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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARQUISE DAVIS, Defendant and Appellant.	B259183 (Los Angeles County Super. Ct. No. BA414555-02)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Remanded for resentencing.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra and Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Marquise Davis appeals from the judgment entered after a jury convicted him of several offenses arising from the armed robbery of a fast-food restaurant and kidnapping of a customer to make his getaway with his confederate, Davon Winston. The jury also found true special criminal street gang and firearm-use enhancements. Previously convicted of multiple armed robberies in two other cases,[1] Davis was sentenced to 32 years to life for his crimes in this case and to a blended aggregate sentence of 155 years to life. On appeal Davis contends the testimony of the People's gang expert was based on improper hearsay and violated his Sixth Amendment right of confrontation. He also challenges certain aspects of the trial court's sentence. We agree sentencing errors were committed that require a remand for resentencing. We affirm Davis's convictions in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Davis was charged in an amended information with second degree robbery (Pen. Code, § 211)[2] (count 1), assault with an assault weapon (§ 245, subd. (a)(3)) (count 2), kidnapping to facilitate a carjacking (§ 209.5, subd. (a)) (count 3) and dissuading

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[1] Davis's convictions for numerous felonies arising from other armed robberies committed with Winston were affirmed in *People v. Davis* (Sept. 1, 2015, B253574) [nonpub.] (*Davis I*) (affirming sentence of 90 years to life) and *People v. Davis* (Apr. 6, 2016, B255790) [nonpub.] (*Davis II*) (affirming sentence of 53 years eight months). Winston died in prison on November 19, 2017 and is not a party to this appeal.

[2] Statutory references are to this code unless otherwise stated.

a witness when having a prior conviction for the same offense (§ 136.1, subd. (c)(3)) (count 4). It was specially alleged as to counts 1 through 3 that a principal had been armed with an assault rifle (§ 12022, subd. (a)(2)) and as to counts 1 and 3 that a principal personally used a firearm (§ 12022.53, subds. (b) & (e)(1)). As to all counts it was further specially alleged the offenses had been committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).)

2. *Evidence at Trial*

a. *The People's evidence*

Around 1:30 a.m. on November 26, 2012 two African-American men wearing knit ski masks with holes cut for the eyes entered a Subway sandwich shop on Manchester and Central Avenues in Los Angeles and screamed at everyone in the shop to get on the ground and to hand over their cell phones. The taller of the two robbers, armed with a long gun that appeared to be an assault rifle, ordered the employees behind the counter to open the cash registers and the safe; the shorter man ran to the back of the shop. The employees did not have the key to the safe and could not open it. The robbers also demanded their victims' car keys. Only Aleah Porter, a customer, admitted to having keys.

Porter and two store employees testified at trial to the events inside the shop, and a surveillance video of the robbery was played for the jury. Porter also testified, after she had handed over her car keys, the men ordered her at gunpoint to accompany them to her car and told her to drive them away. The taller man told her their getaway driver had left them. Later, the robbers, who referred to each other in the car as "Blood" and "Mook" or "Monk," took off their masks; and the shorter man switched places

with Porter and took over driving. He wore tan pants and a Louis Vuitton belt.

As Porter and the two men passed a Little Caesars pizza restaurant, one of the men suggested they stop and rob it. Porter pleaded with them not to do that with her in the car. When Porter began to cry, both men assured her they would not hurt her. The driver told Porter they were not bad guys, but he needed money to take care of his kids. He also said he was a rapper and had "rapped with Joe Moses." He asked Porter for her driver's license, wrote down her personal information and invited her to follow him on social media. The driver stopped in an alley near Century Boulevard, and the two men wiped down Porter's car for fingerprints before leaving her.

Porter was interviewed a few days after the robbery by Los Angeles County Sheriff's Detectives Veronica Conrado and Maria Tomes. Porter showed the detectives the alley where she had dropped the men off and told the detectives she thought the shorter man had said they were going to his girlfriend's or his mother's house.

A few weeks later Detective Conrado interviewed Davis and Winston. During the interview Davis described himself as a rapper and said he had performed with Joe Moses and his street name was "Young Monk." He also gave a home address that backed up to the alley where the gunmen had released Porter following the robbery.

Porter could not identify the robbers in a photographic line-up. Several weeks later, following a live line-up, Porter selected three individuals, including Davis. She stated Davis "looked like" the driver, but she did not recall him walking with a limp. In a separate live line-up Porter also identified Winston, but wrote

"maybe." A sheriff's deputy who had accompanied Davis to the line-up testified Davis had walked without a limp on the way from the jail, but walked with a limp during the line-up.

On two occasions deputies placed Davis and Winston together in a holding cell and recorded their conversations, portions of which were played to the jury. In one instance Davis commented he had intended to shave his head bald and responded to Winston's mention of pictures the detectives had shown them by saying, "You know, I had my hair in that afro." In another, Davis asked Winston what he thought police wanted to talk to them about. Winston replied, "I have no idea, . . ." Davis responded, "I hope it's not Subway or Little C's"; and Winston said, "If it ain't one thing, it's another, man."

The People and defense counsel stipulated that on December 22, 2012 Davis and Winston were in the back seat of a car stopped by police from which four cell phones were recovered. One of the phones contained photographs of Davis and Winston wearing clothes similar to the suspects from the robbery. Davis wore a Louis Vuitton belt. The digital date and time on the photographs was the afternoon before the robbery.

Los Angeles County Deputy Sheriff Antonio Guillen, a 22-year law enforcement veteran and gang investigator, testified as an expert witness on criminal street gangs. Guillen opined Davis and Winston were 92 Bishop Bloods gang members. Although Guillen testified inconsistently about whether he had ever met Davis and Winston, he explained he had been told by other law enforcement officers, as well as civilians, that each was a member of the gang. In support of his opinion Guillen showed the jury photographs of Davis's and Winston's multiple gang-related tattoos. Based on his experience as a law enforcement

officer in the area controlled by the 92 Bishop Bloods gang, including conversations with, and arrests of, 92 Bishop Bloods gang members, Guillen testified the gang's primary activities were selling narcotics, robberies, burglaries and vandalism.

To establish the 92 Bishop Bloods' pattern of criminal gang activity, the prosecutor introduced evidence of criminal convictions in two earlier cases, *People v. Reel* (Super. Ct. L.A. County, 2008, No. TA098183) [possession of narcotics for sale] and *People v. Keller* (Super. Ct. L.A. County, 2012, No. VA119188) [attempted robbery] and asked Deputy Guillen if he had an opinion whether the defendants in those cases were members of the 92 Bishop Bloods at the time they committed the crimes. Guillen responded the two men, Kerry Reel and John Brown Keller, had been members of the 92 Bishop Bloods when they were convicted of their crimes, an opinion, he explained, that was based on statements made to him by the arresting officers in the two cases. No other evidence was offered to prove Reel and Keller's gang membership; the jury was instructed, however, it could also consider Davis and Winston's participation in the charged offenses in determining whether the People had established a pattern of criminal gang activity.

Given a hypothetical resembling the facts of this case, Guillen opined the charged offenses in this case were committed to benefit the 92 Bishop Bloods gang. Guillen explained such robberies enhance the reputation of the gang and elevate the reputation of the gang members who commit the crimes. He also cited instances in which gang members have used the proceeds from robberies and the sale of contraband, including stolen cell phones, to purchase drugs to benefit the gang. He testified his opinion would not change even if the perpetrators had not

identified themselves as 92 Bishop Blood gang members during the robbery, bore no visible gang-related tattoos and had not shared the proceeds of the robbery with other gang members.

b. *The defense evidence*

Davis called his second cousin, James Smith, as a defense witness. Smith testified Davis had spent the night at his house on November 25, 2012, a date he remembered because it was two days before Thanksgiving. According to Smith, Davis could not have left the house without his knowledge because the inside doors could only be opened with a key in Smith's possession. Smith also acknowledged Davis was a member of the 92 Bishop Bloods gang.

Davis testified on his own behalf. He stated he grew up in Inglewood and Watts with his mother, who was often homeless. He had joined the gang when he was 12 or 13 years old to gain protection from an uncle who had been sexually abusing him. His sponsor had been a gang member named Monk; and Davis took the name Baby Monk, later shortened to Monk. Davis denied robbing the sandwich shop and testified he had spent the night at Smith's house. On cross-examination Davis told the prosecutor he had had a change of heart about his participation in the gang after he had received three life sentences in his last case and was no longer an active member of the gang. Davis also admitted he owned a Louis Vuitton belt after being shown a photograph of himself wearing the belt. Asked whether he had rapped with Joe Moses, Davis demurred, clarifying he was a rapper but only knew Moses because Moses had grown up in the neighborhood. When the prosecutor showed Davis photographs of him wielding what appeared to be an assault rifle, Davis insisted the gun was a toy prop, which, as his counsel later elicited, had been purchased to

help market his rap album. Davis admitted he had been convicted of 15 felonies involving moral turpitude.

c. *The People's rebuttal*

In rebuttal the prosecutor asked the court to take judicial notice that in 2012 Thanksgiving fell on November 22.

3. *The Verdict and Sentencing*

Davis and Winston were convicted on all counts, and the jury found true all specially alleged firearm-use and criminal street gang enhancements. On its own motion the trial court ruled the People had failed to prove the rifle used in the robbery qualified as an assault weapon and reduced the charge on count 2 from assault with an assault weapon (§ 245, subd. (a)(3)) to assault with a firearm (§ 245, subd. (a)(2)) and the associated special allegation from a principal's use of an assault weapon (§ 12022, subd. (a)(2)) to a principal's use of a firearm (§ 12022, subd. (a)(1)).

The trial court imposed a blended aggregate sentence of 155 years to life in state prison for all three of Davis's cases pursuant to California Rules of Court, rule 4.452. The court selected one of the robbery counts in *Davis II* as the principal term for determinate sentencing purposes and imposed a total sentence that included indeterminate life terms for kidnapping to facilitate a carjacking in the instant cause and three counts of dissuading a witness for the benefit of a criminal street gang in *Davis I,* consecutive subordinate determinate terms for many of the remaining counts, and associated firearm and criminal street gang enhancements.

CONTENTIONS

Davis contends there was insufficient evidence to support the jury's finding he had committed the underlying offenses for the benefit of a criminal street gang and the gang expert's testimony was based on inadmissible hearsay statements in violation of the confrontation clause of the Sixth Amendment. He additionally argues the trial court erred by imposing dual firearm enhancements on counts 2, 3 and 4 in *Davis II*, a point the Attorney General concedes, and by imposing both a gang enhancement and an enhancement for personal use of a firearm enhancement on count 1 of the same case.

DISCUSSION

1. *The Gang Enhancements Were Properly Imposed*

a. *Governing law*

Section 186.22, subdivision (b)(1), provides for a sentence enhancement for any person convicted of a felony that was 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. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170; see *People v. Albillar* (2010) 51 Cal.4th 47, 60 ["the Legislature included the requirement that the crime to be enhanced be committed for the benefit of, at the direction of, or in association with a criminal street gang to make it 'clear that a criminal offense is subject to increased punishment under the [gang enhancement statute] only if the crime is "gang related"'"].) A "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [certain enumerated] criminal acts[,] . . . having a common name or

common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "pattern of criminal gang activity" means "the commission of . . . or conviction of two or more of [certain enumerated offenses]" that "were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).) Offenses charged in the case before the jury can be included in the crimes relied upon to show a pattern of criminal gang activity. (*People v. Loeun* (1997) 17 Cal.4th 1, 10; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1401.)

Davis attacks the jury's true finding on the criminal street gang enhancement on two grounds: (1) Deputy Guillen's opinion identifying the pattern of gang activity by 92 Bishop Bloods was based on inadmissible testimonial hearsay in violation of Davis's Sixth Amendment right of confrontation; and (2) there was insufficient evidence to support the jury's gang-benefit finding. While we agree certain statements by Deputy Guillen offered to support his opinions were improperly admitted, any error was harmless; and there is ample evidence supporting the jury's finding.

b. *Deputy Guillen's statements identifying Reel and Keller as gang members were improper, but the error was harmless*

"In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) At the time of Davis's trial Supreme Court authority conferred broad latitude on gang experts to rely upon statements by fellow officers and gang members in opining that the crime charged involved gang-related activity. (See *People*

v. Gardeley (1996) 14 Cal.4th 605, 611-613, 619 (*Gardeley*); *People v. Stamps* (2016) 3 Cal.App.5th 988, 993.) Trial courts, in turn, possessed "broad discretion to determine whether particular facts to which an expert was prepared to testify were sufficiently 'reliable' to come before the jury." (*Stamps*, at p. 994, citing *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753.)

The Supreme Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which considered the extent to which *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) and California hearsay rules preclude an expert witness from relating case-specific hearsay in explaining the basis for an opinion, altered this deferential approach to expert testimony. (*Sanchez*, at p. 670.) *Sanchez* held, "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.* at p. 686.)

In *Sanchez* the expert had based his opinion the defendant was a member of a certain gang on various police contacts during which the defendant was in the company of members of that gang, and on statements he made when given a "STEP notice" informing him he was associating with a known gang. (*Sanchez, supra*, 63 Cal.4th at pp. 672-673.) The expert admitted he had

never met the defendant, was not present when the STEP notice was given or during any of the police contacts, and his knowledge of these matters was derived from police reports and a field identification card. (*Id*. at p. 673.) As the Court explained in finding these statements had been improperly admitted, "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. . . . There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception. [¶] What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez,* at pp. 685-686.)

Moreover, like any hearsay, if the out-of-court statement is testimonial and is offered against the defendant in a criminal prosecution, *Crawford* and its progeny govern its admissibility. (See *Sanchez, supra,* 63 Cal.4th at p. 686.) "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Id*. at p. 689; accord, *People v. Gallardo* (2017) 18 Cal.App.5th 51, 67 ["to be 'testimonial' under *Crawford*, the statement must have been 'given *and* taken primarily for the purpose [of] . . .

establish[ing] or prov[ing] some past fact for possible use in a criminal trial'"]; *People v. Lara* (2017) 9 Cal.App.5th 296, 336-337.)

To prove a "pattern of criminal gang activity" by the 92 Bishop Bloods, the People presented documentary evidence of the criminal convictions of two men—Kerry Reel (convicted of possession of narcotics for sale) and John Brown Keller (convicted of robbery). Because that evidence did not establish Reel and Keller were 92 Bishop Bloods gang members, the prosecutor asked Deputy Guillen if he had an opinion whether Reel and Keller were members of the 92 Bishop Bloods when those crimes were committed. Guillen offered his opinion Reel and Keller were members of the 92 Bishop Bloods at that time. Asked to explain the basis for his opinion, Guillen stated he had spoken with the investigating officers in both cases and was told by each of them that Reel and Keller had been members of the 92 Bishop Bloods. In the case of Reel, Guillen said the investigating officer had told him Reel had a gang-related tattoo on his neck. Winston and Davis objected on relevance and hearsay grounds. The court overruled the objections and permitted the testimony under *Gardeley*, *supra,* 14 Cal.4th 605.

As we explained in finding the same error in *Davis II*, although the prosecutor framed his inquiry, and Deputy Guillen his answer, in the form of an opinion, the hearsay information he conveyed about Reel's and Keller's gang membership was not based on his personal knowledge or expertise. Indeed, anyone who had spoken to the arresting officers in those cases, whether or not a gang expert, could have provided the same answers to the prosecutors; Guillen was simply the channel by which the views of the deputies who had arrested Reel and Keller were placed before

the jury. Thus, like the out-of-court statements in *Sanchez*, Guillen's statements offered case-specific testimonial facts about Reel's and Keller's gang membership to be considered by the jury for their truth—in violation of hearsay rules and the confrontation clause.

A violation of a criminal defendant's Sixth Amendment right of confrontation requires reversal of the conviction unless the People establish beyond a reasonable doubt the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Livingston*, *supra*, 53 Cal.4th at p. 1159; *People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661.) In applying this standard, "'We ask whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error.'" (*Livingston*, at p. 1159; see also *People v. Pearson* (2013) 56 Cal.4th 393, 463 [""'To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." [Citation.] Thus, the focus is on what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "whether the . . . verdict actually rendered in this trial was surely unattributable to the error."'"].)

Viewing the record as a whole, the error in admitting Deputy Guillen's statements identifying Reel and Keller as 92 Bishop Bloods gang members was harmless beyond a reasonable doubt. There was overwhelming evidence Davis and Winston were members of the 92 Bishop Bloods gang and had committed the charged crimes in concert with each other. The jury was properly instructed in accordance with CALCRIM No. 1401 that it could consider not only Reel and Keller's convictions for pattern of

criminal gang activity, but also the crimes charged in this case. (*People v. Loeun*, *supra*, 17 Cal.4th at pp. 9-10 [requisite pattern of criminal gang activity can be proved by "evidence of the defendant's commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member"]; see *Gardeley, supra*, 14 Cal.4th at p. 625.) Having found Davis and Winston guilty of committing those offenses, the jury necessarily found true the predicate crimes required to prove a pattern of criminal street gang activity by the 92 Bishop Bloods.

c. *The enhancement was supported by substantial evidence*

Davis contends there was insufficient evidence to establish the crimes were committed for the benefit of, at the direction of or in association with the 92 Bishop Bloods because there was no evidence he claimed his gang identity during the robbery and kidnapping or that he shared the proceeds with other gang members.

A true finding on this aspect of the gang enhancement requires proof of two related elements: First, the underlying felony must have been "committed for the benefit of, at the direction of, or in association with any criminal street gang." Second, the defendant must have had "the specific intent to promote, further, or assist in any criminal conduct by gang members." (*People v. Albillar, supra,* 51 Cal.4th at p. 50; *Gardeley, supra,* 14 Cal.4th at pp. 615-616.) The first element is satisfied by proof the defendant committed the crime in concert with a known gang member. (*Albillar,* at p. 68; cf. *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [absent evidence the gang members committed the crimes "on a frolic and detour

unrelated to the gang," the jury could infer the requisite association from the fact the defendant committed the crime with a known gang member].) The second is satisfied by proof the defendant intended to commit the crime with the other gang member. (*Albillar,* at p. 68.)

Substantial evidence supported the jury's finding that the crimes were not committed as purely personal activities, but to benefit the 92 Bishop Bloods.[3] Davis admitted he was a gang member; and the jury rejected his misidentification defense, finding he had committed the charged crimes with Winston, whom Deputy Guillen had opined was also a member of the 92 Bishop Bloods and who had many of the same gang-related tattoos as

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[3] "In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*People v. Albillar, supra,* 51 Cal.4th at pp. 59-60; accord, *People v. Livingston*, *supra*, 53 Cal.4th at p. 1170.) "The relevant facts must, however, meet the statutory requirements for a gang enhancement in order for it to apply." (*People v. Garcia* (2014) 224 Cal.App.4th 519, 523.)

Davis.[4] (See *Sanchez, supra,* 63 Cal.4th at p. 677 [expert may testify that a particular tattoo is "a symbol adopted by a given street gang"; the presence of the tattoo signifies the person belongs to the gang].) The jury's conviction of the two gang members on four separate counts committed in concert more than satisfied the related prongs of the enhancement. Substantial evidence thus supported the jury's true finding on the gang enhancement.

2. *Aspects of the Blended Sentence Must Be Corrected*

Davis contends the blended aggregate sentence imposed by the trial court improperly included firearm enhancements under both sections 12022.5, subdivision (a), and 12022, subdivision (a)(2), on counts 2, 3 and 4 of the charges in *Davis II* in violation of section 1170.1, subdivision (f), which prohibits the imposition of additional punishment under more than one enhancement for "being armed with or using . . . *a firearm in the commission of a single offense*." (See *People v. Rodriguez* (2009) 47 Cal.4th 501, 509 ["[b]ecause the firearm use was punished under two different sentence enhancement provisions, each pertaining to firearm use, section 1170.1's subdivision (f), requires

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[4] Deputy Guillen also explained, in response to a hypothetical based on the facts of this case, that gang members commit such crimes to obtain money and cell phones for distribution to other gang members or for sale and the money from the sale of that contraband or from the proceeds of robberies benefits the gang by permitting it to obtain drugs for sale, firearms and other contraband, thereby increasing the gang's resources. According to Guillen, although gang members do not necessarily identify themselves as gang members during the crime, they often brag about the crime afterward to their fellow gang members to enhance their reputation in the gang.

imposition of 'only the greatest of those enhancements' with respect to each offense"].) The Attorney General agrees the principal-armed enhancements imposed on those counts under section 12022, subdivision (a)(2), totaling five years, should be stayed. (See Cal. Rules of Court, rule 4.447.)

The parties also agree the sentence imposed on count 1 in *Davis II* must be modified. On that count the court imposed a consecutive subordinate determinate term of five years: eight months for the attempted robbery, plus one year (one-third of the enhancement for being armed with an assault weapon, as provided in section 12022, subdivision (a)(2)), plus three years eight months (one-third of the enhancement for committing a violent felony for the benefit of a criminal street gang). This term included two errors: First, the attempted robbery term should have been six months—one-third of one-half of the middle term of three years for second degree robbery (§§ 213, subd. (a)(2), 664, subd. (a), 1170.1, subd. (a)), not eight months. Second, because attempted robbery is defined as a "serious" felony under section 1192.7, subdivision (c)(19) and (c)(39), but not a violent felony under section 667.5, subdivision (c)(9), it was punishable under section 186.22, subdivision (b)(1)(B), rather than subdivision (b)(1)(C). Accordingly, the gang enhancement on this count should have been one year eight months (one-third of five years), not three years four months. The total for this subordinate consecutive term count should have been three years four months, not five years.

Although not identified by the parties, a similar error was made in the subordinate determinate term on count 5 of *Davis I*, another conviction for attempted robbery. The court again imposed a term of eight months, rather than six months, for

attempted robbery and added three years four months for a gang enhancement for a violent felony, rather than a one-year-eight-month enhancement for a serious felony to benefit a criminal street gang. (See *In re Harris* (1993) 5 Cal.4th 813, 842 ["[a]n appellate court may 'correct a sentence that is not authorized by law whenever the error comes to the attention of the court'"].)

Finally, the trial court imposed firearm enhancements under sections 12022.5 or 12022.53 on counts 8 and 9 in *Davis I* and counts 2, 3 and 4 in *Davis II*. At the time of sentencing imposition of these enhancements was mandatory. In October 2017, after briefing was completed in this case, the Legislature passed Senate Bill No. 620, which took effect on January 1, 2018. Sections 12022.5, subdivision (c), and 12022.53, subdivision (h), both now provide, "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."[5]

As the Attorney General acknowledges, sections 12022.5, subdivision (c), and 12022.53, subdivision (h), as amended, apply retroactively to Davis and other defendants whose sentences were not final before those provisions came into effect. (E.g., *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; see *People v. Brown* (2012) 54 Cal.4th 314, 323-324; *In re Estrada* (1965) 63 Cal.2d 740, 745.) In light of the other sentencing errors discussed, and absent any

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[5] We invited Davis's appellate counsel and the Attorney General to file supplemental letter briefs addressing the effect on Davis's blended sentence of Senate Bill No. 620's amendments to sections 12022.5, subdivision (c), and 12022.53, subdivision (h).

indication in the record that a remand to allow the trial court to determine whether to strike firearm enhancements previously imposed under section 12022.5 and 12022.53 would be futile, Davis is entitled to a new sentencing hearing.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated, and the matter remanded to correct the sentencing errors identified in this opinion and to allow the trial court to conduct a new sentencing hearing to determine whether to exercise its discretion to strike firearm enhancements previously imposed under sections 12022.5, subdivision (a), and 12022.53, subdivision (b).

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.*

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