Filed 2/7/17 P. v. Session CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVONTE SESSION et al., Defendants and Appellants.	B266207 (Los Angeles County Super. Ct. No. PA081310)

APPEAL from judgments of the Superior Court of Los Angeles County, David B. Gelfound, Judge. Affirmed as modified.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant Davonte Session.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant William Leander Jones.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant Anisha Johnson.

Kamala D. Harris, Attorney General, Gerald A. Engler and Lance E. Winters, Assistant Attorneys General, Jonathan M. Krauss, Wyatt E. Bloomfield, and Amanda Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

In this gang-related drive-by-shooting case, Davonte Session, William Leander Jones, and Anisha Johnson appeal from the judgments entered upon their convictions by jury trial of shooting at an inhabited dwelling, assault with a semiautomatic firearm upon three individual victims, and carrying a loaded firearm while an active participant in a criminal street gang. In addition, Session was convicted of possession of a firearm by a felon, and Jones was convicted of possession of a firearm by a violent felon. Both were convicted of being felons in possession of ammunition.

Appellants argue that under Penal Code section 654[1] they may not be punished for both shooting at an inhabited dwelling and assaulting victims outside the dwelling. Session and Jones separately argue section 654 bars punishing them for both carrying a loaded firearm in a vehicle and being a felon in possession of a firearm. They also argue the sentence for carrying a loaded firearm may not be enhanced under section 186.22, subdivision (b)(1) because the offense already was elevated to felony status under subdivision (a) of the same statute. Johnson separately argues her conviction for carrying a loaded firearm and the true finding on the gang enhancement are not supported by substantial evidence. We disagree with these arguments.

---

[1] Subsequent statutory references are to the Penal Code.

Respondent concedes that section 654 bars separate punishments for possession of a firearm and possession of ammunition. We accept the concession and order the judgments as to Session and Jones modified to stay the sentence on counts 12 and 14 respectively. We shall affirm the judgments as modified.

FACTUAL AND PROCEDURAL SUMMARY

On July 20, 2014, Michelle Ventura and her mother Dora Palacios were outside a converted garage in Pacoima where they lived. Michelle was holding her infant daughter, Mia. The garage was attached to the house of Juan Gutierrez, the baby's father. Gutierrez was inside the house, and Ventura's brother Jay was inside the garage. At trial, Ventura testified that, at about 6:30 p.m., she noticed a brown car driven by a woman with red hair pass by. At least two men were in the car. Ventura heard gunshots and ran into the house.

Gutierrez immediately gave chase in his green SUV. A patrol officer saw a tan SUV speed westbound on Van Nuys Boulevard followed by Gutierrez's car. The tan SUV ran a red light, but Gutierrez stopped. He told the officer that shots had been fired at his house from the vehicle he was pursuing. The officer caught up with the tan SUV and ordered appellants to exit. Johnson, whose hair had been dyed bright red, was in the driver's seat. Jones was in the front passenger seat, while Session was in the back seat behind the driver. An underage girl wearing a bright red t-shirt was in the rear right passenger seat. Two semiautomatic pistols were found in a compartment in the right rear passenger section of the SUV. No live ammunition was found in the magazines or guns.

Three casings were found in the street and two bullet fragments were found in the driveway of Gutierrez's house. The casings and one of the bullet fragments were matched to the firearms found in appellants' car. Bullet holes were found in Gutierrez's SUV, in an RV parked in front of his house, in the garage door, and in a couch behind that door.

Session and Jones were members of the Pacoima Piru Bloods gang, a rival of the Humphrey Boys gang. The Pacoima Piru Bloods were associated with the color red. Gutierrez was a Humphrey Boys gang member, and his house in that gang's territory was known to police for gang activity. The Pacoima Piru Bloods and Humphrey Boys had been feuding over overlapping territory.

Appellants were charged with the attempted murder of Palacios, Ventura, Gutierrez, and Mia (§§ 664, 187; counts 1-4); shooting at an inhabited dwelling (§ 246; count 5), assault with a semiautomatic firearm against the same four individuals (§ 245, subd. (b); counts 6-9), and carrying a loaded firearm while an active participant in a criminal street gang (§ 25850, subds. (a) & (c); count 10). Session also was charged with possession of a firearm by a felon (§ 29800, subd. (a)(1); count 11) and possession of ammunition by a felon (§ 30305, subd. (a)(1); count 12). Jones also was charged with possession of a firearm with a prior violent conviction (§ 29900, subd. (a)(1); count 13) and possession of ammunition by a felon (§ 30305, subd. (a)(1); count 14). All offenses were alleged to have been gang-related. (§ 186.22, subd. (b)(1).) Various firearm enhancement allegations were attached to counts 1 through 9, including allegations of personal use and discharge of a firearm by both Session and Jones, as well as general allegations as to all appellants of a principal's use and

discharge of a firearm. (§ 12022.5, 12022.53, subds. (b), (c) & (e)(1).) A prior strike conviction resulting in a prison term was alleged as to Session and Jones. (§§ 667, 667.5, 1170.12.)

Ventura was reluctant to testify, and her trial testimony differed somewhat from statements she had made after the shooting. At that time, she told police that Gutierrez, her brother Jay and her sister Elizabeth had been outside at the time of the shooting, but at trial, she testified Jay had been inside the converted garage and Gutierrez had been inside the house. She did not mention Elizabeth. Ventura told police a brown car had passed by twice but at trial she testified she had seen it pass by only once. At trial, Ventura insisted she had heard but not seen the shots fired, and she denied having said that she had seen a man seated in the back seat behind the driver and another man seated in the front passenger seat. She was impeached with her statements to police that she had seen a gun fired through the driver's window and another gun fired over the roof of the vehicle.

Gutierrez was uncooperative at trial. He denied having been at the house at the time of the shooting or having pursued appellants afterwards, and he claimed not to remember anything. One of the investigating officers, Officer O'Brien, testified that on the night of the shooting Gutierrez had told her his house had been fired upon and his baby almost killed. According to O'Brien, Gutierrez described the shooters' car as a gold SUV, with four occupants and a female driver, and claimed the shooter was the male in the back seat. O'Brien assumed Gutierrez had witnessed the shooting because he told her he had seen the car drive by once or twice before shots were fired from that car.

The jury acquitted appellants of attempted murder (counts 1-4) and assault against Gutierrez (count 8). It convicted them as

charged on all other counts. The jury found the allegations that Session personally had used and discharged a firearm, attached to counts 5, 6, 7, and 9, to be not true. All other enhancement allegations were found to be true. The prosecution conceded that Session's prior conviction of carrying a loaded firearm was not a strike, and Session admitted the prior prison term allegation. Jones admitted his prior strike.

The court imposed an indeterminate term of 15 years to life in prison on count 5 as to each appellant; in Jones's case, the term was doubled to 30 years to life under the Three Strikes law. The firearm enhancements attached to this count were stayed.

The determinate term as to Jones was 55 years, 8 months. It consisted of a high term of 9 years on count 6, doubled under the Three Strikes law, and enhanced by 10 years for the firearm use and by 5 years for the felony prior, for a total of 33 years on the principal term. On counts 7 and 9, the court imposed one-third of the middle term of 6 years on count 7, doubled, plus one-third of the firearm enhancement, for a total of 7 years, 4 months on each count, to run consecutively. The court stayed the gang enhancements on counts 6, 7, and 9. On counts 10, 13, and 14, the court imposed three consecutive terms of 2 years, 8 months, each of which consisted of one-third of the mid-term for the substantive offense, or 8 months, doubled; and one-third of the gang enhancement, or 1 year, 4 months.

The determinate term as to Session was 24 years, 4 months. It consisted of a high term of 9 years on count 6, plus 5 years for the gang enhancement and 1 year for the prison prior, for a total of 15 years. On counts 7 and 9, the court imposed one-third of the middle term of 6 years, plus one-third of the gang enhancement, for a total of 3 years, 8 months on each count. The sentence on

count 10 consisted of one-third of the mid-term for the substantive offense, or 8 months, and one-third of the gang enhancement, or 16 months, for a total of 2 years. All these terms were to be served consecutively. The court imposed concurrent 5-year terms on counts 11 and 12, consisting of 2 years for the substantive offense and 3 years for the gang enhancement.

The determinate term as to Johnson was 8 years, consisting of the low term of 3 years on count 6, plus 5 years for the gang enhancement. The court imposed concurrent sentences on the remaining counts: 8-year terms on counts 7 and 9, and a 4-year term (2 years for the offense and another 2 years for the gang enhancement) on count 10.

Appellants received presentence credits and were assessed fines and fees. This appeal followed.

DISCUSSION

I

Appellants challenge portions of their sentences under section 654, which bars multiple punishment under different provisions of law for a single criminal act or indivisible course of conduct incident to a single objective. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.)

A. Shooting at an Inhabited Dwelling

Appellants argue multiple punishment for shooting at an inhabited dwelling and assaulting the persons standing in front of it was improper under section 654. However, the multiple victim exception allows separate punishment for each crime of violence against a different victim, even though all crimes are part of an indivisible course of conduct with a single principal objective. (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1630–1631.)

Appellants claim there is no substantial evidence that anyone was inside the converted garage at which shots were directed. They rely on conflicting testimony as to the whereabouts of Gutierrez and Ventura's brother Jay. But under the substantial evidence test we view the evidence in favor of the prosecution and do not resolve conflicts in the testimony. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Ventura had told police Gutierrez and Jay were in front of the house during the shooting, but at trial she explained they were outside when "the cops came." She testified Jay was in the garage, which she called "our house—converted apartment, where he was living." On cross-examination, Ventura answered affirmatively questions asking whether Jay was in the house or the garage. Session argues her answers mean that Jay was in the main house, not in the garage. Ventura's answers show she considered the converted garage to be their house. Indeed, an attached garage is considered a room in a dwelling. (*People v. Morales* (2008) 168 Cal.App.4th 1075, 1081.) Ventura also testified that Gutierrez was in the main house at the time of the shooting, which may explain why the jury acquitted appellants of the assault charge against him. Gutierrez's denial that he was home was contradicted by his own statements to police after the shooting.

Ventura's trial testimony is substantial evidence that there were one or more victims of the shooting at an occupied dwelling who were not named in any other count for which appellants were convicted. (See *People v. Felix*, *supra*, 172 Cal.App.4th at pp. 1630–1631.) Separate punishment on count 5 (shooting at an inhabited dwelling) was proper.

B. Firearm Possession

Session and Jones argue they may not be punished for both carrying a loaded firearm and being a felon in possession of a firearm because possessing and carrying the firearms in the car were part of an indivisible course of conduct, incident to the drive-by shooting. An ex-felon may be separately punished for the continual possession of a firearm "before, during and after" a crime involving the use of that firearm. (See *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413.) The possession "is complete once the intent to possess is perfected by possession. What the ex-felon does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon." (*Id.* at p. 1414; see also *People v. Jones* (2002) 103 Cal.App.4th 1139, 1147 [passenger who fired shots could be punished for actual or constructive possession of firearm while riding in car].)

Here, the jury was instructed that "[t]wo or more people may possess something at the same time," and the evidence supported the conviction of Session and Jones for joint possession of the two firearms found in the car. (See *People v. Gant* (1968) 264 Cal.App.2d 420, 423 [defendants may be convicted of joint possession of firearm that is readily accessible to each defendant and in exclusive possession of neither].) There is substantial evidence the two guns were in appellants' car before and after the shooting. Who put them there, or who acquired and possessed them beforehand is not material since it is inferable that Session and Jones had joint constructive possession of the two guns while riding in the car. (See *People v. Jones*, *supra*, 103 Cal.App.4th at p. 1147.)

Section 654 allows multiple punishment under separate provisions of law for possessing more than one firearm. (*People v. Sanders* (2012) 55 Cal.4th 731, 734.) Session's attempt to limit the holding of *Sanders* to separate violations of the same statute is unavailing, as the court in that case explained the defendant could be punished for violations of two separate statutory provisions—former sections 12021, subdivision (a)(1) (felon in possession) and 12021.1, subdivision (a) (violent felon in possession)—based on his simultaneous possession of two firearms. (*Sanders*, at p. 734.)

Contrary to Session's argument, current California Supreme Court precedent does not require that we consider carrying and possessing multiple firearms to be an indivisible course of conduct incident to the same objective. In *People v. Jones* (2012) 54 Cal.4th 350, 353, the court considered "carrying, and thus possessing, a single firearm, . . . to be a single physical act." The court overruled *In re Hayes* (1969) 70 Cal.2d 604, which had held that the single act of driving in violation of two different criminal statutes may be punished twice. (*Jones*, at pp. 355–358.) At the same time, however, the court quoted with approval Chief Justice Traynor's reasoning that possession of separate items results in separate acts of possession. (*Id.* at p. 358, citing *Hayes*, at p. 613 (dis. opn. of Traynor, C. J.).) By this logic, carrying, and thus possessing, two firearms results in two punishable acts of possession, rather than in a single act or indivisible course of conduct. Since Session and Jones committed multiple criminal acts, rather than a single act that violates multiple statutes, separate punishments on counts 10 (carrying a loaded firearm), 11 (felon in possession as to Session) and 13 (violent felon in possession as to Jones) were proper.

B. Possession of Ammunition

Respondent concedes that the sentence for possession of ammunition on counts 12 (Session) and 14 (Jones) must be stayed. Where "all of the ammunition is loaded into the firearm, and 'indivisible course of conduct' is present," section 654 bars punishment for possession of both a firearm and ammunition. (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.)

Here, the prosecution relied on a technicality to argue that possession of ammunition was divisible from the firearm possession. Officer Rood, who discovered the two pistols in appellants' SUV, testified that "[b]oth firearms were expended. They had no live ammunition inside the magazine or in the gun, in which the smaller of the two had the magazine inserted still into it, and the larger black steel had the magazine just inside of it." A magazine is included in the statutory definition of ammunition. (§§ 30305, subd. (a); 16150, subd. (b).) In its sentencing memorandum, the prosecution argued that "[p]ossession of each weapon is a divisible act as is the possession of each magazine, particularly since one was apart from its corresponding weapon."

While Officer Rood's testimony suggests one of the magazines was not completely inserted into its corresponding weapon when found, other evidence indicates the gun had been fired during the shooting, which means the magazine at one point was completely loaded into the gun. Thus, the evidence does not indicate the magazine was possessed separately from its corresponding firearm. *People v. Lopez*, *supra*, 119 Cal.App.4th 132 cannot be read to exclude from section 654 loosely loaded ammunition. We shall order the concurrent 5-year term on count

12 as to Session and the consecutive term of 2 years, 8 months on count 14 as to Jones stayed under section 654.

II

Session and Jones argue the sentence for carrying a loaded firearm (count 10) may not be enhanced under section 186.22, subdivision (b)(1) because the firearm offense was elevated from a misdemeanor to a felony based on a finding of active gang participation under section 186.22, subdivision (a). They rely on cases declining to apply two gang-related penalty provisions to the same crime. We find those cases distinguishable.

In *People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1445 (*Arroyas*), the Court of Appeal held that section 186.22, subdivision (d), which allows a misdemeanor committed for the benefit of a gang to be punished as a felony, may not be used to "bootstrap" a misdemeanor into subdivision (b)(1) of that statute, which subjects a felony committed for the benefit of a gang to additional punishment. Two years later, in *People v. Briceno* (2004) 34 Cal.4th 451, 465 (*Briceno*), the Supreme Court held that section 1192.7, subdivision (c)(28), which defines a felony committed to benefit a gang as a serious felony, may not be used to "bootstrap" such a felony into section 186.22, subdivision (b)(1)(B), which subjects a serious felony committed for the benefit of a gang to increased punishment. The court noted it would be "improper to use the *same* gang-related conduct" to obtain additional punishment. (*Briceno*, at p. 465.) Similarly, in *Lopez v. Superior Court* (2008) 160 Cal.App.4th 824, 832 (*Lopez*), the court concluded that section 186.22, subdivision (d) may not be used to elevate contempt of court (§ 166, subd. (a)(4)) to a felony based on violation of an injunction "issued to abate gang-related conduct," because the same acts comprised "both the disobedience of the

injunction *and* the proof of a gang connection for the enhancing allegation under section 186.22, subdivision (d)."

The provisions at issue in those cases (§186.22, subd. (d) and § 1192.7, subd. (c)(28)) had been enacted pursuant to the same voter initiative (Prop. 21, as approved by voters, Primary Elec. (Mar. 7, 2000)), and the courts concluded that in approving the initiative the voters had not intended to apply "'a double dose of harsher punishment'" to offenses committed for the benefit of a gang. (*Briceno*, *supra*, 34 Cal.4th at p. 465, quoting *Arroyas*, *supra*, 96 Cal.App.4th at p. 1445; see also *Lopez*, *supra*, 160 Cal.App.4th at p. 830.)

In contrast, in *People v. Jones* (2009) 47 Cal.4th 566, 568–569, the court found no problem in the application of both section 186.22, subdivision (b)(4), which subjects certain felonies committed for the benefit of a gang to life imprisonment, and section 12022.53, which imposes an enhancement for personally discharging a firearm in the commission of a felony punishable by life imprisonment. (§ 12022.53, subds. (a)(17) & (c).) The court distinguished *Briceno*, *supra*, 34 Cal.4th 451 and *Arroyas*, *supra*, 96 Cal.App.4th 1439 because in those cases the courts considered "the interplay between two statutory provisions that impose penalties for committing a crime to benefit a criminal street gang, and each concluded that the California electorate, which enacted those provisions through an initiative measure, did not intend to apply both provisions to the same crime." (*Jones*, at p. 575.) In contrast, the provisions at issue in *Jones* "appear[ed] in separate statutes enacted at different times" and "only one of the two provisions at issue—section 186.22[, subdivision] (b)(4)—pertain[ed] to criminal street gangs." (*Jones*, at p. 575.)

One of the provisions at issue in this case, section 25850, subdivision (c)(3), elevates carrying a loaded firearm to a felony on proof of all the elements of the crime of active gang participation in section 186.22, subdivision (a). (*People v. Robles* (2000) 23 Cal.4th 1106, 1115 (*Robles*) [interpreting former § 12031, subd. (a)(2)(C)]; *People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1172 & fn. 2 [§ 12031 was renumbered § 25850].) Section 25850, subdivision (c)(3) appears in a separate statutory scheme. While it punishes the offense of carrying a loaded firearm (§ 25850, subd. (a)) as a felony by reference to a provision in the gang statute (§186.22, subd. (a)), there is no evidence of legislative intent precluding application of subdivision (b)(1) of the same statute, which enhances the punishment for a felony committed for the benefit of a gang. (§186.22, subd. (b)(1).) That is because section 186.22, subdivisions (a) and (b) use different language, have different elements, and punish different conduct.

In summary, the crime of carrying a loaded firearm may become a felony by reason of the defendant's participation in conduct giving rise to another felony, which need not be gang related. (See *People v. Lamas* (2007) 42 Cal.4th 516, 524 (*Lamas*); see also *People v. Albillar* (2010) 51 Cal.4th 47, 59 (*Albillar*).) On the other hand, the crime of carrying a loaded firearm may be deemed gang related based on the conduct that gave rise to the crime itself, rather than to another crime. (See *Albillar*, at p. 66.) Thus, there is no necessary overlap between the conduct that elevates carrying a loaded firearm to felony status and that which subjects the resulting felony to additional punishment under the gang enhancement.

More specifically, carrying a loaded firearm becomes a felony under section 25850, subdivision (c)(3) on proof of a violation of

section 186.22, subdivision (a), which prohibits active participation in a criminal street gang "'with knowledge that its members engage in or have engaged in a pattern of criminal gang activity'" and willful promotion, furtherance or assistance "'in any felonious criminal conduct by members of that gang.' (§ 186.22[,subd.] (a).)" (*Robles*, *supra*, 23 Cal.4th at p. 1115.) However, a "defendant's misdemeanor conduct—being a gang member who carries a loaded firearm in public—cannot satisfy section 186.22(a)'s third element, felonious conduct, and then be used to elevate the otherwise misdemeanor offense to a felony." (*Lamas*, *supra*, 42 Cal.4th at p. 524.) Rather, carrying a loaded firearm becomes a felony only if section 186.22, subdivision (a) "has been *completely* satisfied by conduct *distinct from* the otherwise misdemeanor conduct of carrying a loaded weapon . . . ." (*Lamas*, at p. 524; see also *People v. Infante* (2014) 58 Cal.4th 688, 694 [conduct's status as felony must be established independently of § 186.22, subd. (a) and former § 12031].) Thus, carrying a loaded firearm becomes a felony under section 25850, subdivision (c)(3) only because of the defendant's participation in a separate felony.

The jury in this case was instructed that felonious criminal conduct means "attempted murder, assault with a semiautomatic firearm or shooting at an inhabited dwelling," which comprised the conduct during the drive-by shooting that formed the basis for counts 1 through 9. The jury convicted appellants of shooting at an inhabited dwelling and three counts of assault with a semiautomatic firearm, and the conduct underlying those convictions elevated carrying a loaded firearm to felony status.

Felonious conduct may satisfy section 186.22, subdivision (a) even if it is not gang related under subdivision (b)(1). (*Albillar*, *supra*, 51 Cal.4th at p. 59.) Therefore, there was no requirement

that the felonies committed during the drive-by shooting be gang related in order to elevate carrying a loaded firearm to a felony. Section 186.22, subdivision (b)(1), on the other hand, requires that a felony be gang related in order to be subject to an additional enhancement. (*Albillar*, at p. 60.) To be gang related, a felony must be "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." (§186.22, subd. (b)(1).) But the "criminal conduct" in question under subdivision (b)(1) need not "be 'apart from' the criminal conduct underlying the offense . . . sought to be enhanced." (*Albillar*, at p. 66.) Hence, the crime of carrying a loaded firearm may be deemed gang related without reference to any other criminal conduct.

Here, there was evidence that appellants—two members and one associate of the Pacoima Piru Bloods gang—carried loaded firearms in a vehicle into rival gang territory. The gang expert testified that appellants acted "in retaliation for perceived disrespect, and to assert and reestablish their dominance over a rival gang." That would have been sufficient to bring felony carrying a loaded firearm within section 186.22, subdivision (b)(1). (See, e.g., *People v. Leon* (2008) 161 Cal.App.4th 149, 155, 163 [evidence sufficient under § 186.22, subd. (b)(1) to enhance carrying loaded firearm as active gang participant where defendant and his fellow gang member carried loaded firearm in rival gang territory]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [knife possession not gang related where "[t]he prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use [a] knife in a gang-related offense"].)

The hypothetical posed to the expert was based on the entire incident, including the drive-by shooting and the presence of guns in appellants' car, because gang enhancement allegations were attached to all counts. Even so, the fact that the jury found all crimes to have been gang related does not mean the felonious conduct used to satisfy section 186.22, subdivisions (a) was a necessary element of the gang enhancement attached to the carrying a loaded firearm count under subdivision (b)(1).

Section 186.22, subdivisions (a) and (b)(1) overlap to the extent they reference the definition of criminal street gang under subdivision (f). The jury was instructed that all of appellants' crimes could be used to establish the pattern of criminal gang activity that defines a criminal street gang. But independent evidence of crimes committed by other members of the Pacoima Piru Bloods was introduced to establish the required minimum of two predicate offenses under section 186.22, subdivision (e). Thus, appellants' conduct during the drive-by shooting was not necessarily used to find that the Pacoima Piru Bloods were a criminal street gang for purposes of the gang enhancement.

Appellants argue that, under *People v. Nguyen* (2015) 61 Cal.4th 1015, active gang participation may not be additionally punished under the gang enhancement In that case, the court accepted the Attorney General's concession that a conviction for street terrorism under section 186.22, subdivision (a) is not itself subject to a sentence enhancement under subdivision (b)(1), since that enhancement attaches to the underlying felonious conduct, on which such a conviction is based. (*Nguyen*, at p. 1068.) Because appellants were not charged with a violation of section 186.22, subdivision (a), *Nguyen* is inapposite.

Session cites *People v. Flores* (2005) 129 Cal.App.4th 174, 184, which held that a defendant could not be convicted of both street terrorism in violation of section 186.22, subdivision (a), and carrying a loaded firearm as an active gang participant in violation of former section 12031, subdivision (a)(2)(C) because he could not have committed the latter offense without necessarily committing the former. The application of *Flores* to this case is questionable since, in that case, the court accepted the Attorney General's concession with minimal analysis. (Cf. *People v. Schoppe-Rico* (2006) 140 Cal.App.4th 1370, 1383 ["street gang firearm statutes do not include a gang connection element"].) The California Supreme Court has clarified that a sentencing enhancement or penalty provision is not an element of the substantive offense under California law, and the statutory elements test, rather than the accusatory pleading test, determines if a crime is a lesser included offense. (See *People v. Anderson* (2009) 47 Cal.4th 92, 119; *People v. Reed* (2006) 38 Cal.4th 1224, 1229.)

Carrying a loaded firearm in public is a crime under section 25850, subdivision (a). Subdivision (c)(3) is one of several penalty provisions prescribing "an added penalty to be imposed when the offense is committed under specified circumstances." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899 [interpreting § 186.22, subd. (d) as a penalty provision].) A penalty provision "is separate from the underlying offense and does not set forth elements of the offense." (*Ibid.*) Thus, active gang participation cannot be characterized as an element or a lesser included offense of the crime of carrying a loaded firearm. Attaching a gang enhancement to the latter crime does not necessarily punish a defendant for the former.

Because section 186.22, subdivisions (a) and (b) do not necessarily apply to the same conduct, application of the gang enhancement in subdivision (b) to count 10 was proper.[2]

III

Johnson argues the evidence fails to support her conviction of carrying a loaded firearm in a vehicle or the life sentence imposed pursuant to section 186.22, subdivision (b)(4)(B). We review these arguments under the substantial evidence test. As we have explained, that test requires us to view the record and draw reasonable inferences in favor of the judgment. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357.)

A. Constructive Possession

Johnson's reliance on *People v. Sifuentes* (2011) 195 Cal.App.4th 1410 is misplaced. In that case, a gun was found under the mattress in a motel room the defendant occupied with another gang member and two women. The other gang member was kneeling close to where the gun was hidden, while the defendant was lying on another bed. (*Id*. at p. 1413–1414.) There was no evidence that the defendant controlled the gun, and the court found insufficient evidence to support an inference that the gun was a jointly possessed "gang gun." (*Id*. at pp. 1417, 1419.)

Johnson's case is different because she was the driver of the car in which weapons were discovered immediately after a drive-by shooting. There was evidence that shots had been fired through the driver's side window of that car, and that the car had run a red light in a high-speed chase by one of the victims of the drive-by shooting. Carrying a firearm in a vehicle may be

---

[2] Appellants do not argue that the sentence imposed on count 10 should have been stayed under section 654, and we express no view on the matter.

supported by circumstantial evidence of constructive possession. (*People v. Taylor* (1984) 151 Cal.App.3d 432, 436.) An inference of dominion and control arises when a firearm is carried in a vehicle driven by the defendant, particularly where the driver takes evasive action. (*Ibid.* [driver constructively possessed firearm thrown from passenger side of car]; see also *People v. Miranda* (2011) 192 Cal.App.4th 398, 410–411 [front seat passenger constructively possessed firearm thrown out of back passenger window of car engaged in high-speed chase]; *People v. Gant*, *supra*, 264 Cal.App.2d at p. 425 [driver had actual control of speeding vehicle where weapons were readily available to driver and passenger].)

B. Gang Enhancement

Under section 186.22, subdivision (b)(4)(B), shooting at an inhabited dwelling (§ 246) is subject to an indeterminate sentence of 15 years to life in prison if "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." Johnson argues there is no evidence she committed the crime for the benefit of a gang. She complains that the gang expert had no prior knowledge that she was an associate of the Pacoima Piru Bloods but was allowed to proceed on that assumption based solely on the facts of this case. She also claims that the expert speculated about her specific intent to "retaliate[e] for perceived disrespect" based on inadmissible hearsay evidence.

"'Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.' [Citation.]" (*People v. Rios* (2013) 222 Cal.App.4th 542, 567–568.) Circumstantial evidence satisfies the intent

requirement if the "evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, [from which] the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 68.) As the Supreme Court explained in *People v. Vang* (2011) 52 Cal.4th 1038, 1046–1051, the gang expert may answer hypothetical questions that track the evidence in a case and are based on assumptions, the truth of which is for the jury to decide.

"A trier of fact can rationally infer a crime was committed 'in association' with a criminal street gang within the meaning of section 186.22, subdivision (b) if the defendant committed the offense in concert with gang members. [Citation.] 'There is no further requirement that the defendant act with the specific intent to promote, further, or assist a gang; the statute requires only the specific intent to promote, further, or assist criminal conduct by gang members.' [Citation.]" (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1021.) Whether or not Johnson was previously known as a gang associate, there is sufficient evidence that, in this case, she committed crimes "in association" with known Pacoima Piru Bloods gang members. Johnson is incorrect in claiming the only evidence against her was her presence in gang territory with gang members. She was the driver in a drive-by shooting. The evidence that she drove twice by the house of a known Humphrey Boys gang member, allowing shots to be fired from the car the second time, and then sped off supports an inference that she specifically intended to assist the gang members' criminal conduct in shooting at a rival gang member's house. Her hair, which was dyed the gang's color of bright red, is

circumstantial evidence of her affiliation, if not association, with the Pacoima Piru Bloods gang.

The expert testimony supports an inference that the drive-by shooting was for the benefit of the Pacoima Piru Bloods because it arose from a turf war between that gang and its rival, the Humphrey Boys. The expert testified about gang graffiti, in which initials of one gang were crossed out and initials of the other were written over them. Photographs of the graffiti were introduced into evidence without objection. Any hearsay-based claim was thus forfeited and would have been unsuccessful in any event since the graffiti evidence was based on the expert's personal observation and was offered as original evidence of the turf war between the two gangs. (See *People v. Henry* (1948) 86 Cal.App.2d 785, 789 [where issue is "whether certain things were said or done and not as to whether these things were true or false, . . . the words or acts are admissible not as hearsay, but as original evidence"].)

Substantial evidence supports Johnson's conviction on count 10 (carrying a loaded firearm) and the gang enhancement attached to count 5 (shooting at an occupied dwelling).

DISPOSITION

The judgments are modified to stay the terms imposed on count 12 as to Session and count 14 as to Jones. As modified, the judgments are affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modification and to forward it to the Department of Corrections and Rehabilitation.

NOT FOR PUBLICATION IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.