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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ALEX MALDONADO et al., Defendants and Appellants.	B176739 (Los Angeles County Super. Ct. No. BA257101)

APPEAL from judgments of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant Alex Maldonado.

Cheryl Rae Anderson and Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Alejandro Hernandez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts Statement of Facts, Discussion A1, A2, B3, C, D, E and F.

PROCEDURAL BACKGROUND

A jury convicted defendants Alex Maldonado and Alejandro Hernandez of two counts of attempted robbery (§§ 664/211),[1] two counts of kidnapping (§ 207, subd. (a)), and two counts of false imprisonment by violence (§ 236). The jury convicted defendant Maldonado alone of making a criminal threat (§ 422), and found that he had personally used a firearm in all of his crimes (§§ 12022.53, subd. (b); 12022.5, subd. (a)(1)). As against defendant Hernandez, the jury found true the allegation in all counts that a principal had been armed with a firearm (§ 12022, subd. (a)(1)). For all of the crimes of which defendants were convicted, the jury found the criminal street gang enhancement allegation (§ 186.22, subd. (b)(1)) to be true. The court sentenced defendant Maldonado to a term of 64 years and eight months, and defendant Hernandez to a term of 17 years and four months.

In the published portion of our opinion, we hold that assault with a firearm (§ 245, subd. (a)(2)) is a predicate offense under section 186.22, subdivision (e)(1), for purposes of proving a pattern of criminal gang activity. In the unpublished portion, we strike the gang enhancement on other grounds, but otherwise affirm the judgments and remand for resentencing.

STATEMENT OF FACTS

1. *The Prosecution Case*

The crimes were committed on November 27, 2003 (Thanksgiving day) in and around the apartment building located at 511 Parkview in the City of Los Angeles. The building is a "hangout" for the Wanderers street gang. The Wanderers gang has marked the building as its territory by placing its graffiti inside and outside of the apartment building. Defendant Maldonado is a self-acknowledged member of the Wanderers. The graffiti in the building included his street moniker, El Spider. Defendant Hernandez is not known to be a member of the Wanderers.

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[1] All undesignated statutory references are to the Penal Code.

After finishing Thanksgiving dinner in a relative's apartment, Jovanni Gonzalez and Jorge Beltran went outside of the building. They propped open the building's front door so they could easily reenter it. When an unidentified man entered the building, Gonzalez asked him not to close the front door. The man, nonetheless, closed the door and walked away as Gonzalez asked him why he had done that.

Several minutes later, the man returned with four other men. (Neither defendant was in this group.) The group approached Gonzalez and Beltran and asked a question commonly understood to inquire about gang membership: "Where are you from?" Gonzalez replied they were "from nowhere[,]" meaning that they had no gang affiliation. After a brief shoving match, the five men left.

In a few minutes, several of the five returned with defendants Hernandez and Maldonado. Defendant Maldonado was holding a black revolver. Gonzalez and Beltran attempted to flee. They ran to the outside rear area of the apartment building but were soon cornered by their assailants. Defendant Maldonado produced a revolver, held it to Gonzalez's head, and said: "You will die, faggot." Gonzalez reiterated that he had no gang affiliation. Defendant Maldonado ordered Beltran and Gonzalez to remove their shirts so he could see if they had any gang tattoos. The victims complied and defendant Maldonado looked over their bodies. After telling them to put their shirts back on, defendant Maldonado demanded that the two men give him their money. After Gonzalez said he had no money, defendant Maldonado pushed him in the back and said: "Walk." At gunpoint, defendant Maldonado forced Gonzalez and Beltran to walk a distance of 229 feet through the building to a stairwell on the other side of the building.[2] During this time, both defendants Maldonado and Hernandez repeatedly punched and kicked the two men.

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[2] Beltran testified they were forced down a hallway that was "about 80 feet long." Durley Ward, an investigator for the prosecutor's office, measured the distance between the rear of the building where defendants first cornered the victims and the stairwell to which the victims were forced to walk. Ward testified the distance was 229 feet.

When they reached the other side of the building, Gonzalez fell down. Defendant Maldonado proceeded to repeatedly kick him. Gonzalez quickly rose to his feet and ran away. Using a neighbor's phone, he called 911. Meanwhile, Beltran escaped from his assailants.

Very soon thereafter, the police arrived. Gonzalez saw defendant Maldonado using a pay phone across the street. He pointed him out to the police, who quickly arrested him. While defendant Maldonado was being arrested, Gonzalez and Beltran stood in the lobby of the apartment building. Defendant Hernandez approached the two men, pulled a screwdriver out of his pocket, and said: "I'm going to get you for ratting out my homeboy." Beltran got the attention of the police, who took defendant Hernandez into custody.

We will discuss the additional evidence offered to support the section 186.22 gang enhancement findings below, when we address discuss defendants' challenge to those findings.

2. *The Defense Case*

Neither defendant testified. The defense theory was misidentification. In support, defendants relied upon inconsistencies in the victims' statements to the police, the victims' preliminary hearing testimony and their trial testimony. In addition, the defendants introduced expert testimony on eyewitness identification.

DISCUSSION

A. TRIAL COURT COMMENTS ABOUT REASONABLE DOUBT

1. *Factual Background*

Before the voir-dire process began, the court made some preliminary opening remarks to the prospective jury panel. The court stated, in pertinent part:

> "I want to tell you a little something about the burden of proof and what your job is when the time comes and the jury retires to the jury room.

"Ultimately the jury will be asking themselves after all of the witnesses, after all of the closing arguments, after I instruct you on the law and the jury goes in the jury room with their open mind and begins to talk about and deliberate this case, the jury will be asking themselves as to each defendant and as to each count have the People proven this count beyond a reasonable doubt.

"I want to tell you a little about an interpretation of that. And, like I said, if the attorneys think I'm wrong, they can tell you the right way. I have no idea what the evidence is. I have an open mind but ultimately the jury is the one that has to have an open mind to listen to the evidence because you will determine what the facts are in this case.

"When the jury goes in the jury room and ask themselves have the People proven this case beyond a reasonable doubt or proven this count, going count by count or defendant by defendant, have the People proven this case beyond a reasonable doubt, *if the jury decides that yes, the [People] ha[ve] proven this particular count beyond a reasonable doubt, proven beyond a reasonable doubt, equals a guilty vote. It's almost like a mathematical formula, proven beyond a reasonable doubt equals a guilty vote.*

"I want you all to understand the flipside is also true. *If the jury asks themselves have the People proven this count beyond a reasonable doubt, if the answer is no, then that count has not been proven beyond a reasonable doubt, not proven equals a not guilty vote.*

"So when the jury retires, the question you are going to be asking yourself when you look at the evidence is have the People proven this count beyond a reasonable doubt. *Proven beyond a reasonable doubt equals a guilty vote. Not proven beyond a reasonable doubt equals a not guilty vote, almost like a mathematical formula. The attorneys may tell you it's not like a mathematical formula, but that portion proven equals a guilty vote and not proven equals a not guilty vote is an accurate statement*." (Italics added.)

None of the defense attorneys objected to any aspect of the above comments.

At the close of trial, the court submitted CALJIC No. 2.90, the pattern instruction about reasonable doubt.[3]

2. *Discussion*

Defendants now contend that the court's comments constituted a "misleading definition of reasonable doubt" that violated their rights to a fair trial, a jury trial, and due process.[4] Focusing on the court's remarks about a mathematical formula, defendants argue that "the trial court's equating beyond a reasonable doubt to a mere mathematical formula is misleading, does not equate with 'near certitude,'[5] and, indeed, permits conviction upon a standard less than beyond a reasonable doubt. A 'mathematical formula' could very well result in only a 51 percent belief in a defendant's guilt, which, as a matter of law, is not beyond a reasonable doubt. . . . Given the vague, uncertain meaning of 'mathematical formula' and its reduction of reasonable doubt to a mere numbers game, 'there is a reasonable likelihood that the jury understood the instructions

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[3] It reads: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

[4] The Attorney General argues that defendants' failure to object below constitutes a waiver of the contention. The argument is not persuasive. (See, e. g., *People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985.)

[5] Contrary to what defendants suggest, the definition of proof beyond a reasonable doubt does not include the phrase "near certitude." Penal Code section 1096 defines reasonable doubt and CALJIC No. 2.90 repeats that statutory language. The constitutionality of CALJIC No. 2.90 has been conclusively settled. (*People v. Hearon* (1999) 72 Cal.App.4th 1285, 1287.)

to allow conviction based on proof insufficient to meet the [beyond a reasonable doubt] standard.' [Citation.] As a matter of law, the trial court's charge did not correctly convey the critical, overarching concept of reasonable doubt."

Defendants' contention is based upon an unreasonable interpretation of the trial court's comments. The court simply used the mathematical equation as an analogy to explain that a guilty verdict follows if there is proof beyond a reasonable doubt and, conversely, that a not guilty verdict follows if the People fail to establish guilt beyond a reasonable doubt. Because the trial court did not state or imply that the jury should utilize a mathematical formula in its deliberations, its remarks did not run afoul of the holding of *People v. Collins* (1968) 68 Cal.2d 319, 330-332. In sum, nothing in the court's remarks lowered the prosecution's burden of proof, a burden that was properly explained in detail in CALJIC No. 2.90. (See fn. 4, *ante*.)

This case is clearly distinguishable from two recent decisions in which an appellate court concluded that the trial court's impromptu explanation of the concept of proof beyond a reasonable doubt constituted error.

In *People v. Johnson* (2004) 115 Cal.App.4th 1169, the trial court attempted to explain reasonable doubt to the jury by analogizing it to the decisions people make every day such as planning a vacation or boarding an airplane. (*Id*. at p. 1171.) The appellate court held this was improper. It reasoned: "We are not prepared to say that people planning vacations or scheduling flights engage in a deliberative process to the depth required of jurors [in criminal trials]. . . . Accordingly, . . . the trial court's attempt to explain reasonable doubt had the effect of lowering the prosecution's burden of proof." (*Id*. at p. 1172.)

A similar result was reached in *People v. Johnson, supra*, 119 Cal.App.4th 976. There, the trial court equated the standard of proof beyond a reasonable doubt to everyday decisions such as selecting a restaurant at which to eat and driving through an intersection when the signal is green. (*Id*. at pp. 980-982.) In addition, the court characterized as "brain dead" a juror who renders a guilty verdict with "no doubt" about the defendant's guilt. (*Id*. at p. 980.) The appellate court concluded that "the [trial]

court's tinkering with the statutory definition of reasonable doubt, no matter how well intentioned, lowered the prosecution's burden of proof below the due process requirement of proof beyond a reasonable doubt. [Citations.]" (*Id*. at pp. 985-986.)

In the instant case, the trial court's remarks did not improperly analogize either the deliberative process or the People's burden of proof to everyday decision making. Instead, the court simply explained to the jury that if it was convinced that the People had met their burden of proof, it should return a guilty verdict. And that if the jury concluded the People had not met their burden of proof, it should return with a not guilty verdict. These remarks accurately stated the law.

B. STREET GANG ENHANCEMENT

1. *Background*

For all of the crimes committed by defendants, the jury found true the gang enhancement allegation under section 186.22, subdivision (b)(1). "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 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. [Citations.] [¶] A 'pattern of criminal gang activity' is defined as gang members' individual or collective '. . . conviction of two or more' enumerated 'predicate offenses' during a statutorily defined time period. [Citations.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 (*Duran*).)

To prove the section 186.22, subdivision (b)(1) allegation, the prosecution introduced testimony by Los Angeles Police Officer Tony Fitzsimmons, a qualified gang expert, and certified copies of superior court minute orders from the sentencing hearings of two Wanderers gang members, Fernando Canales and Fabian Contreras.

Officer Fitzsimmons testified that the Wanderers "usually . . . engage in street robberies, either by force, fear, by just physical assaults or even with a firearm. [¶] . . . [T]heir confrontations are … fierce, dangerous, and usually unprovoked. They . . . create quite an atmosphere of fear and intimidation within [the] community." He believed that defendants committed the crimes against victims Jovanni Gonzalez and Jorge Beltran to benefit or promote the Wanderers gang. Although defendant Hernandez was not identified as a member of the Wanderers, it was significant that he was with defendant Maldonado, a known gang member, throughout the commission of the crimes. Officer Fitzsimmons testified that "individuals who [were] not necessarily known to [him] as gang members could participate in gang crimes." Further, defendant Hernandez threatened that he would "get [the victims] for ratting out [his] homeboy." The officer explained that "homeboy" was a reference to a fellow gang member and that "ratting out" referred to informing the police of gang activity.

Offered as proof of the necessary predicate offenses, the certified minute orders showed that Canales, a Wanderers' member, was convicted in April 2002 of assault with a firearm (§ 245, subd. (a)(2)). The minute orders also showed that Contreras, another member of the Wanderers gang, was convicted in October 2002 of being a juvenile in possession of a firearm (§ 12021, subd. (e)) and assault with a firearm (§ 245, subd. (a)(2)). He was also found to have committed the crimes to assist in the criminal conduct of a gang.

In closing argument, the prosecutor's comments about predicate offenses were brief. Referring to the proof of predicate offenses, she stated: "Other people using this gang's name have assaulted someone with a weapon, we heard about, had used a firearm in the promotion of the gang. *Those are the two predicates that we talked to you about, prior felony convictions for violence, done in furtherance of this gang.*" (Italics added.)

The information did not plead specific predicate offenses, and the jury was not asked to identify them in its verdicts. The trial court instructed, however, that the

charged predicate offenses were "Assault with a firearm, vandalism and possession of a firearm[.]"[6]

Defendants raise several contentions challenging the jury's findings that the gang enhancement allegations were true. We begin with the claim that assault with a firearm is not a predicate offense.

2. *Assault With a Firearm Is a Predicate Offense Under Section 186.22, subdivision (e)(1)*

One element of the section 186.22 gang enhancement is that members of the gang must have engaged in a pattern of criminal gang activity. Proving a pattern of gang activity requires, in part, evidence that members of the gang have committed two or more specified predicate offenses. The predicate offenses are listed in section 186.22, subdivision (e). Included in the list is section 186.22, subdivision (e)(1): "[a]ssault with a deadly weapon or by means of force likely to produce great bodily injury as defined in Section 245."

Here, the prosecution introduced evidence that two Wanderers gang members, Canales and Contreras, were convicted of assault with a firearm, in violation of section 245, subdivision (a)(2). Defendants contend, however, that assault with a firearm is not a predicate offense under section 186.22, subdivision (e)(1). They argue that the statutory language covers only two discrete crimes: assault with a deadly weapon, and assault by means of force likely to produce great bodily injury, both of which fall under section 245, subdivision (a)(1).

As we explain, defendants' narrow reading of section 186.22, subdivision (e)(1) ignores the provisions of section 245, under which assault with a firearm is simply an aggravated form of assault with a deadly weapon. Further, to exclude assault with a firearm as a predicate offense would be an irrational departure from the legislative intent

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6 Despite the trial court's instruction, neither vandalism nor juvenile in possession of a firearm is a predicate offense under section 186.22, subdivision (e).

of section 186.22. We hold, therefore, that the only reasonable interpretation of section 186.22, subdivision (e)(1) is that assault with a firearm in violation of section 245, subdivision (a)(2) is a predicate offense.

"In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.] If the statutory language is clear and unambiguous, the plain meaning of the statute governs. [Citation.] 'If, however, the language supports more than one reasonable construction, we may consider "a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." [Citation.] Using these extrinsic aids, we "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]'" (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056 (*Lopez*).)

In referring to assault with a deadly weapon, section 186.22, subdivision (e)(1) does not cite section 245, subdivision (a)(1). Rather, the statutory language encompasses "[a]ssault with a deadly weapon . . . *as defined in Section 245*." (§ 186.22, subd. (e)(1), italics added.) Technically speaking, section 245 does not "define" any crimes. Rather, the crime of assault is defined in section 240.[7] Section 245 specifies *different punishments* for various species of assault, without elaborating on the elements of those assaults.[8] (See 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the

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[7] Section 240 states: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

[8] Other statutes define the elements of particular assaults. (See, e.g. § 241.2 [assault on a school or park property]; § 241.3 [assault on a public transportation provider]; and § 244.5 [assault with a stun gun or taser].)

Person, § 40, p. 663 ["Assaults with various deadly weapons have enhanced punishment[.]"].) Thus, the language of section 186.22, subdivision (e)(1), "assault with a deadly weapon . . . as defined in Section 245," is imprecise. But when one examines section 245 as a whole, the meaning of section 186.22, subdivision (e)(1) becomes clear.

Section 245 treats assault with a firearm as an aggravated subset of assault with a deadly weapon. Thus, section 245, subdivision (a)(1) provides that anyone "who commits an assault upon the person of another with a deadly weapon or instrument *other than a firearm* or by means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison or two, three, or four years, or in county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." (Italics added.) Similarly, section 245, subdivision (c) states in relevant part that anyone "who commits an assault with a deadly weapon or instrument, *other than a firearm*, or by means of force likely to produce great bodily injury *upon the person of a peace officer or firefighter* . . . shall be punished by imprisonment in the state prison for three, four, or five years." (Italics added.) By referring to "assault with a deadly weapon or instrument . . . other than a firearm," section 245, subdivisions (a)(1) and (c) implicitly mean that assault with a firearm is simply one type of assault with a deadly weapon. However, the punishment for that category of assault is covered by other subdivisions of section 245.

The potential sentence for assault with a firearm, specified in section 245, subdivision (a)(2), is enhanced as compared to assault with a deadly weapon. Although section 245, subdivision (a)(2) provides the same sentencing range as section 245, subdivision (a)(1), section 245, subdivision (a)(2) *adds* a mandatory minimum sentence of six months in county jail. Likewise, for assault with particular types of firearms -- "a machinegun . . . or assault weapon . . . or a .50 BMG rifle" -- section 245, subdivision (a)(3) specifies a stiffer sentencing range of four, eight, or twelve years in state prison.[9]

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[9] The same is true for assaults with a firearm on a peace officer or firefighter. Section 245, subdivision (d)(1) prescribes the punishment for assault with a firearm on a peace officer or firefighter -- four, six, or eight years in state prison. This range is greater than that provided in

Thus, in the scheme of section 245, assaults with a firearm are treated as an especially dangerous type of assault with a deadly weapon,[10] entitled to greater punishment. Hence, section 186.22, subdivision (e)(1), which includes "assault with a deadly weapon . . . as defined in Section 245," necessarily encompasses assault with a firearm under section 245, subdivision (a)(2). In other words, "as defined in Section 245," assault with a deadly weapon broadly covers the subset of assault with a firearm.

This reading of section 186.22, subdivision (e)(1) is the only one consistent with legislative intent. In enacting section 186.22, the legislature intended to protect citizens from gang violence by providing enhanced punishment for gang related offenses. (§ 186.21.) Assault with a firearm is a particularly dangerous form of assault with a deadly weapon, one that gang members frequently commit for gang purposes. It would be absurd for the legislature to include assault with a deadly weapon *other than a firearm* as a predicate offense to prove a pattern of gang activity, but to exclude assault with a firearm. We will not assume the legislature intended such an irrational result. (*Lopez, supra,* 31 Cal.4th at p. 1056.) We hold that assault with a firearm in violation of section 245, subdivision (a)(2) is a predicate offense included in section 186.22, subdivision (e)(1). Therefore, Canales and Contreras' convictions of assault with a firearm constituted the required proof of two or more predicate offenses.

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section 245, subdivision (c) for assault on a peace officer or firefighter with a deadly weapon *other than a firearm*. Similarly, section 245, subdivisions (d)(2) and (d)(3) apply to assaults with specific types of firearms on peace officers or firefighters. These provisions contain enhanced sentencing ranges beyond the range provided by section 245, subdivision (d)(1).

10 Whether a defendant used a deadly weapon within the meaning of section 245, subdivision (a)(1) is a question of fact that is not controlled by the definition of "deadly weapon" found in other statutes. (1 Witkin and Epstein, Cal. Crim. Law (3d ed. 2000) Crimes Against the Person, §§ 46-47, pp. 669-672.)

3. *There Was Insufficient Evidence that the Convictions of Assault With A Firearm Occurred Within the Statutory Time Period*

Defendants contend that the People failed to show, as required by statute, that "at least one of these [predicate] offenses occurred after the effective date of this chapter [Sept. 23, 1988[11]] and the last of those offenses occurred within three years after a prior offense." (§ 186.22, subd. (e).) We agree.

The jury was properly instructed that in order to sustain the enhancement, it must find that "at least one of those [predicate] crimes occurred after September 26, 1988, and the last of those crimes occurred within three years after a prior [predicate] offense, and the crimes were committed on separate occasions, or by two or more persons."

In regard to showing that one of the predicate crimes occurred after September 26, 1988, the minute order from Canales's sentencing conducted on April 11, 2002 includes the following statement: "The court indicates that the defendant may be housed at the California Youth Authority until he reaches 18 years of age if the California Youth Authority finds the defendant amenable." The jury was therefore informed that at the time Canales committed the crime, he was not yet 18 years old. Even assuming Canales was about to turn 18 at the time of sentencing -- a doubtful proposition since it would have effectively made the trial court's statement meaningless -- that means he would have been approximately four and half years old when section 186.22 took effect in September 1988. The jury could reasonably infer that Canales committed the assault with a firearm some significant time after September 1988 when he became older.

However, there is insufficient evidence to show that the two predicate offenses were committed within three years of each other. The certified minute orders entered into evidence indicated that the information charging Canales was filed on November 30, 2001, and the information charging Contreras was filed on April 16, 2002. However, they do not show when the crimes were committed. Standing alone, evidence of when

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11 Section 186.22 became effective on September 23, 1988. (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 995, fn. 3.)

the charges were filed does not constitute substantial evidence from which a reasonable jury could find that one predicate offense was *committed* within three years of the other. The Attorney General directs us to no evidence that could support such a finding, and we can find none.

Nonetheless, the Attorney General argues that the error was not prejudicial. The argument is constructed on the following logic. The charged crime may serve as a predicate offense.[12] (*Duran, supra*, 97 Cal.App.4th at p. 1457, and cases cited therein.) Kidnapping constitutes a predicate offense. (§ 186.22, subd. (e)(15).) Each defendant was convicted of two counts of kidnapping. Therefore, the kidnapping convictions in this case provided the necessary predicate offenses.

The problem with this argument is that the prosecution did not proceed on this theory at trial, the jury was not instructed on it, and the jury did not make the requisite findings to support it. The amended information did not allege the kidnappings as the predicate offenses. The only evidence offered by the People about predicate offenses was the convictions suffered by Contreras and Canales. In discussing predicate offenses in closing argument, the prosecutor relied solely upon the convictions of the non-defendant gang members. And the jury instruction about predicate offenses did not inform the jury that it could consider the kidnapping charges in making its findings. Having failed in the trial court to seek and obtain findings from the jury that the charged offenses constitute the predicate offenses, the People cannot circumvent this failure by asking this court to make such findings on appeal. Further, the People may not seek a limited retrial on the issue of the enhancements. (*People v. Salas* (2001) 89 Cal.App.4th 1275, 1282-1283.)

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12 "While the statute does not use the word 'predicate' it has become the accepted usage for reference to the statutorily required offenses. This is unfortunate since it implies precedence [to the charged offenses], which . . . is not a requirement, but it seems too well entrenched in the case law to change now." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1383, fn. 13, quoted with approval in *People v. Gardeley* (1996) 14 Cal.4th 605, 610, fn. 1.)

We will therefore strike the sentence enhancements imposed under section 186.22, subdivision (b)(1) and remand the cause for resentencing.[13]

C. CONVICTIONS FOR KIDNAPPING AND FALSE IMPRISONMENT

Defendants contend they were improperly convicted of both kidnapping and false imprisonment "based on the *same* facts and conduct." We disagree.

To a certain extent, defendants rely upon the fact that, pursuant to section 654, the trial court stayed the sentences imposed on the two false imprisonment counts to argue that they have suffered improper multiple convictions. This reliance is misplaced. Whether a defendant may suffer multiple *convictions* for offenses arising out of a course of conduct is separate from the question of whether a defendant may receive multiple *sentences* based upon that course of conduct. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) Multiple convictions are proper if each charge is supported by independent factual evidence. (*Id*. at pp. 692-693.) Here, substantial evidence supports the jury's implied findings that defendants committed false imprisonment separate and apart from kidnapping.[14]

The record establishes that defendants held the two victims at gun point in the rear area of the apartment building. They ordered the victims to remove their shirts to check for gang tattoos. The victims complied and defendant Maldonado looked over their bodies. After directing them to put their shirts back on, he demanded that both victims turn over their money. This conduct more than amply supports the convictions for false imprisonment. It was only after these events took place that defendants committed

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[13] This conclusion makes it unnecessary for us to discuss defendants' remaining challenges to the gang enhancement.

[14] In closing argument, the prosecutor explained: "In this case you've got numerous examples of the false imprisonment during this episode. They were trapped at the back gate, couldn't leave, surrounded, gunpoint. [¶] They were also compelled to move, and then again they were trapped in the stairwell, and clearly the victims did not consent to the restraint or confinement."

kidnapping when, at gun point, they forced the victims at gunpoint to walk into the building, traverse a hallway, and arrive at an interior stairwell.

D. FAILURE TO INSTRUCT SUA SPONTE ON FALSE IMPRISONMENT AS A LESSER INCLUDED OFFENSE TO THE CHARGE OF KIDNAPPING

When the parties discussed jury instructions, the court stated: "I do not intend to give any lessers. Lessers are given by the court when there's evidence that an element of the charge has not been proven and there's substantial evidence that would support a finding of guilt on a lesser offense. [¶] I think based on the defense, which I think is we're the wrong people, and what was presented, I don't see that those elements are met nor would I be intending to give any lesser-included offenses. [¶] If anyone wants to be heard on that, now is the time to be heard." Neither defense attorney disagreed with the court's assessment of the case.

Defendants now contend that the trial court had a sua sponte duty to instruct that false imprisonment was a lesser included offense of the charged crime of kidnapping and that the failure to so instruct results in prejudicial error. We disagree.

"[T]he crime of false imprisonment is necessarily included in the crime of kidnapping. . . . 'A defendant guilty of kidnapping, as defined by either section[s] 207 or 209 of the Penal Code, must necessarily be guilty of the unlawful violation of the personal liberty of his victim[,] and therefore be guilty of false imprisonment as defined by section 236.'" (*People v. Apo* (1972) 25 Cal.App.3d 790, 796.)

In arguing that that the trial court was required sua sponte to instruct on false imprisonment, defendants focus on the element of kidnapping that requires a movement of the victim that is "substantial in character." (*People v. Smith* (1995) 33 Cal.App.4th 1586, 1593; see also CALJIC No. 9.05.) This is because kidnapping "requires a degree of asportation not found in the definition of false imprisonment. . . . [F]alse imprisonment can occur with *any* movement or *no* movement at all." (*People v. Reed* (2000) 78 Cal.App.4th 274, 284, fn. omitted.)

On this appeal, defendants argue: "The alleged movement of the victims from the rear of the apartment complex to a stairwell area within the complex is not necessarily a substantial distance, and is a question of fact for the jury. . . . [By] not having false imprisonment as a lesser alternative to [the kidnapping charges], the jury, which obviously believed the victims had been restrained [because it convicted defendants of false imprisonment by violence], had no choice but to find [them] guilty of kidnapping." In other words, defendants contend that their movement of the two victims was so insubstantial that the jury could have convicted them only of false imprisonment, not kidnapping. The record does not support this argument.

In determining whether a defendant has substantially moved the victim, the trier of fact is to consider "the totality of the circumstances. . . . [I]n a case where the evidence permit[s], the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez* (1999) 20 Cal.4th 225, 237, fn. omitted.)

Here, defendants forced the two victims at gunpoint to walk from the outside of the rear of the apartment building into the building. Defendants then directed the victims down a hallway to a stairwell on the other side of the building. The total distance traveled was 229 feet. This lengthy movement from a public area (rear of the building) to an internal stairway increased the risk to the victims and decreased the likelihood a third party would detect the crimes. On this record, the trial court was not required to instruct on the lesser included offense of false imprisonment. "Instructions are . . . required sua sponte only if the proof at trial includes substantial evidence that the lesser offense, but not the greater, was committed; such evidence is 'substantial' only if a reasonable jury could find it persuasive. [Citation.]" (*People v. Hagen* (1998) 19 Cal.4th 652, 672.) In this case, there was no substantial evidence that defendants committed false imprisonment, but not kidnapping.

In any event, assuming arguendo the trial court had a sua sponte duty to instruct on false imprisonment, its failure to do so was harmless. The *Watson*[15] standard of appellate review is used to determine if a failure to instruct on a lesser included offense was prejudicial. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) This means that to find the error prejudicial, the record must show that if given the choice between the lesser and greater offenses, it is reasonably probable the jury would have convicted of the lesser. (*Id*. at p. 178, fn. 25.) Here, had the jury been instructed about false imprisonment, it is not reasonably probable that it would have found that defendants' action in forcing the victims to move 229 feet was not a substantial distance so that defendants committed only false imprisonment, not kidnapping.[16]

E. REJECTION OF "ABSENCE OF FLIGHT" INSTRUCTION

Defendants contend the trial court committed prejudicial error because it denied their requests for an "absence of flight" instruction. The contention is not persuasive.

Defense counsel proposed two instructions based on the fact that both defendants stayed in the area after the crimes were committed. The first read:

> "You may consider whether or not a person fled immediately after the commission of a crime, or after he was accused of a crime as a circumstance in this case. The presence of flight may tend to establish a

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[15] *People v. Watson* (1956) 46 Cal.2d 818, 836.

[16] The prosecutor's closing argument addressed the issue of substantial movement as follows. "The important thing[] to remember in this particular crime is that a movement occurred and that occurred for a substantial distance. You recall investigator Ward came in and talked about measuring and where the different stairwells led. [See fn. 2, *ante*.] This is why. [¶] You need to know that this is a big building and that this movement was not merely from, say, a back door to a front door. . . . [¶] In this case what's important is that the movement occurred from this area that was exposed in the back and confined and that it was brought through the building . . . into a structure. . . . [Defendants] moved them from the back through the building to a location of substantially increased risk upon them. [¶] This movement was not only significant in its distance, but it was significant in its location."

consciousness of guilt but this is not sufficient in itself to establish guilt. However, on the other hand, the absence of flight may tend to show that the defendant did not have a consciousness of guilt and this fact alone may be sufficient to create a reasonable doubt as to the defendant's guilt. The weight and significance of these circumstances, if any, are matters for your determination."

The second instruction read:

"The absence of flight of a person immediately after the commission of a crime, or after he is accused of a crime, although the person had the opportunity to take flight, is a fact which may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt. The weight to which such circumstances is entitled is a matter for the jury to determine."

The court ruled: "I've read the cases that have been cited [by defense counsel]. I am refusing the absence of flight instruction at this time." "There is no right to an instruction on absence of flight. [The cited cases] said it's discretionary with the court because the absence of flight can mean so many different things. [¶] . . . I don't find it's of a lot of relevance in this case."

The trial court's ruling was not an abuse of discretion. In *People v. Green* (1980) 27 Cal.3d 1, the court upheld the trial court's refusal to give a similar instruction. The court reasoned that evidence about "the absence of flight is so ambiguous, so laden with conflicting interpretations, that its probative value on the issue of innocence is slight" so that a jury instruction was not required. (*Id*. at p. 39.) The decision in *People v. Staten* (2000) 24 Cal.4th 434 reaffirmed that analysis. The court noted "that such an instruction would invite speculation; there are plausible reasons why a guilty person might refrain from flight." (*Id*. at p. 459.) The *Staten* court also rejected the defense argument (made here) that denial of such an instruction violates due process because section 1127c requires, when supported by the record, an instruction on flight as evidence of consciousness of guilt. (*Ibid.*) "Since flight and the absence of flight are not on similar logical or legal footings, the due process notions of fairness and parity . . . are

inapplicable." (*People v. Williams* (1997) 55 Cal.App.4th 648, 653, cited with approval in *People v. Staten, supra,* 24 Cal.4th at p. 459.)[17]

F. CUMULATIVE ERROR

Lastly, defendants contend that the cumulative effect of the trial court's (alleged) erroneous rulings requires reversal. We disagree. Other than the lack of substantial evidence to support one technical element of the gang enhancement, defendants received due process and a fair trial. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.)

DISPOSITION

The enhancements under section 186.22, subdivision (b)(1) are stricken. Otherwise, the judgments are affirmed. The case is remanded to the trial court for resentencing.

WILLHITE, J.

We concur:

HASTINGS, Acting P.J.

CURRY, J.

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[17] We note that, in any event, counsel for defendant Maldonado's closing argument urged that his client's failure to run was some evidence of his innocence.