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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERON LEWIS WELCOME, Defendant and Appellant.	B230949 (Los Angeles County Super. Ct. No. KA091887)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed in part, reversed in part, vacated in part, and remanded with directions.

Law Offices of Mark J. Werksman, Mark J. Werksman and Kelly C. Quinn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Eron Lewis Welcome appeals from the judgment entered following his conviction by jury of first degree burglary with a person present (Pen. Code, §§ 459, former 667.5, subd. (c)(21)) with admissions he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)), a prior serious felony conviction (Pen. Code, § 667, subd. (a)), and a prior felony conviction for which he served a separate prison term (former Pen. Code, § 667.5, subd. (b)) and a finding he committed the offense for the benefit of a criminal street gang (former Pen. Code, § 186.22, subd. (b)(1)). The court sentenced appellant to prison for 24 years. We affirm the judgment, except we reverse it in part, vacate appellant's sentence, and remand the matter for resentencing with directions.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established about 11:00 a.m. on September 10, 2010, Virginia Zanias and her daughter Whitney, age 23, were in the kitchen of Zanias's home in the 20300 block of Portside Drive in Walnut.

Codefendant Richard Hoover[1] repeatedly rang the doorbell and knocked on the locked front door. Someone then tried to open the door. Zanias heard something that sounded like someone trying to kick in the door. Looking through dark glass in the door, Zanias saw appellant and Hoover at the front door. Appellant was an African-American and Hoover was a Caucasian. Appellant put his face against the glass to try to look inside. Zanias did not answer the door.

Appellant, then Hoover, went through a gate on the side of the house and proceeded to its backyard. Zanias later looked out a window in a door that led from a bedroom to the backyard, and saw appellant. He was wearing a dark, blue and white striped shirt and blue jeans.

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[1] Hoover is not a party to this appeal.

After appellant and Hoover went by, Zanias heard squeaking and scratching sounds. In the back of the house there were two windows that led to a foyer and family room. Appellant and Hoover were there, and Zanias heard them there "making a scratching sound." The left window, for the foyer, had a screen. Zanias testified the screen was "on the window itself." The screen was always on the window except when it was cleaned, and the screen was removed from the inside. Whitney saw appellant standing in front of the window, close to it.

During cross-examination, Whitney testified she could "hear scraping noises, so I'm assuming that they were trying to open the window." Whitney heard the movement of appellant and Hoover at the window but she could see only one of them from her vantage point. Whitney heard the screen pulled off. The windows were not opened. Someone shook a door in the back to see if it was unlocked. None of the doors or windows were broken open.

About 11:30 a.m. on September 10, 2010, Los Angeles County Sheriff's Deputy Marc Saunders received a call about a burglary in progress. While driving to Portside Drive, he saw appellant and Hoover running towards him. Hoover was carrying a large screwdriver. Saunders told them at gunpoint to stop, but the two continued running. Hoover discarded the screwdriver. Deputies eventually apprehended the two.

After deputies arrived at Zanias's home, she observed the screen on the above mentioned left window was off. She testified the screen was "scrunched up." The screen previously had not been in that condition. A Los Angeles County forensic identification specialist unsuccessfully tried to retrieve prints from the left window.

The parties stipulated Rolling 30's Harlem Crips (Rolling 30's) was a criminal street gang within the meaning of former Penal Code section 186.22. Los Angeles Police Officer James Moon, a gang expert, testified as follows. Appellant was a Rolling 30's gang member whose gang moniker was Big Easy. Appellant was about 24 or 25 years old. A photograph depicted tattoos on appellant's arm. One depicted the tattoo OHC, which stood for Original Harlem Crip. The photograph also depicted designations for

cliques within Rolling 30's. Another photograph depicted another Rolling 30's tattoo. Original gangsters (O.G.'s) had been in the gang for years, committed crimes, and had the word "Big" in their monikers. They were the "shot-callers" of the gang and gave orders. The O.G.'s had younger persons who were like assistant managers. The "soldiers" were youngsters.

The Rolling 30's were notorious for disciplining members who did not "put in work," i.e., commit crimes. The following occurred during the prosecutor's direct examination of Moon: "Q. Does that include the managers or the shot-callers? [¶] A. Yes, that's who would order stuff like that. At times they do put in work themselves. That's usually when they do it with younger gang members to show them the way, so they learn how to commit these crimes and be successful. So it benefits the gang itself." Moon did not testify as to what Hoover's age was.

Gang members with the designation "Big" were shot-callers who did training. Most of the time shot-callers delegated work, but when there was someone new to the gang or someone not putting in work, shot-callers accompanied them to show them how to work successfully or to assure they were doing the work and returning a profit to the gang.

Moon testified the expectation was soldiers, the younger ones, would commit crimes to bring money to the gang. Soldiers dressed flashily and displayed money to recruit members. Money was also used to buy narcotics and guns. It was common for Rolling 30's members to be bailed out of jail within hours of their arrest. Moon did not know if appellant "had a bail" and did not remember whether appellant had been in custody the last time Moon had seen appellant in the courtroom.

According to Moon, the commission of burglaries was called "flocking." Residential burglaries were the gang's most common crimes. Items stolen would be converted to cash and the cash distributed within the gang. Persons flocking went as a group. The youngsters called it going to school or going to work, and they brought whatever was needed to commit the crimes, e.g., burglar's tools. When Moon had

arrested people flocking in groups, the size of the groups had ranged from two to five persons. Moon testified he believed a screwdriver was recovered at the scene.

Moon testified that during the last few years, Rolling 30's and its subsets committed crimes like the one in this case. Last year, over 100 arrests were made for residential burglaries committed by the Rolling 30's. They became sufficiently prevalent KTLA did a special on the Rolling 30's, called them knock-knock burglars, and showed video of them knocking on windows, banging on the door, and eventually breaking into the house when they realized no one was home.

The following occurred during the prosecutor's direct examination of Moon: "Let me ask you this then: If two persons went out to a home and did the knocking at the door, ringing the doorbell, then went around to the back of the home, attempted to break into the home and actually pried the window screen off a window, would you consider that as part of what we've been talking about as -- would you have an opinion as to whether or not that was for the benefit of the gang? [¶] A. Yes. [¶] Q. Okay. [¶] Why is that? [¶] A. If -- well, if -- we're talking about documented gang members, and that's their exact M.O. I mean, all the cases I'm coming across, they're knocking on the front door, going around, jumping fences, going into the back and breaking in either through windows or doors or whatever they can get easy access and breaking into these houses."

The colloquy continued, "Q. And why is it, then, though, for the benefit of the gang and not for these two individuals committing the actual crime? [¶] A. For the same reason that I said earlier, is that most of those crimes aren't happening just in their little area. They're in the valley. They're very -- miles -- 30, 40 miles east. Down south as far as Torrance, even further than that. [¶] They're happening everywhere, and they're going outside of their area so it makes it harder for them to be recognized, blend in more. They work as a team. It equals success."

The following later occurred: "Q. So the individual gang members are working as part of a crew, as part of a clique? [¶] A. That's correct. So they can be successful and get away without getting caught. [¶] Q. And the proceeds of these burglaries, they

go not just to the individual members, but all the members of the clique? [¶] A. Within that group and the one that's running it. Yes, there's an expectation. Like I said, they are quick to discipline when that's not happening. [¶] Q. Often, then, the money is used to bail them out if they happen to get caught? [¶] A. Yes." Appellant presented no defense evidence.

ISSUES

Appellant claims (1) there is insufficient evidence of burglary, (2) there is insufficient evidence supporting the true finding as to the gang enhancement, (3) the prosecutor committed misconduct during jury argument, and (4) the trial court erroneously denied appellant's Penal Code section 995 motion.

DISCUSSION

1. *Sufficient Evidence Supports Appellant's Burglary Conviction.*

Appellant claims there is insufficient evidence supporting his burglary conviction because there is insufficient evidence he "enter[ed]" Zanias's house within the meaning of Penal Code section 459.[2] We disagree.

In *People v. Valencia* (2002) 28 Cal.4th 1 (*Valencia*), our Supreme Court concluded "penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute when the window itself is closed and is not penetrated." (*Id.* at pp. 3-4.) There is no dispute the left window at issue was closed and not penetrated. The issue is whether there was penetration into the area behind the screen for the left window.

In the present case, there was substantial evidence as follows. Appellant and Hoover intended to enter the house even before they arrived at the screen. After appellant and Hoover entered the backyard and passed by a window where Zanias was watching, she heard a squeaking and scratching sound. Appellant and Hoover were at the

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[2] Penal Code section 459, states, in relevant part, "Every person who enters any house, room, . . . or other building, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary."

two windows in back of the house, including the left window, and Zanias heard them there "making a scratching sound." Whitney saw appellant standing in front of the window and close to it. There was at least one screwdriver, i.e., the one Hoover discarded.

The screen was to be removed from the inside, i.e., there was no evidence there was anything on the screen that could be employed to facilitate its removal from outside the house. Zanias did not find the screen in place in the windowsill. Instead, the screen had been thrown down and was discovered "scrunched up" in the backyard, providing evidence appellant and/or Hoover had engaged in considerable manipulation of the screen with significant force to remove it. Appellant and Hoover presumably were trying to quickly enter the house; there is no evidence appellant engaged in a discriminating effort to remove the screen without penetrating behind it.

On these facts, the jury reasonably could have concluded appellant and/or Hoover penetrated into the area behind the screen. In particular, the above facts provide substantial evidence appellant and/or Hoover used the screwdriver as a pry tool to penetrate behind the screen, and/or used hands to remove the screen, reaching behind it and through its plane. (Cf. *Valencia*, *supra*, 28 Cal.4th at pp. 4-6.)

Appellant and/or Hoover initially tried to open the front door, and Zanias heard something at the front door like someone trying to kick in the door. Appellant and/or Hoover shook a door in the back to see if it was unlocked. The evidence of these acts provided evidence of a common design or plan (see *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-398, 403) to enter the house by opening closed apertures, and that appellant and/or Hoover penetrated into the area behind the screen and touched the window in an effort to open it. There was sufficient evidence appellant committed first degree burglary with a person present, including sufficient evidence appellant "enter[ed]" Zanias's house within the meaning of Penal Code section 459.

2. *Insufficient Evidence Supports the True Finding as to the Gang Enhancement Allegation.*

Appellant claims there is insufficient evidence supporting the true finding as to the gang enhancement. We agree. Former Penal Code section 186.22, subdivision (b)(1) is part of the California Street Terrorism Enforcement and Prevention Act (STEP Act). (*People v. Albillar* (2010) 51 Cal.4th 47, 54 (*Albillar*).) Our Legislature included the requirement the crime to be enhanced be committed for the benefit of, at the direction of, or in association with a criminal street gang to make it clear a criminal offense is subject to increased punishment under the STEP Act only if the crime is gang-related. (*Id.* at p. 60.)

Not every crime committed by gang members is gang-related for purposes of former Penal Code section 186.22, subdivision (b)(1). (*Albillar, supra*, 51 Cal.4th at p. 60.) The mere fact gang members commit a crime together does not necessarily mean the crime is gang-related for purposes of the former section. (*Id*. at p. 62.)

As to whether appellant committed the present offense "for the benefit of" the Rolling 30's gang, we first consider below the evidence absent Moon's testimony. Viewed from that perspective, the present case was simply one in which appellant and Hoover, initially knocking on a residence's front door, ultimately committed a garden-variety residential burglary in back of the residence, using a pry tool and/or their hands.

Accordingly, appellant had tattoos, but no evidence was presented they were visible to Zanias, Whitney, or, for that matter, Hoover, or that any of those persons believed any of appellant's tattoos were gang tattoos. No evidence was presented appellant and/or Hoover said, did, or wore anything at the scene that indicated either of them was a gang member. No evidence was presented appellant and/or Hoover announced a gang name or gave a gang sign. No evidence was presented Zanias and/or Whitney knew or suspected appellant and/or Hoover were gang members. No evidence was presented Zanias or Whitney were rival gang members.

Moreover, no evidence was presented Hoover knew or suspected appellant was a gang member. No evidence was presented Hoover was a member of the Rolling 30's gang, a point respondent appears to concede. In fact, no evidence was presented Hoover was a member of any gang. The mere fact gang members commit a crime does not make it gang-related for purposes of former Penal Code section 186.22 (*Albillar, supra*, 51 Cal.4th at p. 62), but the present case is one in which there was not even evidence gang *members* committed a crime. Absent Moon's testimony, there was no substantial evidence appellant committed burglary "for the benefit of, at the direction of, or in association with any criminal street gang" within the meaning of former Penal Code section 186.22, subdivision (b)(1).

The above conclusion is not altered when Moon's expert testimony is considered. Moon testified the burglary was committed "for the benefit of" the Rolling 30's gang. However, "something more than an expert witness's unsubstantiated opinion that a crime was committed for the benefit of, at the direction of, or in association with any criminal street gang is required to justify a true finding on a gang enhancement." (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 660 (*Ochoa*).)

Moon clearly testified appellant was a Rolling 30's member. But Moon never testified Hoover was a member of any gang. Moon never testified Hoover associated with gang members. Hoover associated with a single gang member, appellant, only in the sense Hoover was with appellant during the burglary and flight. Moon never testified as to evidence Hoover knew appellant was a gang member or Hoover associated with a person whom Hoover knew was a gang member. Guilt by association is insufficient.

Moon provided generic testimony pertaining to interactions *between gang members*, such as between shot-callers and soldiers. Moon testified to the effect shot-callers usually commit crimes "with younger *gang* members." (Italics added.)

However, Moon did not testify about any interaction between (1) a single gang member and (2) a single nongang member or person as to whom there was no evidence the person was a gang member. Whatever significance Moon's generic testimony might

have had in another case, it does not provide substantial evidence in this case. We have no doubt a gang expert properly can testify in a given case that a person is a gang member. However, no evidence was presented in this case which provided a reasonable basis for an expert opinion Hoover was a gang member, associated with a person knowing the person was a gang member, or otherwise was involved in or connected with a gang. Moon never testified as to Hoover's age; for all Moon's testimony reflects, Hoover might have been older than appellant.

Although Moon testified appellant's tattoos were gang tattoos, no evidence was presented they were visible to Zanias, Whitney, or Hoover. Moon did not testify appellant committed the present offense in Rolling 30's territory; indeed, Moon's testimony was to the contrary. Moon did not testify as to specific instances in which the gang committed crimes far outside its territory for the benefit of the gang, i.e., instances which might have provided a basis for his opinion the instant crime--committed in Walnut--was gang-related. In any event, Moon testified, "They're happening everywhere." The fact, if true, gang-related crimes are committed everywhere cannot mean crimes committed anywhere are necessarily gang-related.

When the prosecutor posed his hypothetical question pertaining to whether Moon had an opinion as to whether the present offense was committed for the benefit of the gang, Moon replied yes and, when the prosecutor asked why, Moon replied, "If -- well, if -- *we're talking about documented gang members, and that's their exact M.O.*" (Italics added.) However, Moon never testified Hoover was a gang member, documented or otherwise.

Moreover, the fact, if true, the way appellant and Hoover committed the present offense was the "exact M.O." of the Rolling 30's does not make the offense gang-related. The way appellant and Hoover committed the present offense was also the "exact M.O." of garden-variety burglaries that are not gang-related. Nothing about the way appellant and Hoover committed the present offense indicated it was not merely a crime but a gang-related crime or committed in a way that made it distinctively a signature crime

committed by a gang, and/or by the Rolling 30's gang. (Cf. *Ochoa, supra*, 179 Cal.App.4th at p. 662.)

We note there are numerous cases in which one or more persons first knocked at the front door of a residence and, having heard no answer, went to the backyard and burglarized the residence from a back door or window, with no indication the crime was gang-related. (*In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1533*; People v. Farley* (1996) 45 Cal.App.4th 1697, 1701-1703 [screened window]; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 203, 207 [same]; *People v. Aguilar* (1989) 214 Cal.App.3d 1434, 1435; *People v. Muldrow* (1988) 202 Cal.App.3d 636, 640; *People v. Statler* (1985) 174 Cal.App.3d 46, 49-50; see *People v. Prince* (2007) 40 Cal.4th 1179, 1196, 1202, 1257.)

Moon's unsubstantiated testimony appellant committed the present offense "for the benefit of" a criminal street gang, considered alone or with the rest of the evidence in this case, did not provide substantial evidence on that issue. Moreover, based on the above analysis, we also conclude there was insufficient evidence appellant committed the present offense "at the direction of, or in association with any criminal street gang" within the meaning of former Penal Code section 186.22, subdivision (b)(1). The true finding as to the gang enhancement allegation was not supported by substantial evidence. (Cf. *Ochoa*, *supra*, 179 Cal.App.4th at pp. 656-665.) In light of the above, we will remand the matter for resentencing absent the gang enhancement. (Cf. *People v. Ramon* (2009) 175 Cal.App.4th 843, 858.) We express no opinion as to what, following remand, appellant's sentence or any component thereof should be.[3]

[3] In light of our discussion, there is no need to reach appellant's claim the trial court erroneously denied his Penal Code section 995 motion regarding the gang enhancement allegation.

3. *No Prejudicial Prosecutorial Misconduct Occurred.*

The court, during its final charge to the jury, gave CALCRIM No. 1700, which stated, inter alia, "Under the law of burglary, a person enters a building if some part of his or her body or some object under his or her control penetrates the area inside the building's outer boundary. [¶] A building's outer boundary includes the area inside a window screen." There is no dispute as to the validity of that instruction.

The prosecutor subsequently commented without objection, "Once they pried that window screen off the window, *they had entered that space*. That is a completed burglary[.]" (Italics added.) The prosecutor later commented without objection, "Once they pried that window screen off the window, that was a completed burglary." During closing argument, the prosecutor urged without objection, "it was a completed crime once they had the screen off."

Appellant claims the prosecutor's above comments misstated burglary law because penetration into the area behind the screen, and not merely removal of the screen, is a completed burglary. However, appellant waived the issue by failing to object to the prosecutor's comments and by failing to request a jury admonition, which would have cured any harm. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215.)

Moreover, the court, using CALCRIM No. 1700, instructed on the law of burglary. The court also gave the jury CALCRIM No. 200, which told them the court would instruct on the law that applied in this case, they must follow the law as the court explained it to them, and if they believed the attorney's comments on the law conflicted with the court's instructions, the jury must follow the court's instructions. We presume the jury followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) No prejudicial prosecutorial misconduct occurred.

Appellant also claims the prosecutor committed misconduct during opening and closing arguments by (1) commenting Hoover was a Rolling 30's member or trying to become one, (2) commenting appellant, a senior gang member, was with Hoover, a junior gang member, to teach Hoover how to commit residential burglaries, and (3) commenting on matters outside the record. Appellant refers to about nine instances of misconduct.

We have reviewed each alleged instance of misconduct in the record. As to each, appellant waived any issue of prosecutorial misconduct by failing to object on that ground (*People v. Coddington* (2000) 23 Cal.4th 529, 614) and failing to request a jury admonition (*People v. Mincey* (1992) 2 Cal.4th 408, 471; Evid. Code, § 353) which would have cured any harm. Moreover, the jury heard the evidence. The court, using CALCRIM No. 200, instructed the jury they were to decide what the facts were based solely on the evidence and, using CALCRIM No. 222, instructed the jury that nothing attorneys said was evidence and their remarks during closing arguments were not evidence. We presume the jury followed those instructions. Appellant has failed to demonstrate how his claim affects his burglary conviction; he elsewhere has challenged only the sufficiency of the evidence he "enter[ed]" Zanias's house, and we already have resolved that issue. To the extent appellant's claim relates to the gang enhancement, we will vacate its true finding for the reasons previously discussed. No prejudicial prosecutorial misconduct occurred.

DISPOSITION

The judgment is affirmed, except appellant's sentence is vacated, the true finding as to the former Penal Code section 186.22, subdivision (b)(1) allegation is reversed, and the matter is remanded for resentencing consistent with this opinion. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment following resentencing.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.