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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARQUEZ EZELL,

Defendant and Appellant.

B264581

(Los Angeles County
Super. Ct. No. BA392173)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed in part; remanded in part for resentencing.

Valarie Mark Kalb, 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, Chung L. Mar and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Marquez Ezell appeals the judgment following his conviction and sentence for possession of a firearm and ammunition by a felon, along with gang and prior conviction enhancements. We reject his challenges to the trial court's refusal to bifurcate trial on the gang enhancements and exclusion of certain defense evidence. However, as respondent concedes, insufficient evidence supported the five-year gang enhancement, so it must be stricken. In the absence of the gang enhancement, the five-year prior serious felony enhancement must also be stricken. Because those errors may have affected other parts of appellant's sentence, we will remand for resentencing. Otherwise, we affirm.

PROCEDURAL BACKGROUND

After trial, a jury found appellant guilty of possession of a firearm by a felon (Pen. Code, former § 12021, subd. (a)(1),¹ now § 29800, subd. (a)(1)) and possession of ammunition by a person prohibited from possessing a firearm (former § 12316, subd. (b)(1), now § 30305). The jury found true allegations the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(B).)

It was alleged appellant had suffered three prior convictions under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and three prior serious felony convictions (§ 667, subd. (a)(1)), and he had served a prior prison term (§ 667.5, subd. (b)). All of those enhancements arose from the same prior case No. KA084274. In a bifurcated proceeding, the court found true he had suffered the three prior convictions.

¹ All undesignated statutory citations are to the Penal Code unless otherwise noted.

The court sentenced him to 14 years in state prison. Treating the prior convictions as a single strike, the court imposed the midterm of two years for the firearm possession count, doubled to four years under the Three Strikes law, plus five years for the gang enhancement and five years for the prior convictions. The court imposed and stayed the sentence on the ammunition possession count. Appellant timely appealed.

FACTUAL BACKGROUND

1. Prosecution Case

On the afternoon of December 22, 2011, Los Angeles Police Detective Silvia Sanchez was patrolling with two other officers in the area around Jefferson Boulevard in Los Angeles. She sat in the front passenger seat while Officer Glick drove and Officer Rand sat in the back seat. As they drove eastbound on Jefferson Boulevard, Detective Sanchez observed appellant and two other males standing between two fences. She noticed appellant wearing a heavy jacket. Officer Glick said something that prompted the officers to drive around the block and return to the area. Detective Sanchez was “very focused” on appellant’s hands; she saw him reach into his waistband and pull out a black nine-millimeter semiautomatic handgun. She said, “Gun.” Appellant leaned over and tossed the gun with his left hand into a space between some concrete and a fence.

As the three men attempted to walk away, the officers handcuffed and detained them. Detective Sanchez recovered the gun. Officer Glick checked it and found six bullets in the magazine and one in the chamber. It appeared to be operational. Appellant was arrested; the two men with him were questioned and released.

The gun and ammunition were not checked for fingerprints. Detective Sanchez initially suggested such testing was customary and officers might have forgotten to submit the items for testing. She later explained the police typically will not test for fingerprints when a police officer witnesses the crime.

Los Angeles Police Officer Saul Moran testified as a gang expert. He was assigned to the Southwest Division Gang Enforcement Detail and was responsible for gathering and documenting intelligence concerning the Rolling 30's Harlem Crips gang (Rolling 30's). He testified the Rolling 30's had approximately 700 documented gang members, and he described the gang's history, territory, hand signs, and symbols. The gang's primary activities included robbery, burglary, theft, possession of firearms, shootings, possession of narcotics, and "many other[s]." The area where appellant was arrested was within Rolling 30's territory. Officer Moran also testified regarding crimes committed by two Rolling 30's gang members in 2014 that resulted in convictions.

Officer Moran opined appellant was a member of the Rolling 30's gang because appellant self-admitted his gang membership to officers at the time of his arrest; he was arrested with two other gang members; he had multiple gang-related tattoos; and he was wearing a jacket associated with the gang at the time of his arrest.

When presented with a hypothetical question tracking the facts surrounding appellant's arrest, Officer Moran opined appellant carried the gun for the benefit of the Rolling 30's. As he explained, wearing gang attire and having gang tattoos instilled fear in residents to prevent them from reporting crimes. Carrying a gun facilitated crimes of opportunity, intimidated the

community, and garnered respect for the gang. Also, carrying the gun in the presence of two other gang members gave them access to the weapon.

It was stipulated appellant had a prior felony conviction.

2. Defense Case

Appellant testified, claiming he never possessed the gun Detective Sanchez found. Instead, he claimed he was framed and the “whole case is about Officer Glick” and his problem with appellant and his family.

On the day of his arrest, he was living in Las Vegas but was visiting family members who lived around the corner from Jefferson Boulevard in Los Angeles. He went to the corner of Jefferson Boulevard and saw his two friends there. He stood talking to them as a police car drove by. Between 30 and 60 seconds later, the police car returned. Three officers jumped out of the car and ordered him and his friends to stand against a wall with their arms and legs spread. They all complied. As appellant was being patted down, Officer Glick “began to walk the perimeter” and yelled, “Gun.” Then, according to appellant, Officer Glick “came out with the gun.” Appellant did not see where the gun came from and denied possessing it at any time. He denied tossing it and claimed he was right-handed. He provided handwriting samples to the jury using each hand.

As appellant sat handcuffed in the back of a police car, his sister, Jasmine Brown, arrived at the scene. He observed a confrontation between her and Officer Glick. At the time of the incident, she worked for the Los Angeles Police Department, although she no longer worked there at the time of trial.

Appellant and his friends were taken to the police station and placed in the same holding cell. Officer Glick removed

appellant and took him to the parking lot, where they had a conversation, during which Officer Glick threatened him. When they finished talking, Officer Glick brought him back to the cell, then separately pulled out each of appellant's friends and brought them back after 10 to 15 minutes. After three and a half hours in custody, appellant was booked. His friends were released. When Officer Glick told him he was being charged with possession of a firearm, appellant yelled several times, "Fingerprint the firearm."

Appellant posted bail several days later and was told to return to court on January 14, 2012. He returned to Los Angeles for that court date, but was told at the courthouse he "wasn't on the list that day." As a result, he believed no case had been filed against him and returned to Las Vegas.

In Las Vegas, appellant worked at a marketing research job, which he obtained using his real name and social security number. He also paid his income taxes and got married while living there. He returned to Los Angeles "[p]lenty of times" to visit family and attend family events. He was eventually arrested in Las Vegas on an outstanding warrant in August 2014 after committing a traffic violation. At the stop, he provided his California identification and was informed of the outstanding arrest warrant.

At the time of trial, appellant was 28 years old. He admitted he joined the Rolling 30's gang when he was 15 or 16 and got gang tattoos when he was 17 or 18. After serving time in prison for first degree burglary and attempted burglary, he left the gang because he wanted to change his life. He claimed he was wearing the jacket associated with the gang when he was arrested simply because he was cold and he had left it behind at

his mother's house when he moved. It was a Minnesota Twins jacket, and the symbol "TC" stood for "Twin City," not the gang-related "30 Crip."

He testified that, in late November 2011 before he moved to Las Vegas, appellant had a "problem" with Officer Glick, which led to his arrest. Appellant lost his apartment in Los Angeles when it was raided, which prompted him to move to Las Vegas. Something also happened to his two sisters. Appellant acknowledged he had no problem or prior contact with Detective Sanchez or Officer Rand.

Appellant's sister Jasmine Brown testified that, on the day of appellant's arrest, she arrived at the scene and saw appellant in the back of a police car. She recognized Officer Glick, who approached her, resulting in a confrontation. At the time, Brown worked for the Los Angeles Police Department and filed a complaint against Officer Glick that day.

3. Rebuttal

In rebuttal, the prosecution called two officers involved in appellant's apprehension in Las Vegas. Las Vegas Police Officer Samuel Cortez learned about appellant's outstanding warrant and stationed officers for surveillance near appellant's possible residence. Officer Cortez observed appellant leave the location, and once appellant was a block away, officers activated their lights and sirens. Appellant ran, jumped a wall, and crossed a road. At one point, he attempted to enter a building. Officers followed him on foot and ultimately detained him after he had traveled two to three blocks.

Los Angeles Police Officer Drew Gontram was assigned to transport appellant from Las Vegas to Los Angeles. While on the plane, appellant told him he knew he was "wanted" and "hot."

He said he had been under surveillance so he would usually walk out the back door without any issues. Appellant denied the gun was his.

The prosecution introduced a bail document from the court file indicating appellant was supposed to appear in court January 19, 2012. The parties stipulated appellant's arrest warrant issued on that date.

DISCUSSION

1. Request to Bifurcate

Appellant contends the trial court abused its discretion and violated his constitutional rights when it denied his request to bifurcate trial on the gang enhancements from trial on the substantive crimes. We disagree.

Before trial, appellant moved to bifurcate the gang allegations, arguing the case was "fairly simple" because the police would testify they arrested appellant after they recovered a gun they saw him toss. The gang evidence would not be probative of these issues and would be highly prejudicial. The prosecution disagreed, arguing appellant was seen wearing gang attire with two other gang members in an area of high gang activity. Further, carrying the gun showed allegiance to the gang, intimidated the community, and gave appellant's companions access to a weapon. Without elaborating, the court determined the gang evidence was relevant to the substantive offenses and denied the request to bifurcate.

A trial court has discretion to bifurcate the determination of a gang enhancement from the determination of guilt of the underlying crime. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*).) Bifurcation may not be warranted, however, when the gang evidence is relevant to the charged offense.

“Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary.” (*Id.* at pp. 1049-1050.) A defendant seeking severance must “ ‘clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.’ ” (*Id.* at p. 1050.)

We review the denial of a bifurcation request for abuse of discretion based on the record as it stood at the time of the ruling. (*People v. Franklin* (2016) 248 Cal.App.4th 938, 952 (*Franklin*).) “Our review is guided by the familiar principle that ‘[a] court abuses its discretion when its rulings fall “outside the bounds of reason.” ’ [Citations.] If the trial court’s ruling was correct on the record before it, the ruling is subject to reversal only upon a showing that ‘ “joinder actually resulted in ‘gross unfairness’ amounting to a denial of due process.” ’ ” (*Id.* at pp. 952-953.)

Bifurcation was not warranted here because much of the gang evidence was relevant to appellant’s motive for carrying the gun. (See *Franklin, supra*, 248 Cal.App.4th at p. 953 [“[G]ang evidence is ‘relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related.’ ”].) As the prosecutor pointed out to the trial court, the gang evidence provided several reasons why appellant would have possessed the gun—showing allegiance to the gang, intimidating the

community, and giving appellant's gang-member companions access to a weapon. Given appellant was spotted wearing a gang-affiliated jacket with two fellow gang members in a known gang area, the gang evidence helped explain why he would have been carrying a gun at the time. This record distinguishes this case from *People v. Albarran* (2007) 149 Cal.App.4th 214, which involved the introduction of highly inflammatory gang evidence and the absence of a link between the crime and an alleged gang motive. (*Id.* at pp. 227-228.)

Appellant claims on appeal the gang evidence was only minimally probative of motive because there were "ample other reasons" why appellant would have been carrying a firearm that day, such as that some individuals may legally possess firearms. Yet, he points to no specific reason why *he* might have possessed a gun that day. Even if he did, that would only go to the weight of the gang motive evidence, not its relevance. (See *Franklin, supra*, 248 Cal.App.4th at p. 953 ["The gang evidence here was thus relevant to the prosecution's theory of motive. That the defense countered with a different theory did not diminish the relevance of the gang evidence offered in support of the prosecution's case"].) In any event, his position now is entirely inconsistent with his defense at trial that he never possessed the gun for any reason.

Further, the gang evidence did not create a substantial danger of prejudice requiring bifurcation. Again, most of the gang evidence was probative of appellant's motive to possess a firearm. To the extent some of it was not, such as the convictions of other gang members, that evidence was not particularly inflammatory in comparison to the gang evidence that was relevant. (See *Hernandez, supra*, 33 Cal.4th at p. 1051.) And the

jury was admonished not to use the gang evidence to conclude appellant had a bad character or criminal disposition. Further, apart from the gang evidence, appellant's credibility was severely damaged when the jury learned he was a convicted felon and the prosecution offered evidence that he was not arrested at a traffic stop in Las Vegas as he claimed, but as he was fleeing from authorities. He also admitted on the flight to Los Angeles that he was a wanted fugitive, in contrast to his testimony that he believed no charges had been filed against him. Any additional damage to his veracity from the gang evidence was minimal.

Given much of the gang evidence was probative of the substantive crimes and none of it was unduly prejudicial, its admission did not result in "gross unfairness" at trial denying him due process. (*Franklin, supra*, 248 Cal.App.4th at p. 953.)

2. Officer Glick Evidence

Appellant contends the trial court abused its discretion and violated his constitutional rights to confront and cross-examine witnesses and to present a defense by excluding certain evidence about Officer Glick's history with appellant and his family. We reject his claim of error in part and find any exclusion of this evidence was harmless beyond a reasonable doubt.

A. Background

Before trial, the prosecution asked the court to exclude any evidence showing Officer Glick might have been suspended or otherwise disciplined for actions related to appellant's family. Defense counsel was unaware if Officer Glick had been disciplined, but he noted Officer Glick had appellant's sister Jasmine Brown fired from the Los Angeles Police Department. He said there would be testimony that when Brown approached Officer Glick at the scene of appellant's arrest, he told her he

would get her brother convicted, he had gotten her fired, and he had gotten her other sister arrested, which defense counsel said was true. Defense counsel further explained Brown filed a complaint with the Los Angeles Police Department about Officer Glick's conduct because he was "very aggressive" when he approached her at the scene. Again, defense counsel did not know if Officer Glick had been disciplined as a result. According to defense counsel, appellant's defense was that the incident was personal and appellant had not tossed the gun.

The prosecutor was also unaware whether Officer Glick had been disciplined for the incident. He noted the prosecution would not be calling Officer Glick as a witness because two other officers witnessed appellant's conduct. He said there was no reason for appellant to call Officer Glick only to impeach him, so the prosecutor requested the court exclude any impeachment evidence as well as any impeachment witnesses due to late notice.

Defense counsel did not intend to call Officer Glick, but he indicated appellant would testify that Officer Glick kicked down his door a few months before the current incident and attempted to arrest him. Defense counsel also believed Brown should be permitted to testify to her contact with Officer Glick at the time of the incident. And evidence that Officer Glick had gotten his other sister arrested would also be relevant.

The prosecutor objected that the evidence of Brown's firing was hearsay. Defense counsel clarified that Officer Glick filed a complaint against her with the Los Angeles Police Department alleging she obtained information on a suspect from the computer system. She was suspended at the time of appellant's arrest in this case and eventually terminated. Defense counsel argued

Officer Glick had a “vendetta” against appellant’s family, which affected his credibility. Defense counsel noted that, in apparent contrast to Detective Sanchez’s trial testimony, Officer Rand (the third officer with Officer Glick and Detective Sanchez at appellant’s arrest) testified at the preliminary hearing that Officer Glick shouted “gun” when the weapon was allegedly thrown and Officer Glick was the person who recognized appellant and caused them to turn around and drive back to the location. Defense counsel concluded even if the People did not intend to call Officer Glick as a witness, “It’s a major issue in this case.”

The prosecutor reiterated he did not intend to call Officer Glick and the defense should not be permitted to attack his credibility. Defense counsel claimed the officers were “covering for each other.”

The court asked why the prosecution would not call Officer Glick, and the prosecutor responded that he had two other percipient witnesses—Detective Sanchez and Officer Rand. The court asked if the prosecution also was not calling him so it would not have to deal with any impeachment. The prosecutor responded, “That’s part of it, yes.” The court viewed Brown’s firing as a “side issue” and “tangential,” unduly consuming time and confusing the issues. The court also found the defense did not provide timely discovery on the issue. Nonetheless, the court reserved ruling.

When the court revisited the issue, defense counsel stated he was not so concerned with whether Officer Glick caused Brown to be fired, but he maintained Officer Glick made certain statements at the scene, namely, that he had reported Brown, he had arrested appellant’s other sister, and he was going to “get”

appellant. Counsel argued this was relevant to Officer Glick's mindset because he was the only one who knew appellant, he turned the car around, and he arrested appellant. The court again inquired why the prosecution was not calling Officer Glick, and the prosecutor was reluctant to provide detail for "work product" reasons, but did indicate the two other officers who saw appellant were available to testify. The court inferred that the prosecution believed Officer Glick may be a problematic witness, so it was opting to call other witnesses to testify to similar facts. Defense counsel responded that Officer Glick was different because he had asked appellant to become an informant and had told appellant he was the one who kicked down appellant's door prior to the incident in this case, who had gotten his sister arrested, and who had reported Brown.

The court reserved ruling until appellant testified and objections were raised. The court also deferred ruling on admitting Brown's testimony until the defense provided a written summary of her proposed testimony to the prosecution. When the prosecutor said he had not received a statement regarding appellant's other sister, defense counsel doubted whether she would be called as a witness at all.

During trial, the issue came up again. Defense counsel reiterated Brown would testify she arrived at the scene and had a confrontation with Officer Glick, who told her he had gotten her fired, had gotten her sister arrested, and was going to "take care of her brother." She would also testify she saw three men arrested and taken from the scene. The court questioned whether Officer Glick's statement was hearsay, and defense counsel argued it was not offered for its truth, but to show why appellant moved to Las Vegas.

The court ultimately excluded the statement by Officer Glick to Brown at the scene. During the course of appellant's testimony, the court also sustained objections and excluded the following testimony: (1) during the conversation between appellant and Officer Glick in the jail parking lot, Officer Glick threatened to file the instant case as a "third strike"; (2) during that same conversation Officer Glick referred to what he had done to appellant's sisters; (3) Officer Glick had bragged to appellant about kicking in his apartment door; and (4) Officer Glick had arrested appellant's sister.

B. Analysis

Evidence is relevant if it has " "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," ' tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.' " (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.) All relevant evidence is admissible unless otherwise provided by statute, and a trial court has broad discretion to determine the relevance of evidence. (*Ibid.*) Under Evidence Code section 352, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of undue consumption of time, undue prejudice, confusion of the issues, or misleading the jury. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609 (*Cudjo*).

We review the trial court's exclusion of evidence under state law for abuse of discretion and will not reverse unless "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Further, "[a]s a general matter, the ordinary rules of evidence do

not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice’ [¶] It follows, for the most part, that the mere erroneous exercise of discretion under such ‘normal’ rules does not implicate the federal Constitution.” (*Cudjo, supra*, 6 Cal.4th at p. 611.)

Even if the court abuses its discretion and violates a defendant's constitutional rights by excluding certain evidence, we will not reverse if, “assuming that the damaging potential of the cross-examination were fully realized, [we] might nonetheless say that the error was harmless beyond a reasonable doubt.” (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) In reviewing for harmless error, we consider “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” (*Ibid.*)

Appellant contends the evidence regarding Officer Glick was relevant in three ways: (1) it supported appellant’s defense that Officer Glick framed him due to hostility toward him and his family; (2) it showed Detective Sanchez had a motive to lie to cover up Officer Glick’s misconduct; and (3) it explained why appellant moved to Las Vegas. We reject his contention the Officer Glick evidence was relevant to the third issue—why he moved to Las Vegas—so the court did not abuse its discretion in refusing to admit it for that reason. As to the other two grounds, we find that, even assuming there was error, the exclusion of the

Officer Glick evidence did not result in any conceivable prejudice to appellant.

As for appellant's flight to Las Vegas, the record belies appellant's claim that he left Los Angeles out of fear of Officer Glick's hostility toward him and his family. Appellant testified he lost his apartment when "someone raided" it, but he did not testify he moved because he was afraid of or felt intimidated by Officer Glick after the alleged raid. Instead, he moved to Las Vegas "because it was cheaper up there." He also did not suggest he failed to appear for his court date in Los Angeles because he feared Officer Glick, as he now argues. He apparently showed up on the wrong date and was told he was not on the list, so he had assumed no case had been filed against him. He also frequently returned to Los Angeles, which was inconsistent with any fear of Officer Glick. Thus, allowing appellant to introduce evidence that Officer Glick was hostile toward him and his family would not have explained his flight to Las Vegas or his missed court date in Los Angeles.

As for appellant's remaining arguments, even if the court had admitted the Officer Glick evidence, the chance that the jury would have reached a more favorable verdict was remote. First, the evidence was cumulative because other evidence gave the jury the opportunity to evaluate appellant's basic defense that he was framed by Officer Glick. Appellant testified he had a "problem" with Officer Glick, something had happened to his sisters, and the "whole case is about Officer Glick" and his problem with appellant and his family. He also testified Brown got into a confrontation with Officer Glick at the scene, and Officer Glick had threatened him during the conversation they had in the jail parking lot. Brown also testified she got into a

confrontation with Officer Glick at the scene and filed a complaint against him that day. Based on this evidence, the jury could have inferred Officer Glick may have framed appellant due to the animosity toward him and his family. By convicting appellant, however, it appears the jury rejected that theory. The excluded details of Officer Glick's actual statements to Brown at the scene, in particular that he was going to "take care of her brother," would have added little to the strength of his defense. Indeed, it was not particularly probative of a set-up, given Officer Glick made these statements *after* appellant had been arrested, suggesting he wanted to see appellant prosecuted for the criminal conduct the officers just witnessed. Similarly, the other testimony about Officer Glick's involvement with raiding appellant's apartment or threatening to file this case as a "three strikes" case did not add significant strength to appellant's defense.

Second, the evidence of appellant's guilt was compelling, and the admission of the Officer Glick evidence would not have undermined it. Appellant was spotted in gang territory wearing a gang jacket with two other gang members, and the gang expert testified to several gang-related reasons why appellant would have possessed the gun. Detective Sanchez specifically testified she saw him toss the gun as she "focused" on his hands. Appellant suggests Detective Sanchez was covering for Officer Glick, but that was merely speculation. And as discussed above, appellant's credibility was severely damaged. Not only did the jury learn he was a convicted felon, it learned he lied about being arrested at a traffic stop in Las Vegas, when he actually fled from authorities, and he lied about believing no charges had been filed against him, when he admitted on the flight to Los Angeles that

he was a wanted fugitive. On this record, any exclusion of the Officer Glick evidence was harmless beyond a reasonable doubt.

3. Cumulative Error

Having assumed only minor error, we reject appellant's argument cumulative error warrants reversal.

4. Gang Enhancement

Appellant asserts a host of challenges to the five-year gang enhancement pursuant to section 186.22. We need address only one, which is dispositive: the evidence was insufficient to demonstrate a pattern of criminal gang activity, an element of the gang enhancements. Respondent concedes the issue, so the gang enhancement must be stricken.

To establish the gang enhancement pursuant to section 186.22, subdivision (b), the prosecution must show, *inter alia*, that the group's members engage in, or have engaged in, a pattern of criminal gang activity. (§ 186.22, subd. (f); *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 (*Duran*).) A pattern of criminal gang activity is defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" of the offenses enumerated in the statute, "provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e); see *Duran, supra*, at p. 1457.)

Crimes committed after the date of the commission of the charged offense may not serve as predicate offenses to show a pattern of criminal gang activity. (*Duran, supra*, 97 Cal.App.4th at p. 1458; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1383;

People v. Godinez (1993) 17 Cal.App.4th 1363, 1370.) Here, the crimes reflected in the predicate convictions were committed in 2014, long after appellant committed his offenses in 2011, so they could not qualify as predicate offenses. The only other crimes that might have served as predicate offenses were appellant's charged crime of felon in possession of a firearm (§ 186.22, subd. (e)(31); *Duran, supra*, at p. 1457 [charged crimes may serve as predicate offenses]) and appellant's prior offenses of burglary and attempted burglary. But respondent concedes no evidence showed when the burglary offenses were committed, so the jury could not determine whether they qualified. (§ 186.22, subd. (e); *Duran, supra*, at p. 1457.) Further, burglary was not listed as a predicate crime in the jury instruction on the pattern of criminal gang activity. (See *People v. Garcia* (2014) 224 Cal.App.4th 519, 526 (*Garcia*) [offense did not qualify as predicate crime in part because it was not listed in jury instructions].) Because the record showed only one predicate crime, there was insufficient evidence to support the gang enhancements and they must be stricken.

5. Prior Conviction Enhancement

In addition to the five-year gang enhancement, the court imposed a consecutive five-year enhancement pursuant to section 667, subdivision (a)(1), which applies to "any person convicted of a serious felony who previously has been convicted of a serious felony." "Serious" felonies are those listed in section 1192.7, subdivision (c). (§ 667, subd. (a)(1), (4).) Appellant's charged offenses of felon in possession of a firearm and ammunition are not listed, so they were serious felonies only by virtue of the gang enhancements. (§ 1192.7, subd. (c)(28) [listing "any felony offense, which would also constitute a felony violation of Section

186.22”].) Respondent concedes this enhancement must also be stricken in the absence of the gang enhancement.

6. Scope of Remand for Resentencing

Because we have stricken the gang and prior conviction enhancements, we must remand the case for resentencing so the trial court may reconsider all aspects of its sentencing choices in light of our decision. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258.) To guide the trial court on remand, we note (1) the gang enhancement may not be retried (*Garcia, supra*, 224 Cal.App.4th at p. 526), and (2) appellant may not be subject to a term longer than his original 14 years (*People v. Hanson* (2000) 23 Cal.4th 355, 357).

Respondent contends, as part of that resentencing, the trial court should either impose or strike the one-year enhancement pursuant to section 667.5, subdivision (b), for appellant’s prior prison term. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241 [court may not stay § 667.5, subd. (b) enhancement; it must be imposed or stricken].) Appellant opposes this request, arguing the record is unclear as to whether the court found the prior prison term allegation true. We think appellant has the better argument.

As noted, the information alleged appellant had suffered three prior strike convictions (§§ 667, subds. (b)-(i), 1170, subds. (a)-(d)) and three prior serious felonies (§ 667, subd. (a)(1)), all from the same case No. KA084274. The information also alleged appellant served a prior prison term based on one of the counts in that same case. (§ 667.5, subd. (b).) In the bifurcated court trial on the priors, the court found “those three prior convictions in KA084274” true. It did not address the prior prison term allegation. At the sentencing hearing, the court doubled the base

term due to the strike convictions and imposed the (now-stricken) five-year enhancement for the prior felonies. But it did not mention the prior prison term allegation.

Because nothing in the record indicates the court found the section 667.5, subdivision (b) prior prison term allegation true or considered it as part of appellant's sentencing, we will not instruct the court to either impose or strike it on remand. Instead, the court may conduct further proceedings to determine whether the prior prison term allegation is true and sentence appellant accordingly.

DISPOSITION

The five-year enhancement pursuant to section 186.22, subdivision (b) and the five-year enhancement pursuant to section 667, subdivision (b) are stricken. The matter is remanded for resentencing consistent with this opinion. In all other respects, the judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.