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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ERNESTO ALVAREZ,

Defendant and Appellant.

B280970

(Los Angeles County  
Super. Ct. No. SA091285-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge. Affirmed in part; reversed in part with directions.

Michael W. Flynn, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

A jury convicted defendant Miguel Ernesto Alvarez of second degree robbery. (Pen. Code, §§ 211, 212.5, subd. (c).)<sup>1</sup> The jury also found true a criminal street gang enhancement allegation. (§ 186.22, subd. (b)(1)(C).) The trial court sentenced defendant to 12 years in state prison—two years for the robbery plus 10 years for the gang enhancement.

We agree with defendant’s sole contention on appeal—that there was insufficient evidence to establish the two predicate offenses required to support the gang enhancement. (§ 186.22, subd. (e).) There was substantial evidence of only one predicate offense. Because there was insufficient evidence of *two* predicate offenses, we direct the trial court to strike the gang enhancement. We also remand this matter for resentencing.

## II. DISCUSSION

### A. *Predicate Offenses*

“Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a

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<sup>1</sup> Further statutory references are to the Penal Code.

common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. (§ 186.22, subd. (f); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 319-320; *People v. Gardeley* (1996) 14 Cal.4th 605, 616-617[, disapproved on another point in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13]; *People v. Loeun* (1997) 17 Cal.4th 1, 8.)

“A ‘pattern of criminal gang activity’ is defined as gang members’ individual or collective ‘commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more’ enumerated ‘predicate offenses’ during a statutorily defined time period. (§ 186.22, subd. (e); *People v. Gardeley, supra*, 14 Cal.4th at p. 617.) The predicate offenses must have been committed on separate occasions, or by two or more persons. (§ 186.22, subd. (e); *People v. Loeun, supra*, 17 Cal.4th at pp. 9-10.)” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.)

#### B. *Standard of Review*

“The standard of appellate review for determining the sufficiency of the evidence supporting an enhancement is the same as that applied to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Mejia* (2012) 211 Cal.App.4th 586, 614.) Like a conviction unsupported by substantial evidence, a true finding on a gang enhancement without sufficient support in the evidence violates a defendant's federal and state constitutional rights and must be reversed. (*People v.*

*Weddington* (2016) 246 Cal.App.4th 468, 483; *People v. Ochoa* (2009) 179 Cal.App.4th 650, 656-657.)

“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.’ (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) We draw all reasonable inferences in favor of the verdict, and presume the existence of every fact the jury could reasonably deduce from the evidence that supports its findings. (*People v. Maciel* (2013) 57 Cal.4th 482, 515; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.)” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 947.)

C. *Application to the Present Case*

1. The first predicate offense: the robbery in this case

Defendant committed the present robbery on August 15, 2015 at approximately 5:30 a.m. Robbery is among the qualifying predicate offenses listed in section 186.22, subdivision (e)(2). Moreover, it is well established and the parties agree that the charged robbery qualified as one of the two requisite predicate offenses. (*People v. Loeun, supra*, 17 Cal.4th at p. 8; *People v. Gardeley, supra*, 14 Cal.4th at p. 625; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 581; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1400; *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.)

## 2. The second predicate offense: Gallegos

The People introduced a certified minute order reflecting that defendant's fellow gang member Rudy Phillip Gallegos was convicted of possession of a loaded firearm in violation of section 25850, subdivision (a). Carrying a loaded firearm in violation of section 25850 qualifies as a predicate offense. (§ 186.22, subd. (e)(33).) However, Gallegos committed his crime on October 23, 2015, *after* defendant committed the present robbery. A gang enhancement must rest on evidence of the gang's *past* criminal conduct. (*People v. 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, 1365, 1368-1370.) Because Gallegos committed his offense *after* defendant committed the robbery, Gallegos's crime does not qualify as a predicate offense. (*Ibid.*) The People so concede.

In *Godinez*, our colleagues in Division Four explained that consistent with constitutional due process notice standards, the gang enhancement requires evidence of a gang's *past* criminal conduct. "Use of acts occurring after a defendant's commission of charged offenses to establish the existence of a 'pattern of criminal gang activity' within the meaning of section 186.22, subdivision (c) [now subdivision (e)] deprives the defendant of notice, in advance of his conduct, that his acts will fall within the proscription of section 186.22. Due process entitles a defendant to notice, *before* he acts, of the criminality and consequences of his conduct. [Citation.] [¶] We recognize that it is not likely that a defendant will consult the Penal Code before acting. Nevertheless, due process entitles defendant to fair warning that his contemplated conduct is within the proscription of a

particular statute. [Citations.] [¶] ‘Where a provision is of doubtful validity we must, if possible, impose on it a construction which eliminates doubts as to its constitutionality.’ [Citation.] Section 186.22 has withstood other challenges to its constitutionality through narrow construction. [Citations.] We follow that lead, construing its requirements for establishing a ‘pattern of criminal gang activity’ as excluding offenses occurring after the charged offenses for which a defendant is on trial.” (*People v. Godinez, supra*, 17 Cal.App.4th at pp. 1369-1370.)

### 3. The second predicate offense: Lucio

The People introduced a certified minute order showing Alejandro Lucio, a member of defendant’s gang, was convicted of first degree burglary. Burglary qualifies as a predicate offense. (§ 186.22, subd. (e)(11).) But there was no evidence on what date or at what time Lucio committed the burglary. The only evidence was that Lucio committed the burglary “on or about August 15, 2015.” Specifically, the People introduced a certified minute order that stated Lucio had been charged with committing burglary “on or about 8/15/15,” and plead no contest to that charge on October 29, 2015. August 15, 2015 is the same day defendant committed the present robbery. Defendant committed the robbery at approximately 5:30 a.m. The People failed to establish that Lucio committed the burglary *before* defendant committed the robbery. Because Lucio may have acted *after* defendant committed the robbery, the evidence was insufficient to support a predicate offense finding. (*People v. Duran, supra*, 97 Cal.App.4th at p. 1458; *People v. Olguin, supra*, 31

Cal.App.4th at p. 1383; *People v. Godinez, supra*, 17 Cal.App.4th at pp. 1365, 1368-1370.)

The Attorney General argues the jury could reasonably infer Lucio's crime preceded defendant's act. We disagree. Evidence Code section 600, subdivision (b) defines an inference as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." A reasonable inference must be based on evidence not speculation. "A reasonable inference . . . 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' [Citations.]" (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on another ground as stated in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5; accord, *People v. Davis* (2013) 57 Cal.4th 353, 360.) "[A] court may not . . . "go beyond inference and into the realm of speculation in order to find support for a judgment. A finding . . . which is merely the product of conjecture and surmise may not be affirmed." (*People v. Memro* (1985) 38 Cal.3d 658, 695, overruled on other grounds by *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; *People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Ochoa, supra*, 179 Cal.App.4th at p. 663.) . . . Indeed, '[a] trier of fact may rely on inferences to support a conviction only if those inferences are "of such substantiality that a reasonable trier of fact could determine beyond a reasonable doubt" that the inferred facts are true. (*People v. Raley* (1992) 2 Cal.4th 870, 890-891.)' (*People v. Rios* (2013) 222 Cal.App.4th 542, 564.)" (*People v. Franklin, supra*, 248 Cal.App.4th at pp. 947-948.)

There was no reasonable, credible, solid evidence to support a nonspeculative inference Lucio committed the burglary *before* defendant committed the robbery. (See *People v. Mejia* (2007) 155 Cal.App.4th 86, 93-95 [victim’s testimony was insufficient evidence of continuous sexual abuse—that at least three months elapsed between first and third time defendant sexually abused victim before her 14th birthday].) The Attorney General cannot point to any fact or facts that would support an inference Lucio committed the burglary prior to 5:30 a.m. on August 15, 2015. The only evidence as to the timing of Lucio’s burglary was that he committed it “on or about” the same day defendant committed the present robbery. The jury could only have guessed that the burglary occurred prior to 5:30 a.m. on August 15, 2015. No evidence supported a reasonable inference to that effect.<sup>2</sup>

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<sup>2</sup> Defendant asks this court to take judicial notice of documents filed in the Lucio case as evidence Lucio committed the burglary *after* defendant committed the robbery: (1) an amended felony complaint; (2) a felony advisement of rights, waiver, and plea form; (3) a probation officer’s post-sentence report; and (4) the preliminary hearing minute order. We deny defendant’s judicial notice request. With the exception of defendant’s exhibit 4, the documents in question, even if relevant and admissible, were not presented in the trial court. As a result, we will not consider them on appeal. (*People v. Sanders* (2003) 31 Cal.4th 318, 323, fn. 1; *People v. Amador* (2000) 24 Cal.4th 387, 394; see *People v. Peevy* (1998) 17 Cal.4th 1184, 1207 [“an appellate court generally is not the forum in which to develop an additional factual record, particularly in criminal cases when a jury has not been waived”].)

The minute order attached to defendant’s judicial notice request as exhibit 4 is an uncertified version of the minute order the People introduced in the trial court as exhibit 14. Exhibits



#### 4. Conclusion: remand for resentencing

Because the evidence was insufficient to support the gang enhancement, the true finding on that allegation must be stricken and the consecutive ten-year term imposed must be reversed. (*People v. Perez* (2017) 18 Cal.App.5th 598, 614, 627; *People v. Franklin, supra*, 248 Cal.App.4th at pp. 947, 952, 957; *People v. Ochoa, supra*, 179 Cal.App.4th at p. 656.)

The Attorney General seeks a remand “to give the trial court an opportunity to restructure its sentencing choice.” The Attorney General notes that the trial court sentenced defendant to the low term for robbery, two years. (§ 213, subd. (a)(2).) We agree that a remand for resentencing is appropriate. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 509 [proper remedy where sentence violated section 1170.1, subd. (f) is remand]; *People v. Franklin, supra*, 248 Cal.App.4th at p. 957 [remanding for resentencing where insufficient evidence to support gang enhancement].)

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admitted in the trial court are part of the record on appeal. (Cal. Rules of Court, rule 8.320(e); *People v. Williams* (2013) 218 Cal.App.4th 1038, 1054, fn. 4.) Because the document is already a part of the record on appeal, there is no need to take judicial notice of defendant’s exhibit 4.

### III. DISPOSITION

The sentence is reversed and the matter is remanded for resentencing. On remand, the trial court is to strike the Penal Code section 186.22, subdivision (b)(1)(C) gang enhancement. The judgment is affirmed in all other respects. The trial court is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

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KIM, J.\*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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