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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK RUIZ,

Defendant and Appellant.

2d Crim. No. B291732
(Super. Ct. No. 2014011115)
(Ventura County)

Frank Ruiz appeals from the judgment entered after a jury had convicted him of actively participating in a criminal street gang (count 1 - Pen. Code, § 186.22, subd. (a))[1] and assault with a firearm (count 2 - § 245, subd. (a)(2)). As to the second count, the jury found true allegations that appellant had personally used a firearm (§ 12022.5, subd. (a)) and had committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(B)). Appellant admitted one prior serious felony conviction (§ 667,

[1] Unless otherwise stated, all statutory references are to the Penal Code.

subd. (a)(1)), one prior prison term (§ 667.5, subd. (b)), and one prior "strike" within the meaning of California's "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

The trial court sentenced appellant on count 1 but stayed execution of the sentence pursuant to section 654. As to count 2, the court imposed the following sentence: the upper term of four years, doubled to eight years because of the strike; plus five years for the gang enhancement; plus the upper term of 10 years for the firearm-use enhancement; plus five years for the prior serious felony conviction; plus one year for the prior prison term. Pursuant to section 654, the court stayed execution of the 10-year sentence for the firearm-use enhancement and the one-year sentence for the prior prison term. The aggregate unstayed sentence on count 2 was 18 years.

The People make two concessions: first, the conviction on count 1 must be reversed; second, as to the conviction on count 2, the matter must be remanded to the trial court so it may exercise discretion whether to strike the prior serious felony conviction in furtherance of justice pursuant to amended sections 667, subdivision (a)(1) and 1385, subdivision (b). The People dispute appellant's contention that the trial court erroneously admitted hearsay evidence as well as evidence of uncharged gang shootings.

We reverse the conviction on count 1. As to count 2, on our own motion we vacate the trial court's unauthorized section 654 stay of the 10-year consecutive sentence for the firearm-use enhancement. We remand the matter to the trial court so it may exercise discretion whether to strike the prior serious felony conviction. In all other respects, we affirm.

Facts

One night in October 2013, Rudy Marquez and his girlfriend, Jessica McClurg, drove to Vons to buy baby supplies. McClurg entered the store while Marquez remained by the vehicle in the parking lot. A young, skinny man approached Marquez and asked, "[W]here you from?" Marquez replied, "I ain't from nowhere, where you from?" The man said he was from "Southside" or "Sur Town." The man "tried to sucker punch" Marquez and "barely misse[d]" him.

Marquez chased the man, who was not armed. He heard McClurg call out that someone had a gun. Marquez suddenly saw a bigger, older man about 15 feet away and "could hear him try to cock [the gun], but he couldn't." Marquez "started running." "He was zig-zagging in an attempt not to get shot." He heard one shot fired. The bullet did not strike him.

Ewan Wallace saw the bigger, older man chase Marquez. The man shot once at Marquez. He "was definitely trying to hit [Marquez]." "He was aiming directly at [Marquez]." It was not "a warning shot." The shooter and his companions ran to a car, entered it, and drove away "at a high rate of speed."

The shooter was identified as appellant. He was a long-time member of the Sur Town Chiques (Sur Town) criminal street gang. His gang moniker was "Villain." The trial court took judicial notice before the jury that in 2002 appellant had been convicted "of a violent felony for the benefit of the Sur Town criminal street gang against a victim who [was] a documented member of the Colonia Chiques criminal street gang."[2] A gang

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[2] The 2002 conviction was for assault with a firearm. (§ 245, subd. (a)(2).) Appellant was sentenced to prison for eight years.

expert opined that appellant was still a member of Sur Town at the time of the October 2013 Vons parking-lot shooting.

The skinny, younger man who threw the punch at Marquez was identified as Juan Hernandez. A gang expert opined that Hernandez "was a Sur Town gang member with the moniker of 'Manos.'" At the time of the shooting, Hernandez was 16 years old.

A police officer found a spent shell casing in the Vons parking lot. The shell casing had been ejected from the same 9-millimeter pistol that had been used in four other gang shootings.

In response to the prosecutor's hypothetical question incorporating the facts of the Vons parking-lot shooting, a gang expert opined that it had been committed for the benefit of a criminal street gang.

The Conviction for Actively Participating in a Criminal Street Gang (Count 1) Must be Reversed

To actively participate in a criminal street gang in violation of section 186.22, subdivision (a) (section 186.22(a)), a defendant must "willfully promote[], further[], or assist[] in any *felonious criminal conduct* by members of that gang." (*Ibid.*, italics added.) Here, the allegedly felonious conduct was Hernandez's simple assault (§ 240) or his act of fighting in a public place (§ 415, subd. (1)), both of which are misdemeanors. The trial court concluded that the commission of these misdemeanors could constitute felonious conduct pursuant to section 186.22, subdivision (d) (section 186.22(d)), which permits a misdemeanor to be punished as a felony if it was committed for the benefit of a criminal street gang. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 909 ["Section 186.22(d) enables prosecutors to more severely punish gang-related misdemeanors"]; *People v. Sweeney*

(2016) 4 Cal.App.5th 295, 300-301 [section 186.22(d) "is an alternative punishment provision . . . . [W]hen a crime would otherwise be a straight misdemeanor, section 186.22 elevates it to a wobbler"].) The court instructed the jury: "*Felonious criminal conduct* means committing or attempting to commit any of the following crimes: [¶] 1. Fighting in a public place, when the crime is committed for the benefit of a criminal street gang; [¶] 2. Assault, when that crime is committed for the benefit of a criminal street gang."

Appellant contends, and the People concede, that "[t]he court was wrong in concluding that[, pursuant to section 186.22(d),] a violation of section 415 or section 240 can constitute felonious conduct for the purpose of [satisfying the requirements] of . . . section 186.22(a)." The People assert that the trial court's conclusion is contrary to *People v. Lamas* (2007) 42 Cal.4th 516 (*Lamas*), and *People v. Infante* (2014) 58 Cal.4th 688.

We accept the People's concession. "[*A*]*ll* of section 186.22(a)'s elements must be satisfied, including that defendant willfully promoted, furthered, or assisted felonious conduct by his fellow gang members *before* [a statute such as section 186.22(d)] applies to elevate defendant's . . . misdemeanor offense to a felony. Stated conversely, section [186.22(d)] applies only *after* section 186.22(a) has been *completely* satisfied by conduct *distinct from* the otherwise misdemeanor conduct" constituting a violation of section 240 or section 415. (*Lamas*, *supra*, 42 Cal.4th at p. 524.) "[*M*]*isdemeanor conduct* . . . cannot constitute 'felonious criminal conduct' within the meaning of section 186.22." (*Ibid.*)

Thus, as a matter of law the evidence is insufficient to prove the felonious conduct element of section 186.22(a). The

People note that, although the conviction on count 1 must be reversed, "the reversal has no effect on the length of appellant's [sentence]" since "[execution of] the sentence on count 1 was stayed pursuant to section 654."[3]

The Admission of McClurg's Statements Did Not Violate Appellant's Constitutional Right to Confront Witnesses

Jessica McClurg, Marquez's girlfriend at the time of the shooting, did not testify. Over appellant's objection, the trial court admitted her statements to a police officer pursuant to Evidence Code section 1240, the spontaneous declaration exception to the hearsay rule. Evidence Code section 1240 provides, "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant

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[3] For the first time in his reply brief, appellant argues that the conviction on count 2 must also be reversed because the People failed to carry their "burden of proving that [the] constitutional error [in misinstructing the jury on the element of felonious conduct as to count 1] did not also contribute to the verdict on count two and the gang enhancement [alleged in that count]." The argument is forfeited because it was not made in appellant's opening brief. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218.) In any event, the argument is devoid of merit. The misinstruction on the meaning of "felonious conduct" as to count 1 has no bearing on the validity of appellant's conviction on count 2 for assault with a firearm. Nor does it affect the validity of the true finding on count 2's gang enhancement pursuant to section 186.22, subdivision (b)(1), which requires "the specific intent to promote, further, or assist in *any criminal conduct* [not just felonious conduct] by gang members." (§ 186.22, subd. (b)(1), italics added.)

was under the stress of excitement caused by such perception." The hearsay rule excludes "evidence of a statement that was made other than by a witness while testifying . . . and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).)

Appellant does not argue that McClurg's statements failed to satisfy the requirements of the spontaneous declaration exception to the hearsay rule. He argues that the admission of her statements violated his constitutional right to confront witnesses against him. "In *Crawford v. Washington* (2004) 541 U.S. 36 [(*Crawford*)] . . . , the United States Supreme Court held . . . that the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses." (*People v. Sanchez* (2016) 63 Cal.4th 665, 670.)

Appellant claims that McClurg's hearsay statements were testimonial within the meaning of *Crawford*. Testimonial hearsay statements "are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. . . . [T]hough a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. . . . [T]he statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial." (*People v. Cage* (2007) 40 Cal.4th 965, 984.) "On appeal, we independently review whether a statement was testimonial so as to implicate the constitutional right of confrontation." (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466 (*Nelson*).)

Officer Maribel Ambriz interviewed McClurg at the crime scene. The officer had "responded to a shots fired call." "'McClurg stated the incident happened approximately three to four minutes prior to [Ambriz's] arrival . . . .'" McClurg saw a man "swing at her boyfriend with possibly his fist." She gave a physical description of the assailant and of "a second subject standing a few feet behind her boyfriend and the [assailant]." The assailant "struck her boyfriend, and then . . . reach[ed] into his waistband." McClurg "began screaming very loudly because she believed that the [assailant] was going to pull out a gun." She "[y]ell[ed] at her boyfriend to run inside the store because she was afraid [he] was going to get shot."

In her police report Officer Ambriz noted: "McClurg said that she then heard one or two shots fired and could not provide . . . any further details or information regarding this incident. It was very difficult to get a solid statement from her because she was scared and was in a panic state."

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." (*Davis v. Washington* (2006) 547 U.S. 813, 822.) Thus, "statements in response to police inquiries at the crime scene are not testimonial if the inquiries were designed to ascertain whether there was an ongoing threat to the safety of the victim, the officers, or the public. [Citations.] For example, questioning a victim to identify a perpetrator for purposes of immediate apprehension of the perpetrator for safety reasons does not yield a testimonial statement." (*Nelson*, *supra*, 190 Cal.App.4th at p. 1464; see also *People v. Romero* (2008) 44 Cal.4th 386, 422 (*Romero*)

["statements are not testimonial simply because they might reasonably be used in a later criminal trial. . . . [T]hey are nontestimonial if the primary purpose is to deal with a contemporaneous emergency such as assessing the situation, dealing with threats, or apprehending a perpetrator"].)

McClurg's "statements provided the police with information necessary for them to assess and deal with the situation, including taking steps to evaluate potential threats to others by the perpetrators, and to apprehend the perpetrators. The statements were not made primarily for the purpose of producing evidence for a later trial and thus were not testimonial." (*Romero*, *supra*, 44 Cal.4th at p. 422.)

The Admission of Hearsay Statements as Past Recollection Recorded Did Not Violate Appellant's Constitutional Right of Confrontation

Appellant claims that, in violation of his right to confront witnesses, the trial court erroneously "allowed the prosecution to introduce statements in the police reports of ten police officers who had no memory of the events to which they were testifying." The statements were admitted as past recollection recorded pursuant to Evidence Code section 1237, which provides: "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; (2) Was made (i) by the witness himself or under his direction or (ii) by

some other person for the purpose of recording the witness' statement at the time it was made; (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and (4) Is offered after the writing is authenticated as an accurate record of the statement. [¶] (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party."

The controlling authority is *People v. Cowan* (2010) 50 Cal.4th 401. Based on *Cowan*, appellant's confrontation rights were not violated. The *Cowan* court rejected the defendant's contention that "admitting [a witness's] statement . . . pursuant to Evidence Code section 1237 violated his rights to confront and cross-examine witnesses under the Sixth Amendment to the federal Constitution." (*Id*. at pp. 467-468.) The court reasoned: "As the high court [in *Crawford*] explained, admitting a witness's testimonial hearsay statement does not violate the Sixth Amendment where, as here, the witness appears at trial and is subject to cross-examination about the statement. [Citations.] Defendant contends there can be no constitutionally effective cross-examination when the witness cannot recall the facts related in the hearsay statement. [Citations.] But the high court has squarely rejected that contention, concluding that 'when a hearsay declarant is present at trial and subject to unrestricted cross-examination,' 'the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness'[s] demeanor satisfy the constitutional requirements,' notwithstanding the witness's claimed memory loss about the facts related in the hearsay statement. (*United States v. Owens* (1988) 484 U.S. 554, 559–560 . . . .) Nothing in *Crawford* casts doubt on the continuing vitality of *Owens*." (*Id*.

at p. 468; see also *People v. Rodriguez* (2014) 58 Cal.4th 587, 632 ["Hall's claim of total lack of recall limited defendant's ability to cross-examine her about her prior statements. But this circumstance does not implicate the confrontation clause"].)

Hernandez's Question, "Where are you from?" Is Not Hearsay Evidence

Appellant argues that, over his hearsay objection, the trial court erroneously admitted the following question posed by Hernandez to Marquez, "'Where are you from?'" An out-of-court statement is hearsay evidence only if it is "offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) The trial court correctly ruled that Hernandez's question "is not hearsay. It's not offered for its truth." The question did not expressly or impliedly state a matter capable of being true or false. The trial court observed, "[I]t is simply offered to establish that Mr. Hernandez was declaring his gang affiliation or a challenge." A gang expert testified: "'Where are you from' is a gang challenge. Generally, there's no right answer to 'where are you from.' [¶] If anybody says, 'Where are you from,' generally a gang assault is going to be carried out. Only gang members say, 'Where are you from?'"

The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Uncharged Gang Shootings

Defense counsel objected to the admission of evidence of four uncharged gang shootings involving the same firearm used in the present shooting. All of the shootings occurred in 2013. Counsel stated: "There is no evidence whatsoever to connect [appellant to] any of [the other shootings] apart from the fact that they occurred in the neighborhood in which he lives; at least some of them did. And [two of the shootings] had been pled to by two

other people. Two of them are unsolved. [¶] They all apparently used the same gun, but . . . there's no evidence that [appellant] ever possessed that gun." The trial court replied that there is "eyewitness testimony" that appellant "drew a weapon and fired it . . . at least once at the fleeing victim in this case." There is also evidence "that the shell casing that was left on the ground as a result of that discharge matches up with [shell casings in] these other shootings."

Defense counsel protested that the evidence of the four uncharged shootings is "highly prejudicial" and not "probative" because "there's no indication whatsoever that [appellant] was involved in any of" the uncharged shootings. The trial court responded: "[A]t present my ruling is to overrule that objection. The Court's understanding . . . is that the one pillar of the defense argument is going to be that . . . [appellant] was not a gang member at the time of the offense that he is on trial for now. [¶] The fact that we have eyewitness testimony tying him to a weapon that . . . was . . . used in gang shootings on at least four other occasions . . . is pretty strong evidence that, in fact, he was a gang member at the time of the matter he's on trial for now; otherwise, he would not [have] had access to the particular weapon." Appellant did not dispute the trial court's understanding that a "pillar of the defense argument" was that he was not a gang member when the present shooting occurred. Nor did appellant dispute the court's understanding that the weapon used in the present shooting had been "used in gang shootings on at least four other occasions."

In his opening brief appellant argues that, since there is no evidence that he was involved in the four other shootings, the trial court abused its discretion pursuant to Evidence Code

section 352 (section 352) because the probative value of the shootings was substantially outweighed by their prejudicial impact. Section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." The "undue prejudice" referred to in section 352 "is not synonymous with 'damaging [evidence],' but refers instead to evidence that "'uniquely tends to evoke an emotional bias against defendant'" without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) Appellant claims that the court's abuse of discretion under section 352 rendered the trial "fundamentally unfair" in violation of his constitutional right to due process.[4]

"An abuse of discretion will be 'established by "a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."'" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 390.) "In assessing a claimed abuse of discretion, we assess the trial court's ruling by considering the record then before the court." (*People v. Myles* (2012) 53 Cal.4th 1181, 1200.) "It has long been the general rule and understanding that 'an appeal reviews the correctness of a

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[4] In the trial court defense counsel did not mention section 352, but he did say that the evidence of the four other shootings was "highly prejudicial" and not "probative." The People do not argue that appellant forfeited the section 352 issue by failing to mention the code section. Instead, the People assert that evidence of the four other shootings "was properly admitted under Evidence Code section 352." (Bold omitted.) Accordingly, we assume that appellant properly invoked the statute.

[ruling] as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' [Citation.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

The trial court did not abuse its discretion. It reasonably concluded that the uncharged gang shootings were highly relevant because they would refute appellant's claim that he was not a gang member at the time of the present shooting. Evidence of the uncharged shootings showed that the firearm had been passed around among gang members. A gang expert testified: "Weapons, specifically guns, . . . generally would be passed around from gang member to gang member so that they keep it with[in] the gang, whether they need it for protection or they are arming gang members who go out to commit crimes or to go into rival gang areas." Thus, it is reasonable to infer that appellant would not have possessed the firearm if he had not been affiliated with the gang.

Evidence of the uncharged shootings was not unduly prejudicial. As appellant notes: "[He] was not seen at any of the incidents, he was not arrested for any of them and he was not convicted of any of them." "In two of [the shootings], other people were convicted." "In sum, . . . there was not an iota of evidence to suggest [appellant] was involved in any way [in the four uncharged shootings]."

Appellant contends that, contrary to the trial court's statement, "[i]t was not a 'pillar of the defense argument' that [he] was no longer a gang member at the time of the incident." If this were true, appellant should have so informed the trial court when it ruled on his evidentiary objection. "Because [appellant] never raised this argument below in his Evidence Code section

352 objection, he has forfeited this argument." (*People v. Clark* (2016) 63 Cal.4th 522, 584.)

Remand Is Necessary so that the Trial Court Can Exercise Its Discretion Whether to Strike the Prior Serious Felony Conviction

At the time of sentencing, the trial court did not have the power to strike prior serious felony convictions within the meaning of section 667, subdivision (a)(1). (Former §§ 667, subd. (a)(1), 1385, subd. (b).) Effective January 1, 2019, Senate Bill No. 1393 (S.B. 1393) amended subdivision (a)(1) of section 667 and subdivision (b) of section 1385 to authorize the striking of these convictions in furtherance of justice. (Legis. Counsel's Dig., Sen. Bill No. 1393 (2017-2018 Reg. Sess.) Stats. 2018, ch. 1013, §§ 1, 2 ["This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of the 5-year enhancement"].)

"[I]t is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases [such as the present case] not yet final when [S.B.] 1393 [became] effective on January 1, 2019. [Citations.]" (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) We therefore accept the People's concession that appellant correctly "contends that under Senate Bill [No.] 1393, his case must be remanded to the trial court for consideration of the court's newly enacted discretion to dismiss the [prior serious felony conviction] in the interests of justice."

Unauthorized Sentence

The trial court originally sentenced appellant to prison for 28 years, including a consecutive 10-year upper term for the firearm-use enhancement pursuant to section 12022.5,

subdivision (a). Defense counsel objected: "I'm sorry, your Honor. You indicated on your memo [the memo is not in the record on appeal] that the execution of the ten years . . . was going to be stayed per [section] 654. That makes it 18 years, not 28 years." The trial court said to the prosecutor: "[L]et me ask you, there would seem to be some logic in [section] 654 applying to the special allegation for personal use of a firearm when the principal offense is assault with a firearm. Wouldn't you agree?" The prosecutor replied: "Right. [¶] . . . So my understanding is we get to 18 [years] with the imposition of the [four-year upper term for assault with a firearm (§ 245, subd. (a)(2)), doubled to eight years because of the strike, the five-year section 667, subdivision (a)(1) serious felony] prior and the five-year gang enhancement." The trial court responded: "That's right. [¶] Thank you very much for catching that, Mr. Neary [defense counsel]. You saved your client ten years by doing so, and I appreciate that." The trial court then stated, "As to [the firearm-use enhancement], although the additional and consecutive term of ten years is imposed, it is stayed . . . pursuant to Penal Code section 654 because it is part of the same course of conduct as the principal charge. [¶] [¶] . . . So that means the total term . . . is 18 years, not 28."

Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The trial court erred in staying execution of the 10-year firearm-use enhancement. Section 12022.5, subdivision (a)

provides, "[A]ny person who personally uses a firearm 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 3, 4, or 10 years, *unless use of a firearm is an element of that offense*." (Italics added.) But subdivision (d) of section 12022.5 provides, "Notwithstanding the limitation in subdivision (a) relating to being an element of the offense, the additional term provided by this section shall be imposed for any violation of [s]ection 245 if a firearm is used . . . ." Because section 654 is a general statute and section 12022.5, subdivision (d) is a specific statute, the latter prevails over section 654. When a specific sentencing statute provides the answer whether an enhancement can be imposed, "recourse to section 654 will be unnecessary because a specific statute prevails over a more general one relating to the same subject. [Citation.] The court should simply apply the answer found in the specific statutes and not consider the more general section 654. [¶] Only if the specific statutes do not provide the answer should the court turn to section 654. . . . [A]s a default, section 654 does apply to enhancements when the specific statutes do not provide the answer." (*People v. Ahmed* (2011) 53 Cal.4th 156, 163.)

Our Supreme Court has held that the imposition of a firearm-use enhancement under section 12022.5, subdivision (d) is mandatory when the defendant has been convicted of assault with a firearm: "Under subdivision (a) [of section 12022.5], the trial court must impose an additional term for personal use of a firearm except when such use is an element of the underlying felony. If, however, the underlying felony is assault with a firearm, subdivision (d) removes that prohibition. Accordingly, subdivision (d) creates an exception to the proviso in subdivision

(a) and renders imposition of a use enhancement mandatory for the enumerated offenses." (*People v. Ledesma* (1997) 16 Cal.4th 90, 97 (*Ledesma*).)

The Supreme Court explained why the Legislature intended to make the firearm-use enhancement mandatory when a defendant is convicted of assault with a firearm: "Even before the enactment of section 12022.5, which originally included assault with a deadly weapon, crimes committed with firearms were perceived as more serious than other offenses. [Citation.] The base term for assault with a firearm does not reflect this consideration, however. . . . [The felony punishment for assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)) and assault with a firearm (§ 245, subd. (a)(2)) is the same: imprisonment in the state prison for two, three, or four years.] Only mandatory imposition of the firearm use enhancement could ensure a sentence proportionately more severe [for assault with a firearm]." (*Ledesma*, *supra*, 16 Cal.4th at p. 100.) The "'obvious purpose of section 12022.5 is to deter the use of firearms in the commission of violent crimes by prescribing additional punishment for each use.'" (*Id*. at p. 101.)

The trial court's sentencing error was invited by the prosecutor, and the People have not raised the section 654 issue in this appeal. Nevertheless, the error is correctable under the unauthorized sentence concept. "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. . . . [¶] . . . [A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is

'clear and correctable' independent of any factual issues presented by the record at sentencing. [Citation.]" (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*).) "[T]he sentence is 'subject to judicial correction whenever the error [comes] to the attention of the trial court or a reviewing court,' even if the correction increases the sentence originally imposed." (*People v. Roth* (2017) 17 Cal.App.5th 694, 703.)

"It is well settled . . . that the court acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays or fails to stay execution of a sentence under section 654. [Citations.]" (*Scott*, *supra*, 9 Cal.4th at p. 354, fn. 17.) "'Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.'" (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

Accordingly, as to count 2 (assault with a firearm), we modify appellant's sentence to impose an unstayed consecutive 10-year term for the firearm-use enhancement. This increases appellant's aggregate sentence from 18 years to 28 years, unless the trial court exercises its discretion to strike the five-year prior serious felony conviction. (§ 667, subd. (a)(1).) "[I]t is well established that when a defendant lays his cause on our doorstep, he subjects himself to a thorough review of the proceedings below, and an unauthorized sentence must be vacated and a proper sentence imposed whenever such a mistake is discovered." (*People v. Ayon* (1996) 46 Cal.App.4th 385, 395, fn. 7, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.)

We recognize that, pursuant to Government Code section 68081, appellant is entitled to an opportunity to brief the section

654 issue.[5] But this is a matter of blackletter law. The trial court was not aware of section 12022.5, subdivision (d). Therefore, in the interest of economy and to avoid an unnecessary delay of the proceedings, we have not asked the parties to file supplemental briefs. If appellant has grounds to believe that we are wrong on the section 654 issue, he may timely file a petition for a rehearing as to this issue. (Gov. Code, § 68081.)

Disposition

The conviction for actively participating in a criminal street gang in violation of section 186.22, subdivision (a), as charged in count 1 of the information, is reversed for insufficiency of the evidence. As to count 2, assault with a firearm in violation of section 245, subdivision (a)(2), the judgment is modified to vacate the section 654 stay of the 10-year consecutive term for the firearm-use enhancement. (§ 12022.5, subds. (a), (d).) The matter is remanded to the trial court with directions to exercise its discretion whether to strike the prior serious felony conviction in furtherance of justice. (§§ 667, subd. (a)(1), 1385.) The trial court may also consider whether to strike the firearm-use enhancement "in the interest of justice pursuant to Section 1385." (§ 12022.5, subd. (c).) We express no opinion on how the court

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[5] Government Code section 68081 provides, "Before . . . a court of appeal . . . renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

should exercise its discretion on remand. The trial court shall prepare an amended abstract of judgment and send a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

David R. Worley, Judge

Superior Court County of Ventura

Laini Millar Melnick, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, Acting Supervising Deputy Attorney General, Stephanie C. Santoro, Deputy Attorney General, for Plaintiff and Respondent.