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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PABLO BAUTISTA, Defendant and Appellant.	F043279 (Super. Ct. Nos. 86117 & 103270) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran, Judge.†

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Charles A. French and Jeffrey D. Firestone, 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 1-3 and 5-7 of DISCUSSION.

†Retired judge of the Tulare Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

In March 2002, in case No. 86117, Pablo Bautista (appellant) pled no contest to assault with a firearm (Pen. Code, § 245, subd. (a)(2))[1] and admitted the offense was committed for the benefit of a gang (§ 186.22, subd. (b)(1)). He was sentenced to a term of seven years in state prison. The execution of the term was suspended and he was placed on five years' probation with various terms, including that he serve one year in jail.

In early 2003, appellant violated probation, and new charges were filed against him in case No. 103270. Following a jury trial, appellant was found guilty of count 1, discharging a firearm in a grossly negligent manner (§ 246.3); count 2, possessing a firearm as a convicted felon (§ 12021, subd. (a)(1)); and count 3, shooting a firearm from a vehicle (§ 12034, subd. (d)). Allegations that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), that appellant had a prior strike conviction (§ 1170.12, subd. (c)(1)); and that he had a prior serious felony conviction (§ 667, subd. (a)(1)) were found true.

Appellant was sentenced to 14 years in state prison in the current case, No. 103270: the midterm, doubled, for a total of four years, plus five years each for the gang enhancement and prior serious felony enhancement on count 1. The term for count 2—four years plus an additional three years pursuant to section 186.22, subdivision (b)(1)—was imposed but stayed (§ 654). The term for count 3—four years plus an additional five years pursuant to section 186.22, subdivision (b)(1)—was imposed and ordered to be served concurrent with count 1, plus a five-year enhancement pursuant to section 667, subdivision (a)(1), which was imposed but stayed. Appellant was credited with 210 days for time served.

On appellant's prior case, No. 86117, probation was revoked and he was sentenced to seven years, concurrent, with 597 days' credit for time served.

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[1]All further statutory references will be to the Penal Code unless otherwise stated.

We disagree with appellant's claims of insufficiency of the evidence and prejudicial instructional error. We agree that one of the five-year enhancements added to count 1 must be stricken. Appellant contends, respondent concedes, and we agree that section 654 error occurred as to count 3 and that the section 667, subdivision (a)(1) enhancement imposed on count 2 must be deleted. In all other respects, the judgment is affirmed.

FACTS

Gang Evidence

A stipulated gang expert, Detective Greg Lopez, explained the prison gang origins of rival Sureño and Norteño gangs and their identifications with the numbers 13 and 14 and with the colors blue and red, respectively. Lopez testified as to the criteria used to identify gang members and how their territory is marked.

According to Detective Lopez, Tulare has 100 Sureño gang members who identify themselves as the Wicked Ass Sureño gang and over 300 Norteño gang members. Typical crimes committed by the Sureño gang members include vandalism, auto theft, burglary, and homicide. The crimes are committed to intimidate or eliminate rival gang members. Respect is a notion important in gang life, and crimes often are committed in retaliation for showing disrespect.

Prior Gang Related Offense

Detective Lopez testified that he investigated a January 2002 drive-by shooting in which several suspects, including appellant, were arrested for attempted murder. The shooting was in retaliation for a beating suffered by a Sureño gang member at the hands of a Norteño. Lopez opined that appellant was a Sureño gang member at the time of that incident, based on his clothing, the type of crime, his association with other admitted Sureño gang members, gang graffiti found in his bedroom and on his backyard fence, and the victim's Norteño gang association.

Current Offense

At approximately 3:30 p.m. on an afternoon in January 2003, Robert Barrier and a neighbor child were putting newspapers in the backseat of a car in preparation for a paper route. Barrier heard gunfire coming from the corner. He looked and saw a brownish tan, light-colored, four-door "70 or something" car with three occupants between the ages of 17 to 20. Barrier was approximately 30 feet from the car as it passed him at about 25 to 35 miles per hour. The passenger side of the vehicle was toward Barrier, who ran to the curb and watched as the car turned the corner. Barrier saw the last one or two shots fired from a small handgun in the shooter's hand, which was pointed straight up. The shooter was in the right front passenger seat and, after the last shot, he brought his arm back inside the car.

Barrier reported the shooting to Officer James Kelly. Barrier was able to describe the car, the position of the occupants, their clothing, and their approximate ages, but he had not seen their faces. Kelly broadcast the information.

Detective Lopez heard the broadcast and arrived in the area just west of the shooting, where he saw a brown, four-door Dodge Aries parked in the alley behind appellant's home. Avelino Vasquez was standing near the car and, when he saw Detective Lopez, Vasquez walked into the backyard of appellant's residence.

Detective Lopez saw appellant in the backyard and asked him to stop. Appellant looked at the officer and then ran toward the front of the house. Lopez jumped a fence and ran to the front yard. He announced the officers' presence and stated he needed to talk to the people inside. When no one came out of the house, Lopez and other officers entered.

Inside the residence, Lopez detained six individuals and arrested three of them. Appellant wore a dark blue, hooded, Nike brand sweatshirt and dark pants. Alberto Garcia wore a Nike brand sweatshirt, and Vasquez had on a blue hooded sweatshirt. Of the three others in the residence, who were not arrested, Andy Ramirez wore a dark blue shirt with a gray Raiders sweatshirt over the shoulder; Marcelino Ochoa wore a blue

short-sleeved shirt, blue jeans, a blue belt and blue slippers; and appellant's brother Bernardo wore a gray, hooded, Nike brand sweatshirt.

Using gang membership identification criteria, Detective Lopez testified to his opinion that, at the time of the shooting, appellant, Garcia, Vasquez, and Ochoa were all Sureño gang members. He did not think Ramirez, who was visiting Bernardo, was a gang associate or member; Bernardo was a gang associate through appellant, his brother, but was not yet a member.

Within a few minutes of the shooting, Officer Kelly took Barrier three and a half blocks to an alley where Barrier positively identified the vehicle. About 10 minutes after that, Officer Kelly showed Barrier three subjects from 30 to 40 feet away. By his clothing, which Barrier described as a hooded sweatshirt with a dark stripe, Barrier identified appellant as the shooter. Barrier also identified the driver, who bore a white stripe on his sleeve.

Detective Lopez was familiar with appellant's home from prior contacts, and he knew which room was appellant's bedroom. He searched the room and found several items with gang graffiti and lots of blue clothing and "rags." On a nightstand was a metal jar with "X3," "13," "Wicked," "Surenos," and "Sur" written on it. Another container had "13" and "WAS" on it. A .22-caliber shell was between the two containers. A film canister held five live .44-caliber rounds. Lopez opined that appellant was still a gang member based, in part, on the gang graffiti in appellant's room and more graffiti on a backyard fence.

A .22-caliber rifle with the butt stock cut off was found in the side yard of the property next to appellant's house. The rifle had one live round in the chamber and ten .22-caliber hollow-point rounds in the magazine of the weapon. The rounds were the same type found in appellant's bedroom. Barrier testified that he did not see that weapon at the shooting.

Following advisement of his *Miranda*[2] rights, appellant told Detective Lopez that he had been a member of the Wicked Ass Sureño gang for a long time. He denied being involved in the shooting, and he claimed his fingerprints would not be found in the car.

At the scene where the shots were fired, there was gang-style graffiti written on a fence, including "WAS." Detective Lopez noted that the "WAS" had been scratched off or had a line drawn over it. This indicated to him that the Wicked Ass Sureño gang had marked that territory as their own, but the Norteño gang had crossed out the marking in disrespect. A gang would typically retaliate for such conduct by returning to the area, crossing out the new gang's name and placing more graffiti in its place. The retaliation could also escalate into a shooting or a fight at that location.

Detective Lopez opined that the shooting was done for the benefit of, and in association with, the Sureño gang because the graffiti had been crossed out by the Norteño gang. He opined that such crimes benefited the gang in intimidating other gangs, and also increased the shooters' status in their own gang. Lopez testified that this shooting was distinguishable from general "shooting up in the air" because the individuals in the car were gang members and the offense occurred directly in front of the area where the gang name was crossed out.

Gunshot residue tests were performed and revealed that appellant had particles consistent with gunshot residue on both his hands. This result led to three possibilities: (1) appellant discharged a firearm; (2) he touched a surface that had gunshot residue on it; or (3) he participated in a lead-related hobby or occupation. Garcia was also tested and "highly specific particles of gunshot residue" were found on both his hands.

Defense

Maria Bautista, appellant's mother, testified that two weeks prior to the incident, appellant had moved from his bedroom to the living room, and his former bedroom was then used by Bernardo's friend Ochoa. On the day of the incident, Mrs. Bautista

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[2]*Miranda v. Arizona* (1966) 384 U.S. 436

testified, she came home from work at 2:45 p.m. and found appellant, Bernardo and Garcia there. The police arrived 40 to 45 minutes later and neither of her sons had left in the interim. Mrs. Bautista testified that she loved appellant and would do anything to protect him.

Avelino Vasquez testified that he was in custody at the time of trial for allowing someone to shoot from his vehicle on the date in question. He claimed he drove alone when the shots were fired, but said nevertheless he did not do the shooting. He testified that he was a Wicked Ass Sureño gang member and had gang tattoos, but he claimed not to know what the letters W-A-S stood for.

Marcelino Ochoa testified that, at the time of the incident, he had been staying in appellant's living room for over a week and appellant had his own room. They were friends and fellow WAS members. Ochoa testified that he was with "Andy Garza" and appellant in the carport when he heard gunshots on the day in question, and they were still in the carport when the police arrived.

Appellant testified in his own defense that, on the day of the incident, Vasquez arrived at the house at about noon and they "kick[ed] back." Shortly after 2:00 p.m., he went to the store in Vasquez's car with Vasquez, Ochoa and Ramirez. Appellant was in the back. Shortly before 3:00 p.m., Vasquez dropped appellant at home and left with Garcia to pick up Bernardo at school. When Vasquez returned, he parked the car in the alley. Just before the police arrived, Vasquez, Garcia and Bernardo exited the car. Appellant denied shooting a gun out of the car that day. He testified that he had no job or hobby involving the use of lead, and he did not handle any ammunition on that date.

Appellant testified that the letters W-A-S stood for his gang, the Wicked Ass Sureños. He had those initials tattooed on his hand.

DISCUSSION

1. Sufficiency of the Evidence to Support Conviction on Count 1*

Appellant contends there is insufficient evidence to support his conviction on count 1 for unlawful discharge of a firearm in a grossly negligent manner. We disagree.

We uphold a conviction against a substantial evidence attack if a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. In making this determination, we view the evidence in the light most favorable to the People and presume in support of the judgment every fact the trier of fact could reasonably deduce from the evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

We begin our analysis with section 246.3, which was enacted as a deterrent to the growing number of urban California residents engaged in the dangerous practice of discharging firearms into the air during festive occasions such as on New Year's Eve and the Fourth of July. (*People v. Alonzo* (1993) 13 Cal.App.4th 535, 539; *People v. Leslie* (1996) 47 Cal.App.4th 198, 201.) That section reads:

> "[A]ny person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense …." (§ 246.3.)

To obtain a conviction under section 246.3, a prosecutor must prove the following elements: "(1) the defendant unlawfully discharged a firearm; (2) the defendant did so intentionally; (3) the defendant did so in a grossly negligent manner which could result in the injury or death of a person." (*People v. Alonzo*, *supra*, 13 Cal.App.4th at p. 538; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1439-1440.)

As explained in *Jerry R.*,

> "The Legislature's use of the term 'willfully' means that the prohibited conduct must be performed purposefully or intentionally. The prohibited conduct, the discharge of a firearm, is commonly understood to mean the firing or shooting of a weapon by expelling the charge or bullet. Thus, the statute's plain language requires proof that a defendant purposefully,

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*See footnote, *ante*, page 1.

> willingly, or intentionally fired the weapon, with the added requirement that the firing occurred in a grossly negligent manner which could result in injury or death." (*In re Jerry R.*, *supra*, 29 Cal.App.4th at pp. 1438-1439.)

"Gross negligence," in turn, "requires a showing that the defendant's act was '"such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences."' [Citations.]" (*People v. Alonzo*, *supra*, 13 Cal.App.4th at pp. 539-540.)

Appellant contends that proof of the required element of section 246.3—that the discharge of the firearm could result in injury or death—was lacking, because the evidence showed only that the shots were fired upward into the air. Noting that no evidence was presented "regarding what happens to bullets fired straight up in the air," appellant contends the evidence is insufficient to find the firearm was fired in a manner which could result in injury or death. In addition, the prosecution's argument as to this element—that the witness Barrier could have been injured—was unconvincing because Barrier was 30 feet away from the car and the car was traveling in a direction away from Barrier at the time the shots were fired.

Appellant attempts to distinguish his situation from that of *People v. Alonzo*, but we fail to see any significant difference. In *Alonzo*, the defendant stepped off the curb in front of a 7-Eleven store and fired two shots straight up into the air. The store was located near several other businesses with "a lot" of pedestrian traffic and the incident occurred at 2:00 a.m. (*People v. Alonzo*, *supra*, 13 Cal.App.4th at pp. 537-538.) The court in *Alonzo* reversed a ruling by the superior court which had granted a section 995 motion to set aside the section 246.3 charge. (*Alonzo*, at p. 537.)

The court in *Alonzo* stated it had "no difficulty" in concluding the defendant's behavior could have resulted in injury or death to a person:

> "The shooting of a gun under the circumstances presented in this case not only presented the possibility of hitting a member of the public, it also presented the very real possibility that it would generate responsive gunfire.

The fact that the gun was pointed up in the air does not change this reality." (*People v. Alonzo*, *supra*, 13 Cal.App.4th at p. 540.)

Here, too, evidence was presented that appellant engaged in grossly negligent behavior which could have resulted in injury or death to another. Appellant fired six shots at approximately 3:30 in the afternoon in a residential area where bystanders were present. Barrier was outside in the neighborhood at the time helping a "neighbor kid" fold and load newspapers into a vehicle. Barrier heard all six shots and saw a person on the passenger side of the vehicle, which was towards Barrier, fire the last two shots into the air. In his testimony, Barrier also mentioned a woman and two children who were in the neighborhood at the time, as they ran outside when the shots were fired.

We also reject appellant's claim that there was no evidence from which the jury could find that responsive gunfire was a possibility. Detective Lopez testified that the shooting was done by Sureño gang members within a block of homes occupied by Norteño gang members. The shooting occurred in front of a fence where the Sureño gang name had been crossed out "obviously by a Norteno gang member." Lopez also opined that the motive for the shooting was to show that the Sureño gang members were willing to confront rival Norteño gang members. Responsive gunfire in such a situation was a real possibility.

Firing a gun into the air in a residential neighborhood during the afternoon demonstrates a disregard for human life. (See, e.g., *People v. Leslie*, *supra*, 47 Cal.App.4th at pp. 200-201 [firing four shots straight into the air at a family gathering supported prior conviction for discharging firearm with gross negligence pursuant to § 246.3].) Several people, including Barrier and the child he was helping, were in the vicinity when the shots were fired into the air. The bullets could have struck a resident of the neighborhood or caused responsive gunfire from rival gang members, ultimately causing injury or death. Substantial evidence supports the jury's verdict, and we reject appellant's claim to the contrary.

2. Sufficiency of the Evidence to Support Gang Enhancement*

Appellant contends the gang enhancements attached to each count must be reversed because there is insufficient evidence to show that the gang engaged in one or more of the enumerated crimes listed in section 186.22, subdivision (e) as one of its "primary activities." He also claims the evidence was insufficient to support the finding that the crime here was committed for the benefit of the gang. We examine the entire record to determine whether there was reasonable, credible evidence of solid value from which a rational trier of fact could find the gang enhancement to be true beyond a reasonable doubt. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

As explained in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457:

> "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.]"

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Excluded from that definition is the "occasional commission of those crimes by the group's members." (*Ibid.*) "Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities." (*Ibid.*)

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v.*]

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*See footnote, *ante*, page 1.

Gardeley [(1996)] 14 Cal.4th 605." (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 324.) In *Gardeley*, the gang expert testified that the gang the defendant had been a member of for nine years was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The expert in *Gardeley* based his opinion on conversations with the defendant and fellow gang members, his personal investigations of hundreds of gang crimes, and information collected from law enforcement agencies. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 620.)

While acknowledging that expert opinion testimony may constitute evidence sufficient to support a section 186.22 finding, appellant contends Detective Lopez never testified to the "primary," "chief" or "principal" occupation of the Wicked Ass Sureños. According to appellant, while testimony "danced around the subject" that Sureño gang members commit or "tend to" commit certain crimes, there was "no testimony that certain crimes were one of their main occupations[.]" Appellant also contends Detective Lopez did not give any basis for his opinions.

We disagree with appellant's contentions. Detective Lopez testified that crimes typically committed by Sureño gang members "range from vandalism, auto theft, burglary to homicide." He also testified to a January 2002 shooting of a rival gang member from a vehicle in which appellant participated. Lopez described this shooting as the type of crime Sureño gang members would "tend" to commit. Each of the offenses listed by Lopez, except vandalism, is enumerated in section 186.22. (§ 186.22, subd. (e)(1), (3), (11) & (25).) Lopez opined that the Sureños commit such crimes to "either intimidate or eliminate rival gang members" who outnumber them three to one. The jury could reasonably infer from this testimony that one of the primary activities of the Sureño gang members involved committing various enumerated crimes, rather than "the occasional commission of those crimes." (See *People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 323.)

Detective Lopez, who was currently assigned to the crime unit handling all gang and narcotic investigations, based his testimony on participation in "close to a hundred" gang investigations. He was the lead investigator in the January 2002 shooting. Lopez's opinions were adequately based on his personal experience and knowledge. (See *People v. Gardeley*, *supra*, 14 Cal.4th at p. 620.) Furthermore, defense counsel stipulated to Lopez's qualification as a gang expert.

Appellant also contends there was insufficient evidence that the crime was committed for the benefit of and with the specific intent to promote criminal conduct by gang members. (§ 186.22, subd. (b)(1).) Appellant acknowledges that there was evidence that he was in the car with other gang members, but claims "the evidence that appellant had the specific intent to promote or assist criminal conduct by gang members is very thin." To support this argument, appellant attacks Detective Lopez's theory that the impetus of the crime was retaliation for the line drawn through the letters W-A-S on a fence behind appellant's house. The graffiti, he notes, had been on that fence for over a year and the crime did not occur near the fence.

As pointed out by respondent, however, appellant misstates the evidence. Detective Lopez testified that the lettering W-A-S which had been drawn over was located at the scene of the shooting, not at appellant's residence. In Lopez's expert opinion, the lettering had been crossed out by a rival gang and the Sureños would typically retaliate for such conduct because the gang saw it as being disrespectful. Such retaliation would typically be done by either crossing out the new gang's "tag" and adding more graffiti to the wall, or it could escalate into a fight or shooting at that location.

In *People v. Gardeley*, the gang expert opined that a violent assault on an individual in an area where gang members sell drugs was a "classic" example of gang-related activity. The expert explained that such attacks frighten residents, "securing the gang's drug-dealing stronghold." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 619.) Based on this testimony, the court found sufficient evidence that the defendant had

participated in the attack "'for the benefit of, at the direction of, or in association with'" that gang, and "'with the specific intent to promote, further, or assist in … criminal conduct by gang members'" as specified in section 186.22, subdivision (b)(1). (*Gardeley*, at p. 619.)

Similarly, here, there was sufficient evidence from which the jury could reasonably conclude the shooting was committed "for the benefit of, at the direction of, or in association with" the Sureño gang, and done "with the specific intent to promote, further, or assist in … criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

3. Failure to Give CALJIC No. 2.80*

Appellant argues the trial court prejudicially erred by failing to instruct the jury pursuant to CALJIC No. 2.80 concerning the weight of expert testimony. Respondent acknowledges the error, but contends the failure to instruct was harmless. We agree with respondent.

CALJIC No. 2.80 is the instruction called for by section 1127b and provides:

> "[A witness] [Witnesses] who [has] [have] special knowledge, skill, experience, training or education in a particular subject [has] [have] testified to certain opinions. This type of witness is referred to as an expert witness. In determining what weight to give to any opinion expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion. [¶] An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based. [¶] You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable."

The court must instruct with CALJIC No. 2.80 sua sponte when an expert witness testifies to his opinion at trial. (*People v. Williams* (1988) 45 Cal.3d 1268, 1320, as modified in *People v. Guiuan* (1998) 18 Cal.4th 558, 560-561.) However, """"It is … the

*See footnote, *ante*, page 1.

rule … that the erroneous failure to instruct the jury regarding the weight of expert testimony is not prejudicial unless the reviewing court, upon an examination of the entire cause, determines that the jury might have rendered a different verdict had the omitted instruction been given. [Citations.]"' [Citations.]" (*People v. Williams*, *supra*, at p. 1320.)

Appellant bases his claim of prejudice on the fact that Detective Lopez's testimony "supplied the central evidence of the gang enhancement on key issues like primary activities, commission for benefit of the gang, and specific intent." He also contends the expert testimony was impliedly endorsed when the jury was instructed that, in determining the gang enhancement issue, "you should consider any expert opinion evidence offered …." Finally, he contends the prosecution's argument that the gang allegation was a "no brainer" exacerbated the situation.

We disagree with appellant's contention that the failure to give the instruction was prejudicial. There was no question here that the expert, Detective Lopez, was qualified. Defense counsel stipulated he was, and Lopez testified he had participated in close to 100 gang investigations. Neither was there any question appellant was a gang member, in the company of other gang members, when the crime was committed. Appellant acknowledged his gang membership during his testimony. Avelino Vasquez, who acknowledged he was in custody for allowing someone to shoot from his vehicle on the date in question, testified that he was a Wicked Ass Sureño gang member. Marcelino Ochoa, who was at the house when the shooting occurred, testified that appellant was a close friend and a fellow WAS member.

As appellant contends, the prosecution did argue the gang allegation was "not really" an issue, but defense counsel countered the prosecution's position by questioning Detective Lopez's believability, claiming, "maybe Officer Lopez has something in for [appellant]," he "always kind of hedged his testimony," and had a "bias" against appellant. Furthermore, the jury was instructed with CALJIC No. 2.20 (2000 rev.), which provided, in pertinent part:

> "Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified; [¶] … [¶] The existence or nonexistence of a bias, interest, or other motive; [¶] The existence or nonexistence of any fact testified to by the witness …."

We also disagree with appellant that Detective Lopez's testimony was somehow endorsed by the trial court. CALJIC No. 17.24.2 (2002 rev.) did not endorse the expert testimony as claimed by appellant, but rather instructed the jury to consider it, as well as evidence of past and present conduct by gang members involved in enumerated crimes, in determining whether the felony was committed for the benefit of a street gang. In the same instruction, the jury was further told, "The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

For these reasons, we believe it is not reasonably probable the jury would have reached a different verdict had CALJIC No. 2.80 been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) We reject appellant's claim to the contrary.

4. Failure to Instruct on Whether Current Felony Was a Serious Felony for Enhancement Purposes

Appellant contends the trial court erred under both state law and federal constitutional law in failing to submit to the jury the question whether his current conviction on count 1, discharge of a firearm in a grossly negligent manner in violation of section 246.3, is a serious felony for purposes of two enhancements attached to that count. Both of those enhancements—that is, enhancement under section 667, subdivision (a)(1) and enhancement under section 186.22. subdivision (b)(1)(B)—do require that the current offense be a serious felony.

Section 667, subdivision (a)(1) states, in pertinent part:

> "In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony …, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

Section 667, subdivision (a)(4) in turn states, "As used in this subdivision, 'serious felony' means a serious felony listed in subdivision (c) of section 1192.7."

Section 186.22, subdivision (b)(1) carries three possible additional terms depending on the nature of the current felony:

> "(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion. [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

Appellant's sentence on count 1 was enhanced by five consecutive years pursuant to section 186.22, subdivision (b)(1)(B).

Section 1192.7, subdivision (c) lists the crimes which constitute serious felonies. The crime of discharging a firearm in a grossly negligent manner under section 246.3 is not specifically listed. Instead, such a crime qualifies as a serious felony only if certain conduct relating to the offense is proved. (*People v. Leslie*, *supra*, 47 Cal.App.4th at p. 201.) As pertinent here, section 1192.7, subdivision (c) defines a serious felony to include "any felony in which the defendant personally uses a firearm," as well as "any felony offense, which would also constitute a felony violation of Section 186.22." (§ 1192.7, subd. (c)(8), (28).)[3]

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[3]As appellant notes, subdivision (c)(23) of section 1192.7 makes "any felony in which the defendant personally used a deadly or dangerous weapon" a serious felony. We need not discuss this alternative, however, because it is clear that the weapon involved here was a firearm.

A. The section 667, subdivision (a) enhancement

To clarify: there were two alternative ways in which the appropriate finder of fact could have found that appellant's count 1 offense was a serious felony for purposes of section 667, subdivision (a). These were (1) by finding the offense to have included personal use of a firearm (§ 1192.7 subd. (c)(8)), or (2) by finding the offense to be a "felony offense, which would also constitute a felony violation of Section 186.22." (§ 1192.7, subd. (c)(28).)

As to subdivision (c)(8) of section 1192.7, it is clear that appellant was entitled, under federal constitutional law, to a jury determination whether his count 1 offense included personal use of a firearm and was thus a serious felony. (See *People v. Taylor* (2004) 118 Cal.App.4th 11, 23-24, 28-30 [under *Apprendi v. New Jersey* (2000) 530 U.S. 466, accused has right to jury trial regarding question whether his/her current offense is a conduct-based serious felony under § 1192.7, subd. (c)(8)].)[4] Here, there was no jury trial waiver, either of the question whether the offense charged in count 1 was a serious felony or as to the enhancements in general and, though the jury did make findings as to the enhancements, it was not instructed to decide the question whether the count 1 offense included personal use of a firearm. Further, examination of the record reveals that the prosecutor argued the count 1 offense to the jury on alternative theories: that appellant was the shooter of the firearm, or that he was an aider and abettor of the offense, or a conspirator. Finally, the evidence did not overwhelmingly establish that appellant did, in fact, personally use a firearm. Respondent concedes that, in these circumstances, it was error not to submit the question of personal use to the jury (as to the enhancement) and that we cannot say the error was harmless.

As to the alternate basis upon which the fact finder could have based the section 667, subdivision (a) enhancement—by finding the count 1 offense to constitute a "felony

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[4]Given this conclusion, we find it unnecessary to discuss state statutory law. (See *People v. Epps* (2001) 25 Cal.4th 19, 28 [§ 1025]; *People v. Yarbrough* (1997) 57 Cal.App.4th 469, 477 [§ 969f].)

violation of Section 186.22" pursuant to section 1192.7, subdivision (c)(28)—it is less clear that appellant's jury trial right was infringed. In *People v. Briceno* (2004) 34 Cal.4th 451, the California Supreme Court held that "section 1192.7(c)(28) includes within its ambit any felony offense committed for the benefit of a criminal street gang under the section 186.22(b)(1) gang sentence enhancement." (*Id.* at p. 459.) The jury here did determine that appellant committed the count 1 offense "for the benefit" of a gang within the meaning of the gang enhancement. The parties agree that, where the jury, in connection with other instructions, has necessarily determined adversely to the defendant an issue upon which it was not instructed, no error, or at least no prejudice, is shown. (Cf. *People v. Taylor*, *supra*, 118 Cal.App.4th at pp. 22-23 [when jury has found defendant guilty of one of the serious felonies specifically enumerated in § 1192.7, subd. (c), trial court may find that felony serious as a matter of law].) Thus, if *Briceno* applies here, any infringement of appellant's jury rights was harmless. (See *People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 326 [prejudice from *Apprendi* error judged under *Chapman v. California* (1967) 386 U.S. 18].)

Appellant argues that *Briceno* applies only where the question is whether a prior conviction was for a serious felony, and not where the question pertains to the current offense. As to a current offense, according to appellant, it can be a serious felony under section 1192.7, subdivision (c)(28) only if it is an independent felony offense proved under section 186.22, subdivision (a). Such an independent current offense, appellant contends, was neither charged nor proven here. Neither, according to appellant, can it be said that the jury's finding on the gang enhancement charged pursuant to section 186.22, subdivision (b) constitutes a substitute for a finding on subdivision (a), which has different and distinct requirements of proof.[5]

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[5]A violation under section 186.22, subdivision (a) requires proof of two elements which are not part of the gang enhancement: active participation in any criminal street gang and "knowledge that its members engage in or have engaged in a pattern of criminal gang activity." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fns. 11 & 12.)

Respondent counters that, while *Briceno* does make a distinction between current and former offenses enhanced by gang findings, the opinion holds only that a court is not permitted to "bootstrap" a current felony with a gang enhancement into both a serious felony for purposes of section 667, subdivision (a) and a felony subject to the five-year additional sentence prescribed by section 186.22, subdivision (b)(1)(B). Thus, according to respondent, the jury's finding here that appellant did commit the count 1 offense under the circumstances specified in section 186.22, subdivision (b)(1) is tantamount to a finding that the offense was a serious felony, and no prejudicial infringement of appellant's jury trial right has occurred.

While we agree that there are two possible ways in which to read the opinion in *Briceno*, we believe respondent's reading to be correct. We quote:

> "… The Court of Appeal was apparently concerned that if section 1192.7(c)(28) made *all* gang-related felonies serious felonies, a defendant convicted of a gang-related felony would never be punished under section 186.22(b)(1)(A), the sentence enhancement that applies where the defendant is convicted of a felony that is gang related, but would always be subject to the sentence enhancement for a serious felony that is gang related under section 186.22(b)(1)(B), rendering section 186.22(b)(1)(A) surplusage. Not so.
>
> "[S]ection 186.22(b)(1)(A), (B), and (C) speak to an event that occurs in the current proceeding. Section 1192.7, subdivision (c), on the other hand, comes into play only if the defendant reoffends, at which time any *prior* felony that is gang related is deemed a serious felony. Thus, any felony that is gang related is not treated as a serious felony in the current proceeding, giving effect to section 186.22(b)(1)(A). [Citation.]
>
> "Not only does this interpretation give meaning to section 186.22(b)(1)(A), (B), and (C), it also avoids the impermissible bootstrapping that would occur if any felony that is gang related is also deemed serious in the current proceeding. Specifically, while it is proper to define any felony committed for the benefit of a criminal street gang as a serious felony under section 1192.7(c)(28), it is improper to use the *same* gang-related conduct *again* to obtain an additional five-year sentence under section 186.22(b)(1)(B)…." (*People v. Briceno*, *supra*, 34 Cal.4th at pp. 464-465, fn. omitted.)

We therefore affirm the addition of a five-year enhancement term to appellant's sentence on count 1 pursuant to section 667, subdivision (a), on the basis the jury's finding on the section 186.22, subdivision (b)(1) enhancement was tantamount to a finding that the offense in count 1 was a serious felony pursuant to section 1192.7, subdivision (c)(28). (See *People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 326 [prejudice from *Apprendi* error]; cf. *People v. Taylor*, *supra*, 118 Cal.App.4th at pp. 22-23 [court may find a specifically enumerated felony to be serious].)

B. The section 186.22, subdivision (b)(1)(B) enhancement

The trial court imposed a second consecutive five-year enhancement term on count 1 pursuant to section 186.22, subdivision (b)(1)(B). This was precisely the bootstrapping of which the Supreme Court spoke in *Briceno*. (*People v. Briceno*, *supra*, 34 Cal.4th at pp. 464-465.) We therefore reverse this enhancement and will remand to the trial court for resentencing pursuant to section 186.22, subdivision (b)(1)(A) on count 1.

5. The Trial Court Erroneously Sentenced Concurrent Time on Counts 1 and 3[*]

Appellant was convicted on count 1 of negligent discharge of a firearm, pursuant to section 246.3, and on count 3 of shooting a firearm from a vehicle, pursuant to section 12034, subdivision (d), both based on the same conduct. At sentencing, the trial court imposed sentence on count 3 and ordered that the sentence run concurrent to the sentence imposed in count 1. The parties agree that concurrent sentencing was not appropriate, and that a stay of sentence pursuant to section 654 was the appropriate vehicle by which to avoid multiple punishment for the same act. We agree with the parties.

Section 654, subdivision (a) provides in pertinent part:

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

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[*]See footnote, *ante*, page 1.

> "The purpose of [section 654] is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although these distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one of the separate offenses arising from the single act or omission—the offense carrying the highest punishment. [Citations.]" (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

Respondent concedes, and we agree, that the conduct in count 3, shooting a firearm from a vehicle, was the same as the conduct in count 1, discharge of a firearm in a grossly negligent manner.

When multiple punishments are precluded by section 654, both concurrent and consecutive sentences are prohibited. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) The proper procedure is to impose sentence on the offenses and stay execution of sentence on the offense carrying the lesser penalty, with the stay to become permanent when service of the greater sentence is complete. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 420.)

We will remand this matter for resentencing not only on count 1 but also on count 3. In doing so, we observe that the offense of violating section 12034, subdivision (d) is a specifically enumerated serious felony pursuant to section 1192.7, subdivision (c)(36), and that imposition of consecutive five-year enhancements to the count 3 sentence, pursuant to sections 667, subdivision (a), and 186.22, subdivision (b)(1)(B), would be prohibited by nothing we say in this opinion. Appellant has not argued otherwise.

6. Appellant's Custody Credits*

Appellant contends he is entitled to 212 days of custody credits rather than the 210 days he was credited. Respondent concedes.

As a general rule, a defendant is required to have the trial court correct a miscalculation of presentence custody credits. (§ 1237.1.) If there are other appellate

*See footnote, *ante*, page 1.

issues to decide, however, and there is enough information in the record for this court to calculate the proper number of credits, we may do so in the interests of economy. (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1259; *People v. Jones* (2000) 82 Cal.App.4th 485, 493.) Because we are remanding on other resentencing issues, we will remand on this matter as well.

7. The Abstract of Judgment Must be Corrected to Delete the Count 2 Section 667, Subdivision (a)(1) Enhancement*

The abstract of judgment reflects a five-year prior serious felony enhancement pursuant to section 667, subdivision (a)(1) applied to count 2, but stayed. Appellant contends, and respondent agrees, that the count 2 offense, possessing a firearm as a convicted felon (§ 12021, subd. (a)(1)), cannot trigger such an enhancement. (See § 1192.7, subd. (c).) Nor was such an enhancement imposed at sentencing. Thus, the abstract of judgment must be corrected to delete this enhancement as it pertains to count 2.

We agree with appellant and respondent and order that the abstract of judgment be corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [court has power to correct clerical errors].)

DISPOSITION

The convictions on all counts in this matter are affirmed, as is the judgment, except as indicated in parts 4 and 5, *ante*, with regard to counts 1 and 3. The clerical error in connection with count 2 must be corrected. The matter is thus remanded for resentencing and recalculation of custody credits.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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GOMES, J.