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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. SHANE ALLEN PITTMON, Defendant and Appellant.	B262677 (Los Angeles County Super. Ct. No. GA088565)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed in part, vacated in part, and remanded with directions.

Mark S. Devore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Shane Allen Pittmon appeals from the judgment entered following his convictions by jury on two counts of first degree residential burglary (counts 1 & 2) and one count of attempted first degree residential burglary (count 3), with findings as to each offense he committed it for the benefit of, at the direction of, or in association with, a criminal street gang. (Pen. Code, §§ 664, 459, 460, subd. (a), 186.22, subd. (b)(1)(B).)[1] We affirm in part, vacate in part, and remand with directions.

FACTUAL SUMMARY

1. The Present Offenses.

There is no dispute appellant committed burglaries as follows. Between December 24 and December 28, 2012, appellant burglarized the residence of Jim L.; it was located on Carolwood Drive in Arcadia (count 2). On December 26, 2012, appellant attempted to burglarize the residence of Chengyu W.; it was located on Carolwood Drive in Arcadia (count 3). On December 27, 2012, appellant burglarized the residence of Adam H.; it was located on Winnie Way in Arcadia (count 1).

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that during the Jim L. burglary, jewelry was stolen. During the Adam H. burglary, an Epson projector and a 60-inch television were stolen. Video from surveillance cameras depicted two people, whom Adam H. did not know, in his home on December 27, 2012.

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

On December 28, 2012, Pasadena Police Detective David Duran conducted surveillance of rooms 313 and 314 of a Pasadena motel. Police later that day searched the rooms, which were occupied by appellant, Larry Bishop,[2] and three other persons. Adam H.'s projector was in one of the rooms. Duran contacted appellant in the motel's parking lot and found a cell phone there. He showed it to appellant, who acknowledged it was his.

Following appellant's arrest at the motel, he told police that on the night before the arrest, he and Bishop were "scoping out houses" near Arcadia.[3] At one point, appellant indicated he and another person entered a house but appellant took nothing because "all I take is jewelry" and none was there. Appellant also said he was with Bishop when police arrested them.[4]

Arcadia Police Detective Michael Hale obtained videos from appellant's cell phone. Jim L. testified one such video (People's exh. No. 11) depicted the inside of his home. At trial, the prosecutor asked Chengyu W. if he could tell whether another video (People's exh. No. 13) depicted his house.[5] Chengyu W. replied he could not see anything but he was familiar with the sound of his alarm, and

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[2] Bishop is not a party in this appeal.

[3] A DVD and CD of appellant's statements to police, but not the transcripts thereof, were admitted into evidence. However, in their briefs, the parties cite and/or quote the transcripts. Accordingly, we cite and/or quote them as accurate.

[4] There was also evidence that a Pasadena police officer stopped a vehicle containing appellant and Bishop on December 22, 2012.

[5] Appellant concedes that both video exhibits (Nos. 11 and 13) were obtained from appellant's phone.

what he heard on the video sounded like his alarm. During Detective Hale's interview of appellant, he admitted Bishop might have stolen another item when appellant took the Epson projector.

2. Gang Evidence.

Detective Duran testified as follows. Duran had personally contacted appellant at least seven times between 2007 and December 28, 2012. Based on his training and expertise, Duran opined appellant had been a Pasadena Denver Lanes gang (PDL) member since 2008. Appellant frequented places where PDL members congregated and had a tattoo that said, "Rest in Peace, Little Gator." The phrase was a reference to a PDL member killed in 2006. Duran had contacted appellant with other PDL members in PDL territories.

Pasadena Police Detective Keith Gomez testified he searched appellant's cell phone and it listed as contacts the monikers of more than 10 persons whom Gomez knew were members of PDL or a clique of PDL. Gomez believed appellant was a PDL member, specifically, a member of the Project Gangsters (Project) clique.

Pasadena Police Department Corporal Carlo Montiglio, a gang expert, testified as follows. PDL was a criminal street gang. PDL graffiti included logos of the Philadelphia Phillies and Pittsburgh Pirates, and the letter "P." As a Bloods gang, PDL was associated with the color red.

Gang members were expected to commit crimes for the benefit of the gang. Gang members could increase their influence within the gang by providing funds for the gang by crimes such as burglaries or selling drugs. Burglaries had become a more important funding method for gangs. Some gangs had subsets of members who specialized in committing burglaries. Gang members committed crimes together to promote division of labor during the

crime. A gang member committed crimes with the gang, while a gang associate merely spent time with members. Members, unlike associates, had tattoos.

Montiglio testified about things that "benefit" a gang, within the meaning of section 186.22, subdivision (b)(1). Montiglio testified as follows. Gangs made themselves known in various ways, including using social media. Younger gang members used YouTube to "create[] rap videos and whatnot" of the crimes and activities of their particular gang and "it spreads through social media." Montiglio had seen social media regarding PDL, and had seen PDL members' "rap videos, that sort of thing, online."

Montiglio had about six contacts with appellant between 2008 and the time of trial. For example, in 2008, Montiglio contacted appellant and two people in a vehicle. The two others were a PDL member and a PDL associate. The vehicle contained narcotics packaged for sale. Montiglio believed appellant was then engaged in gang-related narcotics activity.

Montiglio opined appellant was an active PDL member when police arrested him in the present case. Montiglio based this opinion on the following factors. Appellant had tattoos, including logos of the Philadelphia Phillies and Pittsburgh Pirates, the letter "P," and the phrase "Rest in Peace, Little Gator." Appellant had a tattoo of a rose, which signified the City of Pasadena. Appellant also had a tattoo that said, "Fuck All My Enemies." Montiglio opined the enemies were rival gangs. Appellant had tattoos of a stack of money and the phrase, "Break Bread or Get Dead." The stack of money indicated a person's desire to obtain money, and the phrase "Break Bread or Get Dead" was consistent with violence.

Montiglio also based his opinion on the following factors. Appellant had been contacted with other PDL or Project members on several occasions. He had worn gang colors, and had been in locations where PDL members congregated. Appellant's cell phone contained photographs of him wearing gang clothing, a text message listing Department of Corrections information and a mailing address for an incarcerated PDL member, and contacts for PDL members. Montiglio also opined Bishop was a PDL member.

In response to a hypothetical question based on evidence, Montiglio opined that if two persons from a Pasadena gang committed two burglaries and an attempted burglary, stealing electronics and jewelry, the offenses were committed for the benefit of, at the direction of, or in association with, a criminal street gang. Montiglio opined the crimes would be committed in association with a criminal street gang because there were two gang members associating together to commit the crimes. Gang membership permitted division of labor. When gang members together committed crimes, this enhanced their reputation within the gang because the members could vouch for one another that they committed the crime. Attempted or completed residential burglaries would qualify as "putting in work," which was expected of gang members.

Montiglio opined the crimes were committed for the benefit of the gang because crimes like burglaries could provide needed funds for the gang. During burglaries, weapons were stolen and could be used by the gang. Jewelry and electronics were stolen and sold, and the proceeds were used for the gang.

After the prosecution rested, appellant presented no defense evidence.

ISSUES

Appellant claims (1) the trial court erroneously granted the People's motion to amend the information to allege gang enhancements as to counts 2 and 3, (2) insufficient evidence supports the true findings on the gang enhancement allegations on counts 1 through 3, and (3) the trial court's awards of presentence credit in the present case and superior court case No. GA094390 are erroneous. Respondent claims the trial court erroneously stayed the gang enhancements on counts 2 and 3.

DISCUSSION

1. Amendment of the Information Was Proper.

a. ***Pertinent Facts.***

(1) *Appellant's preliminary hearing*.

The felony complaint alleged as count 1 appellant and Bishop committed first degree residential burglary of Adam H.'s residence, and alleged as to that count a section 186.22, subdivision (b)(1)(B) gang enhancement. Count 2 alleged appellant committed first degree residential burglary of Jim L.'s residence, and count 3 alleged appellant committed attempted first degree residential burglary of Chengyu W.'s residence. The complaint contained no gang allegation as to count 2 or count 3. There is no dispute there was sufficient preliminary hearing evidence appellant committed the substantive offenses.

As to the gang allegations, Detective Hale presented evidence of appellant's commission of the crimes, association with Bishop, and video recordings on his cell phone. The parties stipulated PDL is "a street gang pursuant to Penal Code section 186.22 for purposes of [the] preliminary hearing." Montiglio, the People's gang expert, then testified as follows. PDL members were required to "put in work," i.e., commit crimes to benefit the gang, advance its cause,

recruit members, and generate funds for the gang. Committing residential burglaries was a way to "put in work" for the gang.

It was very common for gang members to commit residential burglaries with another gang member. The more participants there were, the easier it was to commit the burglary, there was division of labor, and the participants could vouch for one another that they had committed the crime. The more active a member was, especially in criminal activity, the more their "street cred" was built, therefore, many gang members videotaped themselves committing crimes. It was important for gang members to have evidence they were "putting in work." Gang members videotaped themselves committing crimes to show to other gang members that they were doing work for the gang; videotaping by the members increased their power in the gang and enhanced their status.

Montiglio opined appellant was an active PDL member who was, specifically, in the Project clique. That opinion was based on appellant's PDL tattoos and the facts that, on numerous occasions, police had contacted appellant with PDL members, he was wearing gang attire, and he was in PDL territory. Montiglio opined Bishop was an active PDL member based on his PDL tattoos, Montiglio's prior contacts with him, other officers' contacts with Bishop, areas Bishop frequented, and the PDL and Project members with whom Bishop associated.

The prosecutor posed the following hypothetical question to Montiglio, which related to *three* residential burglaries: "Say that two active gang members go into a neighboring city and commit three residential burglaries. At one location they actually don't make entry because an alarm goes off and they're scared off, but they make entry into two other residential burglaries, and a television is taken in one, a projector is taken in one, miscellaneous

items are taken in another. [¶] Based on that, do you believe that that residential burglary was committed 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 of gang members?" (*Sic*.) Montiglio replied yes.

Montiglio testified the bases of his opinion were the facts (1) there was association because two gang members were jointly committing "this act," which could be beneficial because division of labor would allow them to more easily commit the crime and (2) the gang benefited because stolen items could be converted to funds for use to buy weapons and narcotics, and to rent vehicles so the gang could commit other crimes to enhance its power. Residential burglaries were becoming increasingly common.

The magistrate held appellant to answer, indicating there was sufficient evidence appellant committed "the following offenses," i.e., "count 1, a violation of Penal Code section 459; count 2, a violation of Penal Code section 459; and count 3, a violation of Penal Code section 664/459, each first-degree residential burglary as charged in the complaint." (*Sic*.) The magistrate did not expressly refer to any enhancement allegations.

(2) *The motion to amend the information, and related proceedings*.

Like the felony complaint, the information filed September 27, 2013, alleged the same counts 1 through 3, and a section 186.22, subdivision (b)(1)(B) enhancement only as to count 1. On February 18, 2015, the court called the case for jury trial and stated the case was "[day] seven of ten" for purposes of the statutory time limit. The parties indicated they were ready.

Later on the same day, the prosecutor moved to amend the information by adding a section 186.22, subdivision (b)(1)(B) gang enhancement allegation to counts 2 and 3. The court told appellant's counsel it would hear from him concerning any prejudice as a result of the prosecutor's "belated request." Appellant's counsel replied, "Your Honor, we're day seven of ten. This information was filed September 27, 2013. And at this point, it is just too late in the game to make these kinds of amendments. [¶] And I will submit to the court." The court asked appellant's counsel whether, if the court granted the prosecutor's motion, appellant's counsel would ask for additional preparation time. Appellant's counsel replied no.

The court stated, "The court is going to grant the motion over the objection of the defense. The court can see and has heard no possible prejudice." The court observed that, although the present case was very old, this was largely due to time spent in previous negotiations, and the case had not been pending that long once the parties had decided to go to trial. The court stated, "So for all those reasons, the court will amend the information to add those two allegations." Appellant waived arraignment, entered a not guilty plea, and denied all special allegations. On February 23, 2015, the jury was sworn and trial began.

b. ***Analysis.***

Appellant claims the trial court erroneously granted the People's motion to amend the information to allege gang enhancements as to counts 2 and 3. He argues neither the preliminary hearing evidence nor the original information gave him fair notice he would have to defend against the two additional gang allegations.

(1) *Appellant waived the issue.*

Appellant's claim is unavailing. A preliminary hearing and a magistrate's probable cause finding must precede a felony prosecution on an information in order to establish jurisdiction in the trial court. (*People v. Burnett* (1999) 71 Cal.App.4th 151, 178-179 (*Burnett*).) A violation of this requirement is waivable error where, as here, the trial court had fundamental jurisdiction. (*Ibid.*) Appellant objected to the amendments on the ground they were untimely, not on the fair notice ground. He waived the fair notice issue as to the gang allegations pertaining to counts 2 and 3 of the information. (Cf. *Burnett,* at pp. 178-179; *People v. Newlun* (1991) 227 Cal.App.3d 1590, 1603-1604; *People v. Spencer* (1972) 22 Cal.App.3d 786, 799.)

(2) *Appellant's claim is without merit.*

Even if the fair notice issue were preserved for appellate review, we would reject appellant's claim. As *Burnett* observed, "Section 739 provides in pertinent part: 'When a defendant has been examined and committed . . . , it shall be the duty of the district attorney . . . to file in the superior court . . . an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment *or any offense or offenses shown by the evidence taken before the magistrate to have been committed*.' ' "[A]n information which charges the commission of an offense not named in the commitment order will not be upheld unless (1) *the evidence before the magistrate shows that such offense was committed* [citation], and (2) that the offense 'arose out of the transaction which was the basis for the commitment' on a related offense. [Citations.]" ' [Citations.]

"[T]he court may allow amendment of the accusatory pleading 'for any defect or insufficiency, *at any stage of the proceedings*.' (§ 1009.) Section 1009 provides, however, that '. . . an information [cannot be amended] so as to charge an offense *not shown by the evidence* taken at the preliminary examination.' " (*Burnett*, *supra,* 71 Cal.App.4th at p. 165, italics added.) A conviction for an offense not shown by the evidence taken at the preliminary hearing is reversible per se. (*Id.* at p. 177.)

These principles apply to enhancements. " 'California law under sections 739 and 1009 and relevant cases permit amendment of the information to add . . . enhancements which are supported by the actual evidence at the preliminary hearing, provided the facts show due notice by proof to the accused.' " (*People v. Superior Court* (*Mendella*) (1983) 33 Cal.3d 754, 764.) As long as an amendment to an information otherwise complies with the standards of sections 739 and 1009, " 'there is no bar to adding to the information enhancement allegations that were not charged in the complaint.' " (*Id.* at p. 764.) Trial court discretion in granting a motion to amend "will not be disturbed on appeal in the absence of showing a clear abuse of discretion." (*People v. George* (1980) 109 Cal.App.3d 814, 819.)

In the present case, there is no dispute there was sufficient preliminary hearing evidence appellant committed the offenses alleged in counts 1 through 3 of the felony complaint. Moreover, there was sufficient evidence appellant and Bishop committed them together.

But this is not a case in which the preliminary hearing evidence established only that appellant and Bishop committed the offenses in concert. Montiglio testified appellant and Bishop were PDL members, and the evidence of their past and current relationship provided sufficient evidence each knew the other was a PDL member. Montiglio testified PDL members were required to "put in work," i.e., commit crimes to benefit the gang and generate funds for it. Committing residential burglaries was a way to do this, and it was very common for gang members to commit such burglaries with another gang member.

Importantly, Montiglio testified it was important for gang members to have *evidence* they were "putting in work." There was preliminary hearing evidence that appellant recorded all three of the charged crimes on his cell phone. Montiglio's testimony explained why appellant engaged in the otherwise unusual conduct of making self-incriminating recordings. Montiglio's testimony and the recordings, considered together, were persuasive evidence appellant was recording the crimes so he could later show the recordings to other PDL members to prove he was doing work for the gang and to increase his power and status in the gang.

In sum, the evidence that appellant recorded all of the crimes to show to other PDL members that he was doing work for the gang was persuasive evidence he committed all of the crimes "for the benefit" of the gang, and "in association with" the gang. Moreover, in Montiglio's opinion, the requisite "benefit[]" existed because stolen items could be converted to funds for gang use. There was evidence appellant and Bishop were holed up in a hotel room with the stolen projector and television, which could have been sold to generate funds for the gang. According to Montiglio, the requisite "association" existed because two gang members were jointly

committing "this act" which could be beneficial in light of division of labor.

We conclude the preliminary hearing evidence (1) supported a "strong suspicion" that the offenses at issue in counts 2 and 3 of the felony complaint were gang-related (i.e., 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") for purposes of section 186.22, subdivision (b)(1)(B), and (2) provided fair notice appellant would have to defend against the gang allegations pertaining to counts 2 and 3 of the information. (See *Taylor v. Superior Court* (1970) 3 Cal.3d 578, 582 [general standard for probable cause]; *People v. Albillar* (2010) 51 Cal.4th 47, 59-63, 68 (*Albillar*) [sufficient proof beyond a reasonable doubt of association and benefit]; *People v. Leon* (2008) 161 Cal.App.4th 149, 163 (*Leon*) [association]; *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20 (*Romero*) [benefit]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198-1199 (*Morales*) [association]). Amending the information was proper.[6]

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[6] Appellant was not denied his right to effective assistance of counsel by his trial counsel's failure to object below to the amendments on the ground there was a lack of fair notice. An objection on that ground would have been futile. It is not constitutionally-deficient representation for trial counsel to fail to make futile objections. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

(3) None of Appellant's Arguments Compel a Contrary Conclusion.

Appellant makes four arguments to the contrary. First, appellant argues the phrase "that residential burglary" in the prosecutor's hypothetical question "presumably" referred to the burglary alleged in count 1 of the felony complaint because only that count of the complaint had a gang allegation. Appellant thereby suggests the only burglary that was gang-related according to Montiglio's answer to that question was the burglary alleged in count 1 of the complaint.

Appellant's argument refers to several isolated terms, but it disregards the overall import of Montiglio's testimony. The prosecutor's hypothetical question focused on whether *each of the three offenses* (not just the offense alleged in count 1) was gang-related. The prosecutor referred to gang members committing "three residential *burglaries*" (italics added). Although the prosecutor later corrected himself that one offense was actually an attempted burglary, Montiglio's answer, reasonably understood, was that all *three* offenses were gang-related.

Second, appellant argues the amendment of the information was error in light of (1) the magistrate's failure, in his commitment order, to refer to the gang allegation as to count 1 of the felony complaint and (2) the fact the original information had a gang allegation as to count 1 only. However, the issue is whether the preliminary hearing *evidence* supported the gang allegations as to counts 2 and 3, and we have concluded it does; a fortiori, that evidence *and* the gang allegation as to count 1 of the information

satisfied any valid fair notice concerns as to the challenged gang allegations.[7]

Third, appellant argues in his reply brief that the felony complaint alleged a gang enhancement as to count 1 only, "[t]hus, the expert opinion elicited by the prosecution at the preliminary hearing was limited to the issue of whether the burglary charged in count 1" of the complaint was gang-related. And finally, appellant argues in his reply that Montiglio's expert opinion testimony lacked sufficient foundation because the testimony was generic. We reject both arguments, because they ignore the overall content of Montiglio's testimony. As discussed, Montiglio presented evidence that encompassed all three counts, and he provided detailed support for his opinions.

2. Sufficient Evidence Supports the Gang Enhancements.

Appellant claims there was insufficient evidence at trial for the true findings on the gang enhancements on counts 1 through 3. In considering this argument, "we review the entire record in the light most favorable to the judgment to determine whether it contains 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.

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[7] To the extent appellant suggests as an independent ground of error that the amendments were untimely, we reject the suggestion. Section 1009 authorized amendment of the information for any defect or insufficiency "at any stage of the proceedings." Appellant's counsel denied he was asking for additional preparation time regarding the amendments. The court indicated the amendments were not prejudicial. The court's permitting the amending of the information by the addition of the gang allegations to counts 2 and 3 as against an untimeliness objection was well within its discretion. (See *People v. Winters* (1990) 221 Cal.App.3d 997, 1005.)

[Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*Albillar*, *supra*, 51 Cal.4th at p. 60.)

As discussed in part 2 of the Factual Summary, *ante* at pages 4 through 6, the prosecution presented detailed gang evidence at trial. Three witnesses, Detectives Duran and Gomez and Corporal Montiglio, testified about gang issues. They addressed their contacts with appellant, appellant's gang characteristics, and his gang associations. They gave similar testimony concerning appellant's crime partner, Bishop. Montiglio expressed his expert opinion about gang issues and, in response to the prosecutor's hypothetical question, stated that the charged crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang. Montiglio's opinions were supported by detailed examples from his experience and the evidence presented at trial.

We conclude there was sufficient evidence to support the jury's findings that the crimes were committed "in association" with a criminal street gang. (§ 186.22, subd. (b)(1).) In *Morales*, the court discussed the "association" prong of section 186.22, subdivision (b)(1) and stated, "Defendant argues that reliance on evidence that one gang member committed a crime in association with other gang members is 'circular . . . .' Not so. Arguably, such evidence alone would be insufficient, even when supported by expert opinion, to show that a crime was committed for the *benefit*

of a gang. The crucial element, however, requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang. Thus, the typical close case is one in which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang. Here, however, there was no evidence of this. Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*Morales, supra*, 112 Cal.App.4th at p. 1198; *Leon, supra*, 161 Cal.App.4th at p. 162 [*Morales* concluded that "evidence that a gang member has committed a crime with another person whom he knows to be a fellow gang member will ordinarily be sufficient to meet the disjunctively worded elements of section 186.22, subdivision (b)(1)"].) Similar reasoning applies here.

We also conclude there was sufficient evidence to support the jury's findings that the crimes were committed "for the benefit" of a criminal street gang. (§ 186.22, subd. (b)(1).) The prosecution's expert gave detailed reasons why appellant's crimes were for the benefit of the PDL gang. The expert testimony and the underlying circumstances of the crime are sufficient to support the jury's findings. (See *Albillar, supra,* 51 Cal.4th at pp. 59-63, 68; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512; *Romero, supra,* 140 Cal.App.4th at pp. 19-20; *Morales, supra,* 112 Cal.App.4th at pp. 1198-1199; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

Appellant relies principally upon *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*) and *People v. Ochoa* (2009) 179 Cal.App.4th 650 (*Ochoa*), but they do not compel a contrary conclusion. In *Ramon*, the defendant was convicted of receiving a stolen vehicle and illegal gun possession; the only testimony in

support of the gang enhancement was that the defendant was a gang member and was arrested in gang territory. (*Ramon*, at p. 849.) In *Ochoa*, the defendant was convicted of carjacking; there was no evidence linking the crime to the defendant's gang. (*Ochoa*, at p. 662.) In both cases, the courts held there was insufficient evidence that the crimes were committed for the "benefit" of the gang. (*Ramon*, at pp. 846, 848-850, 853; *Ochoa*, at pp. 652-653, 656-657.)

Neither *Ramon* nor *Ochoa* had the kind of comprehensive gang evidence introduced in the present case, particularly as to the increasing use of burglaries to generate funds for gangs and the unusual evidence of appellant's use of a cell phone to record his crimes -- all of which was explained by expert testimony. In all events, neither *Ramon* nor *Ochoa* was based upon the "in association with" ground of section 186.22, subdivision (b)(1), which has also been established in this case.

3. The Court Erroneously Stayed the Gang Enhancements as to Counts 2 and 3.

The trial court sentenced appellant to prison on counts 1 through 3 for a total of eight years. After doing so, the court stated, "[the jury] found true the 186.22, which carries an additional five years to the base term. [¶] As to counts two and three, the 186.22, the court will impose and stay the sentence in that, and I calculate that as a total of 13 years in state prison."

Respondent claims the trial court erred by staying the section 186.22, subdivision (b)(1)(B) enhancement as to counts 2 and 3. We agree the court erred by doing so. (See *People v. Vega* (2013) 214 Cal.App.4th 1387, 1396-1397 (*Vega*); *People v. Flores* (2005) 129 Cal.App.4th 174, 187 (*Flores*).)

The trial court has several lawful options for the enhancement as to each count: impose the enhancement (§ 186.22, subd. (b)(1)(B)); strike the enhancement entirely, pursuant to section 1385, subdivision (a) (*People v. Fuentes* (2016) 1 Cal.5th 218, 231); strike the punishment, pursuant to section 1385, subdivisions (a) and (c)(1) (*Fuentes*, at p. 228); or strike the punishment, pursuant to section 186.22, subdivision (g) (*Fuentes*, at p. 224).

We will vacate appellant's sentence and remand the matter with directions to the trial court to exercise its discretion regarding the gang enhancements pertaining to counts 2 and 3. (Cf. *Vega, supra*, 214 Cal.App.4th at pp. 1397-1398; *Flores, supra*, 129 Cal.App.4th at pp. 187-188.) We express no opinion as to how the court should exercise that discretion or resentence appellant.

4. Appellant Is Entitled to Additional Presentence Credit.

The trial court sentenced appellant to a total prison term of 13 years in the present case, No. GA088565. The court awarded appellant 81 days of section 2900.5, subdivision (a) custody credit and 40 days of section 4019 conduct credit.

The court subsequently sentenced appellant to a concurrent prison term of 16 months in an unrelated case, No. GA094390, in which appellant had pled no contest to a 2014 violation of Vehicle Code section 2800.2, subdivision (a). In that case, the court awarded appellant 58 days of section 2900.5, subdivision (a) custody credit and 29 days of section 4019 conduct credit.

Appellant claims he is entitled to 80 days, instead of 40 days, of conduct credit in the present case (No. GA088565), and 58 days, instead of 29 days, of conduct credit in the unrelated case (No. GA094390). Respondent concedes the issue. Under the presentence conduct credit accrual rate applicable to appellant's 2012 present offenses and the 2014 offense in the unrelated case, he

was entitled in each case to conduct credit equaling the highest even number of days not exceeding the total number of days he spent in actual custody in each case. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 588, 591.) We will remand the matters and direct the trial court to award appropriate credit.[8] To the extent appellant is entitled to additional custody credits in light of this remand (see *People v. Buckhalter* (2001) 26 Cal.4th 20, 23), the trial court must award them in both cases.

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[8] Appellant's notice of appeal indicates he is appealing from the judgment in the present case (No. GA088565). While appellant did not file a notice of appeal in the unrelated case (No. GA094390), we may address his credits in that case. Section 1260, states, "The court may reverse, [or] affirm . . . a judgment . . . appealed from, . . . and may set aside, [or] affirm . . . any or all of the *proceedings subsequent to*, or dependent upon, *such judgment* . . . and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." (Italics added.) The proceeding in case No. GA094390 was subsequent to the judgment in the present case.

DISPOSITION

The judgment in superior court case No. GA088565 is affirmed, except appellant's sentence and presentence credit award are vacated and the matter is remanded to the trial court with directions to exercise its discretion regarding the Penal Code section 186.22, subdivision (b)(1)(B) enhancements, and to award presentence credit, consistent with this opinion.

The proceeding in superior court case No. GA094390 is affirmed, except appellant's presentence credit award in that case is vacated and the matter is remanded to the trial court with directions to award presentence credit, consistent with this opinion.

The trial court is also directed to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment in each case.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON (MICHAEL), J.*

We concur:

EDMON, P. J.

ALDRICH, J.

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