided ineffective assistance by failing to request an instruction on intoxication. Hernandez also argues substantial evidence does not support the true finding on the gang allegation.

We affirm both convictions. Neither Hernandez nor Dubon received ineffective assistance of counsel, and none of Hernandez's remaining arguments has merit. During the pendency of this appeal, however, the Governor signed Senate Bill No. 1393, which amended sections 667 and 1385 effective January 1, 2019 to give trial courts discretion whether to impose five-year sentence enhancements under section 667, subdivision (a). Because the trial court imposed two such enhancements on Hernandez, we vacate Hernandez's sentence and remand to the trial court with directions to exercise discretion whether to strike

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1 Statutory references are to the Penal Code.

one or more of the enhancements under section 667, subdivision (a).

We also vacate Dubon's sentence and remand with instructions for a new trial on the sentence enhancement under section 12022.7, subdivision (a). The court's error in failing to instruct the jury on the great bodily injury allegation under section 12022.7, subdivision (a), was not harmless with regard to Dubon because Dubon contested the omitted elements of the instruction, and there was sufficient evidence to support a contrary finding.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Dubon and Hernandez Attack Cisneros*

Dubon and Hernandez met Cisneros and several others in the parking lot of a laundromat on the evening of May 4, 2015. The group drank beer together for several hours, and Hernandez and Cisneros shared a small bottle of alcohol. By 10:00 p.m. several people, including Dubon, Hernandez, and Cisneros, appeared intoxicated.

Dubon, Hernandez, and Cisneros also snorted a white substance Hernandez called "crystal." Hernandez became "aggressive" shortly after taking the drug. He said that he was a member of the Playboys gang and that "[t]his was his block and whatever he wanted should be done there." Cisneros said that he was in the military in El Salvador and that Hernandez should not "feel . . . stronger" than "anybody else because everybody was equal." Hernandez insisted he was stronger than Cisneros because he was a "gang banger" and was "going to beat . . . up" Cisneros. Cisneros claimed he was from the "M.S." gang and the

"18" street gang, both of which are rivals of the Playboys, and neither of which was true.[2]

Angered by Cisneros's declaration, Hernandez pushed Cisneros to the ground. Cisneros got up, but Hernandez pushed him down again. Another person in the parking lot that night, Carlos Vasquez, attempted to intervene, but Hernandez "went on hitting" Cisneros in his face and the side of his head, and Dubon kicked Cisneros in his stomach and on his legs. Hernandez pulled a gun from his waistband, gave it to Dubon, and told Dubon to shoot Vasquez if he "went on getting involved." While pointing the gun at Vasquez's forehead, Dubon kicked Cisneros in the stomach and ribs "lots of times." When Cisneros stopped moving, Hernandez grabbed Cisneros's head and repeatedly slammed it against the ground. After Cisneros began bleeding from the back of his head, Dubon and Hernandez backed away from him. Cisneros appeared to be unconscious.

B. *Dubon and Hernandez Dissuade Witnesses from Calling Paramedics or Police*

Vasquez and two other individuals in the parking lot, Flor Aguirre and Jose Gomez, wanted to call paramedics or the police. Dubon and Hernandez said not to call anyone. Hernandez told Aguirre he would kill her, Vasquez, and Gomez if she called police. Gomez offered to drive Cisneros to a hospital, and Aguirre

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[2] "M.S." stands for Mara Salvatrucha, a Salvadoran gang. "18" refers to the 18th Street gang. Both gangs are rivals of each other and the Playboys gang, and according to the People's gang expert, a member of the M.S. gang "would never" simultaneously belong to the 18th Street gang.

rode with him. Dubon got in the car, and Hernandez told Dubon to kill them if they called for help.

At the hospital Aguirre asked a nurse for help and told her she and others found Cisneros on the street. She also gave the hospital a false name because she feared Dubon or Hernandez would kill her if she provided her real name. Aguirre went home directly from the hospital while Gomez returned to the parking lot with Dubon. During the drive back, Dubon told Gomez "not to say anything" and "not to tell anything."

For several days following the beating, Hernandez sent text messages to Aguirre suggesting she not speak with police. Vasquez received threatening phone calls from people who said they were "friends" of Dubon and Hernandez "from the gang." Nevertheless, Vasquez eventually reported the incident to police.

C. *Cisneros Suffers Permanent Injuries*

Cisneros remained in a coma for at least 10 days after the attack. His face was swollen and beaten beyond recognition, and Cisneros's girlfriend saw bruises on his back and hip. Medical records showed Cisneros suffered "trauma" as a result of a "hematoma to the posterior occipital region mostly on the left side."[3] Cisneros underwent two surgeries as a result of the beating, one of which his doctor called "life saving." He stayed in the hospital for two weeks and in a recovery center for almost two months. He also developed epilepsy for which he takes medication.

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[3] The occipital region is the back of the head. (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1185.)

D. *The Jury Convicts Dubon and Hernandez, and the Trial Court Sentences Them*

The People charged Dubon and Hernandez with one count of attempted murder (§§ 664, 187, subd. (a)), two counts of dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)), and one count of assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(4)). The People also charged Hernandez with one count of possession of a firearm by a convicted felon (§ 29800, subd. (a)(1)). The People also alleged Hernandez had four prior convictions for felonies that were serious felonies within the meaning of section 667, subdivision (a)(1), and serious or violent felonies within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12). In connection with the count for assault by means of force likely to cause great bodily injury, the People alleged Dubon and Hernandez personally inflicted great bodily injury on Cisneros within the meaning of section 12022.7, subdivision (a). In connection with all counts except the count against Hernandez for possession of a firearm, the People alleged Dubon and Hernandez committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)).

The jury acquitted Dubon and Hernandez of attempted murder and acquitted Hernandez of possession of a firearm by a convicted felon, but convicted Dubon and Hernandez of assault by means of force likely to produce great bodily injury and both counts of dissuading a witness from reporting a crime. The jury found true the allegations that Dubon and Hernandez personally inflicted great bodily injury on Cisneros (§ 12022.7, subd. (a)) and

that they committed the offenses on which they were convicted for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)).

The trial court sentenced Dubon to a prison term of 16 years, which included a three-year term under section 12022.7 for the great bodily injury enhancement. The court sentenced Hernandez to a prison term of 37 years to life, which included two five-year terms under section 667, subdivision (a), for prior serious felony convictions. Each defendant filed a timely notice of appeal.

DISCUSSION

A. *The Trial Court's Failure To Instruct on the Great Bodily Injury Allegation Prejudiced Dubon, But Not Hernandez*

Dubon and Hernandez argue that the trial court erred by failing to instruct the jury on the sentence enhancement under section 12022.7, subdivision (a), and that this error prejudiced them. The People concede the error but argue the error prejudiced neither of them.

1. *Relevant Proceedings and Applicable Law*

Section 12022.7, subdivision (a), provides, "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." The trial court intended, but apparently forgot, to instruct the jurors they had to make findings in connection with the great bodily injury allegation under section 12022.7, subdivision (a), and failed to

instruct the jury on the elements of the enhancement. The trial court also failed to include an instruction on the enhancement under section 12022.7, subdivision (a), in the packet of written instructions provided to the jury, and neither the prosecutor nor the defense attorneys addressed the elements of the enhancement in their closing arguments. The verdict form for the count of assault by means of force likely to cause great bodily injury under section 245, subdivision (a)(4), however, included a question asking the jury whether, in the commission of that crime, each defendant "personally inflicted great bodily injury upon Victor Cisneros . . . within the meaning of [section] 12022.7[, subd.] (a)."

Had the court given CALCRIM No. 3160, the pattern jury instruction for the enhancement under section 12022.7, subdivision (a), the court would have instructed the jury, among other things, to "decide whether the People have proved the additional allegation that the defendant[s] personally inflicted great bodily injury on [Cisneros] in the commission of that crime." (See *People v. Modiri* (2006) 39 Cal.4th 481, 485-486; *People v. Poroj* (2010) 190 Cal.App.4th 165, 176.) The court did instruct the jury on the elements of assault with force likely to produce great bodily injury under section 245, subdivision (a)(4), which included defining "great bodily injury" as a "significant or substantial physical injury." And the definition of "great bodily injury" under section 245, subdivision (a)(4), is the same as the definition of that term under section 12022.7, subdivision (a). (See § 12022.7, subd. (f) [for purposes of section 12022.7, "'great bodily injury' means a significant or substantial physical injury"]; *People v. Brown* (2012) 210 Cal.App.4th 1, 7 ["[g]reat bodily injury, as used in section 245, means significant or substantial

injury"].) Thus, the jury knew "great bodily injury" meant "significant or substantial physical injury."[4]

Unlike the offense of assault with force likely to produce great bodily injury under section 245, subdivision (a)(4), the sentence enhancement under section 12022.7, subdivision (a), requires the jury to find the defendant personally inflicted great bodily injury. (See *People v. White* (2015) 241 Cal.App.4th 881, 884 ["[s]ection 245 'is directed at the force used, and it is immaterial whether the force actually results in any injury'"]; *People v. Parrish* (1985) 170 Cal.App.3d 336, 343 ["[p]unishment under section 245, subdivision (a), is directed at the force used, and it is immaterial whether the force actually results in any injury," whereas "section 12022.7 punishes the actual infliction of great bodily injury"].) "'Commonly understood, the phrase "personally inflicts" means that someone "in person" [citation], that is, directly and not through an intermediary, "cause[s] something (damaging or painful) to be endured."'" (*People v. Cardenas* 2015) 239 Cal.App.4th 220, 228; cf. *People v. Cross* (2008) 45 Cal.4th 58, 68 [interpreting the meaning of "personally inflict" under § 12022.7, subd. (a)].) "'[F]or the [great bodily injury] enhancement to apply, the defendant must be the direct, rather than proximate, cause of the victim's injuries.'" (*Cardenas*, at p. 228; accord, *People v. Elder* (2014) 227 Cal.App.4th 411, 418; see *People v. Cole* (1982) 31 Cal.3d 568, 579 ["in enacting section 12022.7, the Legislature intended the

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[4] The trial court also instructed the jury that "words and phrases not specifically defined . . . are to be applied using their ordinary, everyday meanings" and that the People had to prove each element of their case beyond a reasonable doubt.

designation 'personally' to limit the category of persons subject to the enhancement to those who directly perform the act that causes the physical injury to the victim"].)

As indicated, the only issue here is whether the trial court's error was harmless. The court's failure to instruct the jury on "any fact that increases a defendant's minimum or maximum sentence . . . is federal constitutional error comparable to the omission of an element, and is subject to *Chapman-Neder* harmless error review." (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1176 (*Valenti*); see *Alleyne v. United States* (2013) 570 U.S. 99, 103 ["[a]ny fact that increases the mandatory minimum is an 'element' that must be submitted to the jury"].)[5] Under *Chapman v. California* (1967) 386 U.S. 18 we must reverse unless the People "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.)

"Where the trial court fails to instruct on an element of the charged offense, however, the People must make a more substantial showing. That showing is governed by *Neder v. United States* (1999) 527 U.S. 1, 17-19, [citation], and by the California Supreme Court's decision interpreting *Neder,* [*People v.*] *Mil* [(2012) 53 Cal.4th 400] . . . . '*Neder* instructs us to "conduct a thorough examination of the record. If, at the end of that examination [we] cannot conclude beyond a reasonable

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[5] Imposition of the three-year sentence enhancement for personally inflicting great bodily injury increases the mandatory minimum sentence for assault by means of force likely to produce great bodily injury, which otherwise carries a maximum term of four years. (§ 245, subd. (a)(4).)

doubt that the jury verdict would have been the same absent the error—for example, *where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding*—[we] should not find the error harmless.'" [Citation.] On the other hand, the error is harmless if the People can prove beyond a reasonable doubt that the omitted element was uncontested and supported by such overwhelming evidence that no rational juror could come to a different conclusion. . . . This is the converse of the substantial evidence test. If the record shows some evidentiary basis for a finding in the defendant's favor on the omitted element, the People have not met their burden and we must reverse." (*Valenti*, *supra*, 243 Cal.App.4th at p. 1166, italics added; see *Mil,* at p. 410 ["the omission of an element of a . . . sentencing factor is harmless when 'the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error'"]; see also *People v. Merritt* (2017) 2 Cal.5th 819, 832 [instructional error was harmless where evidence supporting the omitted element was "overwhelming and uncontroverted"]; *People v. French* (2008) 43 Cal.4th 36, 53 ["[t]he failure to submit a sentencing factor to a jury may be found harmless if the evidence supporting that factor is overwhelming and uncontested, and there is no 'evidence that could rationally lead to a contrary finding'"].) We evaluate prejudice by reviewing "the entire record, '"including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict."'" (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 39; see *People v. Merritt*, *supra*, 2 Cal.5th at pp. 831-832 [evaluating prejudice by examining the

entirety of jury instructions, attorneys' arguments to the jury, and the effect of the jury's other findings].)

2. *Overwhelming Evidence Supported the Jury's Finding That Hernandez Personally Inflicted Great Bodily Injury*

At trial, counsel for Hernandez conceded Cisneros suffered great bodily injury but argued Cisneros sustained his head injuries by falling down while he was drunk and not as a result of Hernandez's blows. Several witnesses testified Cisneros was intoxicated and took drugs the night Hernandez attacked him, but no witness testified they saw Cisneros fall down and hit his head on the ground, other than when Hernandez pushed him and hit him.

Counsel for Hernandez also argued Vasquez, not Hernandez, might have attacked Cisneros. Counsel for Hernandez suggested Aguirre and Gomez conspired to protect Vasquez by blaming Hernandez. Hernandez introduced evidence Aguirre and Gomez initially lied to police about knowing Vasquez and about his presence at the assault, but there was no evidence suggesting anyone other than Hernandez actually hit or slammed Cisneros's head or had a motive for doing so. Indeed, multiple witnesses, including Cisneros, testified that Hernandez, and no one else, got into a verbal altercation with Cisneros, hit Cisneros in the head, and slammed his head into the ground multiple times. Hernandez has not identified any evidence that could support a jury finding that Vasquez, and not Hernandez, attacked Cisneros.

The prosecutor did not specifically address the great bodily injury sentence enhancement in his closing argument, but he

argued Hernandez caused Cisneros "great bodily injury" by "lift[ing] up the head and slam[ming] it down." Considering the trial court's instructions (which included the definition of great bodily injury), the arguments of counsel, the verdict, and the overwhelming evidence of Hernandez's personal involvement in the attack on Cisneros in which he caused severe injuries to Cisneros's head, we have no doubt the jury's finding on the sentence enhancement under section 12022.7, subdivision (a), would have been the same even if the court had properly instructed the jury on that enhancement.

3. *There Was Evidence Sufficient To Support a Finding Dubon Did Not Personally Inflict Great Bodily Injury*

There was little evidence at trial that Dubon, even if the jury believed he kicked Cisneros in the stomach and legs, inflicted great bodily injury. Regarding the extent of his injuries in these areas, Cisneros stated, "When I was going to get up, [Dubon] kicked me in the stomach and it knocked the breath out of me and I couldn't get up." When questioned whether Cisneros had "any injuries to [his] stomach," Cisneros downplayed the extent of his injuries and said, "No, just swelling." Although Cisneros's girlfriend testified she saw bruises on Cisneros's back and hip when she visited him in the hospital, the People did not introduce any other evidence to corroborate the extent of injuries caused by Dubon.

In contrast, as counsel for Dubon stressed during closing argument, Cisneros's medical records did not show he sustained any significant or substantial injury to his stomach, abdomen, or legs. The records reflected that, soon after Cisneros arrived at

the hospital, an examining doctor observed no lesions to Cisneros's back, no deformities to his extremities, and a "soft, flat, nontender, [and] nondistended" abdomen. Cisneros's medical chart for the same day also indicated "[n]ormal [f]indings" for Cisneros's abdomen, respiratory function, and chest. And the diagram used to indicate the locations of Cisneros's injuries indicated only head injuries and an abrasion to his knee. An assessment six days later similarly indicated injuries only to Cisneros's head. As counsel for Dubon rhetorically asked the jury, "Wouldn't you expect to see some evidence of trauma to this area if, according to [Aguirre], Mason Dubon kicked [Cisneros] so many times she lost count?"

As discussed, the trial court instructed the jury on the meaning of great bodily injury under section 245, subdivision (a)(4), but the court did not instruct the jury that, to find true the allegation under section 12022.7, subdivision (a), the jury had to find Dubon directly performed an act that actually caused great bodily injury to Cisneros. (See *People v. Cole*, *supra*, 31 Cal.3d at p. 579; *People v. Cardenas, supra,* 239 Cal.App.4th at p. 228.) In contrast to the evidence showing the extent of injuries Hernandez inflicted on Cisneros, the record contains some, but not much, evidence that Dubon's kicks to Cisneros's stomach or legs actually caused great bodily injury. The record includes at least as much evidence supporting the contrary finding that Dubon did not personally cause "physical pain or damage, such as lacerations, bruises, or abrasions." (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047; cf. *People v. Escobar* (1992) 3 Cal.4th 740, 750 [evidence was sufficient to support a finding of great bodily injury where the victim had "extensive bruises and abrasions over [her] legs, knees and elbows, injury to her neck[,]

and soreness in her vaginal area of such severity that it significantly impaired her ability to walk"].) Although, as the People argue, there was substantial evidence to support the true finding, that is not the test. (See *Valenti*, *supra*, 243 Cal.App.4th at p. 1166 ["the converse of the substantial evidence test" applies when the trial court fails to instruct the jury on the elements of a sentence enhancement].)

Nor, contrary to the People's contention, did the language in the verdict form restating section 12022.7, subdivision (a), cure the court's instructional error. The People correctly argue that """[t]he absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole""" (*People v. Delgado* (2017) 2 Cal.5th 544, 574) and that the trial court's instruction on assault with force likely to produce great bodily injury supplied the jury with the definition of "great bodily injury" for the purposes of section 12022.7, subdivision (a). But the instruction on the assault offense did not supply the missing element of the enhancement, nor did it inform the jurors they had to determine, separately from whether Dubon committed the offense of assault with force likely to produce great bodily injury, whether Dubon personally inflicted actual and substantial injury on Cisneros. (See *People v. Ford* (1964) 60 Cal.2d 772, 792-793 ["it is the trial court's duty 'to see to it that the jury are adequately informed on the law governing all elements of the case submitted to them to an extent necessary to enable them to perform their function in conformity to the applicable law'"]; *People v. Saldana* (1984) 157 Cal.App.3d 443, 453 [the purpose of the instructions "is to ensure that the jury is sufficiently informed of the law in order to arrive at a just and fair verdict"].) A verdict form does not instruct; it is a means for

the jury to communicate its conclusions. Trial judges instruct on the law, jurors answer questions. (See *People v. Cory* (1984) 157 Cal.App.3d 1094, 1103 ["the function of the verdict is to register the jury's determination of whether the evidence sufficiently establishes the facts that the instructions recite are necessary to conviction"].)

Moreover, cases in which reviewing courts have found harmless the failure to instruct on an element of a crime or enhancement usually involve circumstances not present here, such as uncontested or overwhelming evidence to support a finding on the omitted element, written instructions on the element given to the jury that the court failed to give orally, arguments of counsel alerting the jury to its obligation to determine the missing element, or a verdict on properly-instructed offenses or enhancements that necessarily supported a verdict on the missing elements. (See, e.g., *People v. Merritt*, *supra*, 2 Cal.5th at pp. 831-832; *People v. Jennings* (2010) 50 Cal.4th 616, 678; *People v. Chun* (2009) 45 Cal.4th 1172, 1205; *People v. Wright* (2006) 40 Cal.4th 81, 98-99; *People v. Flood* (1998) 18 Cal.4th 470, 505; *People v. Majors* (1998) 18 Cal.4th 385, 410.) In Dubon's case there were no other instructions, written or oral, or arguments by counsel that informed the jurors they could only find the enhancement allegation true if they found Dubon directly inflicted actual and substantial bodily injury on Cisneros. The language in the verdict form, without more, did not make the trial court's error harmless. Therefore, the true finding on the allegation Dubon personally inflicted great bodily injury must be reversed.

B. *Neither Attorney Provided Ineffective Assistance by Failing To Request an Instruction on Voluntary Intoxication*

Dubon and Hernandez contend their counsel should have asked the trial court to instruct the jury on voluntary intoxication in connection with the two counts for dissuading a witness. They correctly observe the crime of dissuading a witness under section 136.1, subdivision (b)(1), requires the specific intent "'to affect or influence a potential witness's or victim's testimony or acts.'" (*People v. Pettie* (2017) 16 Cal.App.5th 23, 68; see *People v. Navarro* (2013) 212 Cal.App.4th 1336, 1347.) Because a defendant's intoxication may negate one's ability to form a specific intent (see *People v. Myles* (2012) 53 Cal.4th 1181, 1217), Dubon and Hernandez argue their trial counsel should have asked (and were deficient in not asking) the court to instruct the jury with CALCRIM No. 3426.[6]

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[6] CALCRIM No. 3426 provides in relevant part: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with <*insert specific intent or mental state required*>." Dubon and Hernandez suggest the specific intent or mental state required is "knowledge [the defendant] was trying to discourage [Aguirre] or [Gomez] from reporting victimization and intended to do so." The crime of dissuading a witness under section 136.1, subdivision (b)(1), however, requires only the intent to affect or influence a potential witness's act of making a report to a peace officer or other designated official. (*People v. Navarro*, *supra*, 212 Cal.App.4th at p. 1347.) There is no requirement for the defendant to have "knowledge" that he or she "was trying to discourage" any such report.

"To establish ineffective assistance of counsel in violation of defendant's right under the Sixth Amendment to the United States Constitution, defendant must show that counsel's performance was deficient and that he was prejudiced by the deficiency." (*People v. Olivas* (2016) 248 Cal.App.4th 758, 770 (*Olivas*); see *People v. Woodruff* (2018) 5 Cal.5th 697, 761; *People v. Johnson* (2016) 62 Cal.4th 600, 653.) "Deficient performance is rarely shown if there was a tactical reason for trial counsel's conduct." (*Olivas*, at p. 770; see *Woodruff*, at p. 762 ["'a] reviewing court will not second-guess trial counsel's reasonable tactical decisions'"].)

A defendant is entitled to an instruction on voluntary intoxication "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.'" (*People v. Williams* (1997) 16 Cal.4th 635, 677; accord, *People v. Myles*, *supra*, 53 Cal.4th at p. 1217; *Olivas*, *supra*, 248 Cal.App.4th at p. 771.)[7] The record contains substantial evidence Hernandez and Dubon were intoxicated and possibly under the influence of drugs the night of the attack. No evidence, however, "demonstrate[d] how [their] intoxication might have resulted in [their] inability to formulate the specific intent necessary to violate [section 136.1]." (*Olivas*, at p. 772; see *Williams,* at pp. 677-678 [no evidence that voluntary intoxication had any effect on defendant's ability to formulate intent]; *People v. Horton*

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[7] Contrary to Hernandez's assertion, the trial court did not have a sua sponte duty to instruct the jury on voluntary intoxication. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 295; *People v. Olivas*, *supra*, 248 Cal.App.4th at p. 770.)

(1995) 11 Cal.4th 1068, 1119 [evidence was insufficient to warrant an instruction on voluntary intoxication where the "defense did not introduce any evidence as to defendant's mental state at the time the [crimes] occurred, or any evidence that would have informed the jury regarding the effect of defendant's freebasing cocaine on his actual formation of the specific intent and mental state involved"].) "Given the absence of such evidence, defense counsel could reasonably have made the tactical decision not to request a voluntary intoxication instruction." (*Olivas*, at p. 772.) Because Dubon and Hernandez cannot show their respective counsel's failure to request an instruction on voluntary intoxication constituted deficient performance, there is no merit to their argument they received ineffective assistance.

C. *Substantial Evidence Supported the Gang Enhancement Alleged Against Hernandez*

1. *Applicable Law and Standard of Review*

Section 186.22 "imposes various punishments on individuals who commit gang-related crimes—including a sentencing enhancement on those who commit felonies 'for the benefit of, at the direction of, or in association with any criminal street gang.'" (*People v. Prunty* (2015) 62 Cal.4th 59, 67 (*Prunty*), italics omitted.) Section 186.22, subdivision (f), defines a criminal street gang as "any 'ongoing organization, association, or group of three or more persons' that shares a common name or common identifying symbol; that has as one of its 'primary activities' the commission of certain enumerated offenses; and 'whose members individually or collectively' have committed

or attempted to commit certain predicate offenses." (*Prunty*, at p. 67; see § 186.22, subd. (f).) "'To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity.'" (*People v. Lara* (2017) 9 Cal.App.5th 296, 326.)

When the People allege the existence of a criminal street gang based on the conduct of a "gang subset," section 186.22 "requires the prosecution to introduce evidence showing an associational or organizational connection that unites members of a putative criminal street gang." (*Prunty*, *supra*, 62 Cal.4th at p. 67.) And, "when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Id.* at pp. 67-68.) "The prosecution's evidence must permit the jury to infer that the 'gang' that the defendant sought to benefit, and the 'gang' that the prosecution proves to exist, are one and the same." (*Id.* at p. 75; see *ibid.* [section 186.22 "requires that the gang the defendant sought to benefit, the individuals that the prosecution claims constitute an 'organization, association, or group,' and the group whose actions the prosecution alleges satisfy the 'primary activities' and predicate offense requirements of section 186.22(f), must be one and the same"].)

"""On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."""" (*People v. Jones* (2013) 57 Cal.4th 899, 960; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 345.) A defendant's stipulation on a contested issue waives any contention there was not substantial evidence to support that finding. (*People v. Crosswhite* (2002) 101 Cal.App.4th 494, 507.)

2. *Relevant Proceedings*

Hernandez and Dubon stipulated that the Playboys was a criminal street gang as defined in section 186.22 at all times pertinent to this case and that they were members of the Playboys gang on May 4-5, 2015. They did not stipulate they committed a crime or engaged in any conduct at the direction of, for the benefit of, or in association with any criminal street gang.

Officer Nicolas Martinez testified the Playboys gang started in the 1950's as a "car club" that met on Sundays in Normandie Park. Eventually the club transformed into a violent street gang, and in 1978 a subset of the Playboys gang called the Eastside Playboys was established east of the 110 freeway. The original group west of the freeway became known as the Westside Playboys. In 1982 a southern faction broke away from the Eastside Playboys and became the Southside Playboys. Officer Martinez explained that the three subsets comprise the "Playboys" and that "they are different geographical areas; however, they are still part of the exact same gang." "[P]ut those three different parts together and you have the entire gang,"

Officer Martinez said. Officer Martinez testified the Playboys gang has an organizational structure and hierarchy, but he did not describe them. He also said the Playboys gang has a "leader," but could not name that person.

Through Officer Martinez the People introduced evidence of predicate offenses committed by members of the Westside Playboys. Hernandez did not stipulate he was a member of this subset of the Playboys, but the area he referred to as his "block" fell within the borders of the Westside Playboys.

Officer Martinez also testified about the ways in which gang members committed crimes to benefit the gang. Factors such as where the crime occurred, the type of crime, the victim, and the context of the crime indicated whether the crime was committed at the direction of, for the benefit of, or in association with a criminal street gang. In response to a hypothetical question involving an attack by two members of the Playboys gang, in a location within the territory of the Westside Playboys, and against a person who claimed to be from a rival gang, Officer Martinez opined the assault would have been committed for the benefit of or in association with a criminal street gang with the intent to promote, further, and assist in any criminal conduct by gang members. Officer Martinez based his opinion on the fact that "a gang member is required and . . . expected to lash out in violence against rivals." He said assaults against rivals help a gang protect its territory, bolster the gang's reputation, and uphold the reputation of the attacker. He also testified that scaring potential witnesses to dissuade them from reporting a crime committed by a gang member is an act for the benefit of, at the direction of, or in association with a criminal street gang.

3. *There Was Substantial Evidence Hernandez Assaulted Cisneros and Dissuaded Witnesses from Reporting the Assault To Benefit the Playboys Gang*

Hernandez stipulated the Playboys gang was a criminal street gang within the meaning of section 186.22 and he belonged to the Playboys gang. Therefore, to prove the gang enhancement allegation under section 186.22, subdivision (b)(4), the People only had to introduce evidence that would allow the jury "to infer that the 'gang' [Hernandez] sought to benefit" and the Playboys gang were "one and the same." (*Prunty*, *supra*, 62 Cal.4th at p. 75.) The People met their burden. Hernandez admitted he was a member of the Playboys, and Officer Martinez's testimony was substantial evidence that Hernandez's assault on Cisneros, and his efforts to dissuade witnesses from reporting the assault, benefitted the Playboys gang.

Hernandez contends the evidence was insufficient to support the true finding on the gang allegation because the People failed to show an associational or organizational connection between the Playboys gang and its subsets. Hernandez does not explain why this argument has any relevance where, as here, he stipulated to the existence of a criminal street gang and his membership in it. While the People intended to use evidence of predicate offenses committed by members of the Westside Playboys to show a criminal street gang existed (see § 186.22, subd. (f)), Hernandez's stipulation obviated the need for the People to introduce evidence of predicate offenses. In any event, Officer Martinez testified the three subsets including the Westside Playboys comprised the Playboys gang, stemmed from the same original street gang, and had an

organizational and hierarchical structure. This testimony would have satisfied the People's burden had they needed to show, beyond the stipulation, "[s]ome organizational or associational connection, whether formal or informal," between the subset of the Playboys to which the members who committed predicate acts belonged and the Playboys gang as a whole. (See *Prunty*, *supra*, 62 Cal.4th at p. 74.)

D. *The Trial Court Must Resentence Hernandez*

On September 30, 2018 the Governor signed Senate Bill No. 1393, which amended sections 667 and 1385 effective January 1, 2019 to give the trial court discretion to dismiss, in furtherance of justice, five-year sentence enhancements under section 667, subdivision (a). (See Cal. Const., art. IV, § 8(c)(1).) Hernandez argues, the People concede, and we agree the new provisions will apply to defendants, like Hernandez, whose appeals will not be final on the law's effective date. (See *People v. Brown* (2012) 54 Cal.4th 314, 323 ["[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date," fn. omitted].) Therefore, we must remand Hernandez's matter for a new sentencing hearing after January 1, 2019 to allow the trial court to exercise its discretion whether to dismiss one or more of the enhancements imposed on Hernandez under section 667, subdivision (a).

DISPOSITION

The convictions are affirmed. Dubon's sentence is vacated, and his matter is remanded for the limited purpose of a new trial on the allegation that he personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). Hernandez's sentence is also vacated, and his matter is remanded with directions for the trial court to resentence Hernandez after January 1, 2019 and to exercise discretion whether to dismiss one or more of the enhancements under section 667, subdivision (a).

SEGAL, J.

We concur:

ZELON, Acting P. J.

WILEY, J.*

Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.