

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FELIX ROLANDO HERNANDEZ,

Defendant and Appellant.

F057417

(Super. Ct. No. F08902368)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Gary R. Orozco, Judge.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Felix Rolando Hernandez was convicted of two counts of felony robbery arising from the invasion of Regina Morales's home, which defendant committed with codefendant Mark Ortega. At a bifurcated trial, the trial court found true gang enhancements for both robberies, participation in a gang, and a prior conviction. On appeal, defendant contends (1) insufficient evidence supported the finding that he committed the robberies with the specific intent to benefit or promote a criminal street gang, (2) insufficient evidence supported the finding that he participated in a criminal street gang, (3) the sentence was cruel and unusual, (4) the trial court imposed an erroneous sentence, and (5) the abstract of judgment should be amended to include properly awarded conduct credits. We will vacate the sentence and remand for resentencing. In all other respects, we will affirm.

PROCEDURAL SUMMARY

On November 20, 2008, the Fresno County District Attorney charged defendant with Regina's murder (Pen. Code, § 187, subd. (a)¹; count 1), the home invasion robbery of Regina and her ex-boyfriend, Gabriel (§§ 211, 213, subd. (a)(1)(A); counts 2 & 3), arson (§ 451, subd. (d); count 4), and participation in a criminal street gang (§ 186.22, subd. (a); count 6).² As to count 1, the information further alleged that defendant committed the murder during the commission of a robbery (§ 190.2, subd. (a)(17)(A)), that a principal intentionally discharged a firearm causing a death (§ 12022.53, subds. (d), (e)(1)), and that defendant committed the murder in association with a street gang with the specific intent to promote the gang (§ 186.22, subd. (b)(1)). As to counts 2 and 3, the information alleged that a principal intentionally discharged a firearm causing a death during commission of the robbery (§ 12022.53, subds. (d), (e)(1)), and that defendant

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

² Count 4 was originally numbered as count 5; count 5 was originally numbered as count 6; count 6 was originally numbered as count 4.

committed the robberies in association with a street gang with the specific intent to promote the gang (§ 186.22, subd. (b)(1)). The information also alleged that defendant suffered a prior conviction within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), that he suffered a prior serious felony conviction (§ 667, subd. (a)(1)), and that he served a prior prison term (§ 667.5, subd. (b)).

Codefendants Ortega and Oscar Verdugo were charged with the same counts, and Ortega was additionally charged with receiving stolen property (§ 496, subd. (a); count 5).

At trial, defendant was convicted of counts 2 and 3, and acquitted of counts 1 and 4. Ortega was found guilty on counts 1 through 5. Verdugo was acquitted on all counts.

In a bifurcated trial, the trial court found defendant guilty of count 6, and found true the gang enhancements as they applied to counts 2 and 3, and the prior conviction. The court similarly found Ortega guilty on count 6, and found true the gang and prior convictions allegations.

The trial court sentenced defendant on the first robbery conviction (count 2) as follows: the upper term of nine years, plus five years for the prior serious felony conviction enhancement, plus 25 years to life for the firearm enhancement. The court doubled the entire term based on defendant’s prior strike, resulting in a determinate term of 28 years, plus a consecutive indeterminate term of 50 years to life. The court then imposed an identical, consecutive sentence for the second robbery conviction (count 3). The court stayed the sentence on the gang participation count and awarded 406 days plus 60 days for time credit.

FACTS

Original Trial

On March 28, 2008, at about 9:00 or 10:00 p.m., defendant (nicknamed “Mellow”) and Ortega (nicknamed “Little Demon”) picked up 21-year-old Benita (nicknamed

“Cute”) at her boyfriend’s apartment. Ortega was driving a stolen Mazda Tribute sport utility vehicle (the SUV), the vehicle Benita had always seen him drive. He was wearing a red shirt, and both he and defendant were wearing red bandanas around their necks. They went to a house where they joined several other people, including Verdugo (nicknamed “Little Silent”), whom Benita had never met. Everyone at the party had been smoking methamphetamine and was “high” or “tweaking.” At some point, Ortega pulled his red bandana over his face and took pictures of himself and defendant with a cell phone. When the methamphetamine started to run low, Ortega said they should go get more, and defendant agreed.

During the party, Benita was sending text messages to 27-year-old Regina. Ortega asked Benita if he could borrow her cell phone. Benita let him use the phone and when he returned it to her, she could see he had accessed her contacts list. He asked her, “Who is that girl Regina in your phone?” Benita said she was a friend. Ortega asked Benita if she wanted a ride to Regina’s home. Benita said she wanted a ride to her own home, but Ortega insisted on taking her to Regina’s home. Ortega asked her if Regina still sold drugs and Benita replied that she did. Ortega said, “All right[,] I’m going to take you to Regina’s.”

At about 1:45 a.m., Ortega got in the SUV. Benita got in the passenger seat and defendant and Verdugo got in the back seat. Ortega’s rifle was between the seats by his right leg; Benita had always seen him with it. He frequently played with it and she had seen him shooting chickens with it in the mountains. As they drove to Regina’s apartment, Ortega passed the rifle to the back seat. Ortega parked the SUV about half a block from Regina’s apartment, on a side street perpendicular to the alley that ran behind the apartments. Everyone got out of the SUV and Ortega told Benita to go inside. Benita thought they were just going to drop her off, but they said they were going to another house nearby. Ortega told Benita to contact them when she was ready to leave Regina’s.

Benita walked down the alley and knocked on Regina's back door because Regina was usually in the back bedroom on the back side of the apartment. No one answered, so Benita went to the front door and rang the doorbell. Again no one answered, so she left and returned to the SUV. The three men were still standing next to the SUV talking. Ortega asked Benita why she had returned. When she said no one answered the door, Ortega told her to go back to Regina's apartment. As she walked back, she called Regina and asked her to let her in. It was not unusual for Benita to show up at Regina's apartment late at night. When Benita knocked on the front door, Gabriel, Regina's ex-boyfriend, answered the door.

Benita went into Regina's bedroom and gave Regina a hug. While they sat and talked with Gabriel, Benita and Regina smoked some methamphetamine. After a short time, Benita went into the kitchen to eat something. Benita finished eating and returned to the bedroom to talk with Regina. Benita sent a text message to Ortega to come pick her up. He responded that they wanted to buy some drugs from Regina, and Benita should let them in when they got there. Benita did not mention Ortega or defendant to Regina.

Ortega repeatedly sent Benita text messages, asking her which apartment was Regina's. According to cell phone records, Ortega and Benita exchanged 42 text messages in the hour between 2:20 a.m. and 3:20 a.m. Benita sent Ortega Regina's address.

While Benita was still in the living room, and Regina and Gabriel were in the front bedroom, Benita heard the back door open. She saw Ortega and defendant walk in the back door, which was unlocked. Benita went to the door and asked Ortega what he was doing because they just walked in. Ortega and defendant were wearing sweaters and they stood right next to each other with their hands behind their backs. Benita did not see a gun. Ortega put his hand on Benita's face and told her to shut up, and he guided her toward the door. Again, she asked him what he was doing and he told her to shut up. He

said to her in a harsh whisper, “Shut up, Benita. I’m trying to rob this bitch.” But Benita protested. Ortega told her “not to trip.” He promised not to harm Regina. He said that “his word [was] with Bond,” and he “put that on the block he wasn’t going to hurt Regina.” This meant that he was promising on his street and on the Bond Street Bulldog gang members with whom he claimed to associate. He repeatedly told Benita to go to the car, but she refused. She begged them not to do anything. Ortega was getting mad and he told her to “get the fuck in the car.” Defendant pushed her out the door and promised not to let Ortega harm Regina. Benita was afraid. She left the apartment and walked to the alley. She was surprised to see that the SUV was now parked in the alley behind Regina’s garage. The SUV was running and Verdugo was in the driver’s seat. Benita got into the passenger’s seat.

According to Gabriel, when Benita was in the living room looking at her cell phone, he and Regina heard a knock on the back screen door. Then Ortega and defendant barged into the room. Ortega was wearing a red beanie on his head and a red bandana covering his face. He was holding a rifle. Defendant was wearing a dark jacket with a hood over his head. Ortega immediately shot Regina and she fell to the floor. Defendant hit Gabriel on the side of his head with a fist. Then defendant yelled at Regina, “Where are your keys, bitch?” Defendant yelled at Gabriel, “Give me your shit.” Gabriel gave defendant his house keys and said, “I don’t have anything else.” Defendant left Regina’s purse on the bed and ran out of the room.

Ortega kicked Regina and asked her, “Where is the money, bitch?” While he was kicking her, he kept the rifle pointed at Gabriel, who was sitting on the bed. Gabriel was afraid and he regretted not being able to protect Regina. Ortega told Gabriel to lie face-down on the bed, but Gabriel refused to comply for fear that Ortega would shoot him in the back of his head. Gabriel held his hands up and said, “I don’t have anything to do with this. I don’t know what’s going on.” Ortega said, “I heard she’s got a gun, too. Do you know where the gun’s at?” Gabriel said, “I never knew about her having no gun.”

When Ortega again asked where the money was, Gabriel offered to look through Regina's purse for him. Ortega signaled for him to do it, so Gabriel grabbed the purse and dumped it on the bed. He found a gold bracelet, but no money.

Ortega said, "I'm going to kill this bitch." He told Gabriel he was going to kill him too because he thought Gabriel was going to try something. Ortega said he was getting an "itchy trigger finger" and he was "ready to die by the Fresno PD." Afraid for his life, Gabriel told Ortega, "My cousin is Donkey," referring to a cousin who was well-known in prison. Gabriel hoped Ortega would realize there would be retribution if he hurt him. Gabriel repeated that he would not do anything and that he did not know what was going on. Ortega told him to go sit in the hallway with his legs crossed and his hands on his head. He said, "I ain't going to kill you[;] it's this bitch." Gabriel asked Ortega why he was going to kill Regina, and he answered, "She burned my homeboy. Sold him 50 dollars worth of cut." This meant the methamphetamine appeared to be real, but was not.

Gabriel heard Ortega shoot the rifle a few more times, then Ortega said, "I'm gone," and he ran past Gabriel. Gabriel thought the rifle sounded like a .22-caliber rifle. Gabriel waited about 10 seconds, then got up and went to Regina. He told her, "It's okay. Get up. They're gone." He picked her up and sat her on the bed, but she fell back on her back, unresponsive. He said, "They're gone. They're gone." She gasped for air and her eyes rolled back in her head. When Gabriel saw blood on his hand, he lifted Regina's shirt and saw a bullet wound near her pelvis. Only then did he realize she had been shot. He ran around the apartment looking for a telephone, then ran outside and told a neighbor to call 911.

Ortega returned to the SUV in the alley carrying his rifle and Regina's purse. Defendant backed Regina's red Geo Prizm out of her garage, and both cars returned to the house where the party was held.

Chica, a young woman at the party, came out and asked about Regina. Chica recognized Regina's car and asked Benita, "Is that Regina's car over there? [¶] ... [¶] Is Regina in there? Tell her to get down and say hi." Defendant told Benita not to say anything. Ortega told someone, "Take that bitch inside and tell her to shut up."

Chica saw Ortega come back into the house. Then she saw some girls looking through a purse that she believed was Regina's.

Benita stayed in the car, and after a few minutes, she, Ortega, and Verdugo left. Ortega dropped Benita off at her apartment.

Officers responded to Regina's apartment at 3:42 a.m., two minutes after being dispatched. The officers found Regina lying on the bed with her legs hanging down. She was gasping for air and her eyes were open, but her pupils were totally dilated and she was not blinking. Her eyes were becoming dry. The officers observed a small bullet wound in her right pelvis from a .22-caliber gunshot, and a small graze wound on her right arm. Regina was taken to the hospital.

Four expended .22-caliber cartridges were found in Regina's living room, hallway, and bedroom. A criminologist later determined that two of the four expended .22-caliber cartridges found in Regina's apartment had been fired by Ortega's rifle. Two of the expended cartridges could not be conclusively identified as having been fired by the rifle.

At 4:42 a.m., Benita received a text message from Ortega asking her how she was going to act. He said, "Man my girl. How gonna you act."

At 7:33 a.m., Benita received another message from him telling her he was leaving town. He said, "Cute, I'm gone b. Yo boy wiggin out." "I'm smashing out of town." "C U when I see U."

At about 8:00 a.m., Regina died at the hospital.

Also at about 8:00 a.m., Ortega gave Chica a ride to work. Ortega drove with a rifle across his lap. Defendant, who was also in the car, had a long, samurai-type sword.

At about 10:00 a.m., Ortega and defendant came to Benita's apartment. Benita asked Ortega what had happened, but he shook his head and did not answer. He kept saying, "Get your stuff[;] we're going to the mountains. We can't be here." Then he said, "I think I murked [Regina]," which meant he thought he had killed her. Benita started crying and told Ortega to get out. He put his head down and repeated that he was sorry. Defendant just shook his head. Benita told them to leave.

At 7:31 p.m., Benita received a text message from Ortega. He said, "[M]y dog, answer da phone. Hella important. Number 007." He had sent her many other messages and he kept calling her, but she did not want to talk to him and she refused to answer.

At about 11:30 p.m., a woman walking in her neighborhood saw an SUV parked behind a small red Geo. Ortega and two other men in dark clothing were standing by the red Geo. They poured gas over the red Geo, set it on fire, and drove away. The woman had previously seen Ortega and a neighbor pushing the red Geo into the neighbor's back yard. A few days after the car fire, the neighbor threatened the woman, telling her to keep her mouth shut or what had happened to her friend would happen to her.

On April 1, at about 8:00 p.m., undercover officers observed Ortega walking with a limp and an obvious bulge in his clothing. They watched him place a .22-caliber rifle, containing a loaded magazine of nine live cartridges, behind a gas station and quickly walk into an adjacent fast food restaurant, where the officers apprehended him. Defendant and Verdugo were not with him.

Ortega was carrying keys to the SUV, which was parked nearby. The SUV's license plates were covered with Auto Maxx paper plates. Ortega was also carrying a cell phone, a red bandana, and some papers, one of which was signed by "Little Demonologist." When the detective, who was present at the scene, picked up Ortega's cell phone and looked at it, he immediately saw a "wallpaper" (background) photograph

displayed on the phone's face. It was a photograph of a male wearing a red hat down to his eyebrows, a red bandana over his face (revealing only his eyes), and red clothing.³ When the detective examined the contacts in Ortega's cell phone, he found someone referred to as "Mellow Bonded 007," with a number the detective knew was defendant's number, even though it was registered to someone else.

The SUV contained five live .22-caliber cartridges and six expended .22-caliber cartridge casings. The criminologist later determined that four of the six expended .22-caliber casings had been fired from Ortega's rifle. The others were inconclusive. The SUV's glove compartment contained several CD's, four of which had Regina's name written on them. Regina always signed her name on her things. Behind the seat was Regina's daughter's toy.

When the police searched defendant's bedroom, they found a samurai-type sword in a case and a CD case between two mattresses on the floor. They also found CD's and a CD case, all with Regina's name on them.

The detective testified that, about 30 hours before Regina was shot (i.e., at about 9:40 p.m. on March 27), Ortega left someone a voicemail message (the parties stipulated it was not left for either defendant or Verdugo). The detective recognized Ortega's voice. In the message, Ortega said, "Aye Bulldog man. [¶] ... [¶] I been cup caking with some little hoe ass beezee ... nigga ..., you know what I mean? [¶] ... [¶] Hit me up boy, Little D." At this point, a female voice could be heard in the background. Then Ortega said, "Lay down this ... hit me up boy. [¶] ... [¶] I need the strap at least, man." The detective testified that the term "strap" meant a firearm or gun.

³ The detective testified the male in the photograph was wearing red clothing, but it appears to us he was wearing a shirt that was predominantly light blue.

Also on March 27, Ortega left a message for “Mellow” on a cell phone registered to someone named Dominguez Perez. The cell phone contained seven voicemail messages that mentioned the name “Mellow.”

The pathologist who conducted the autopsy of Regina’s body found four gunshot wounds: a grazing wound on her upper right arm, a wound through her right thigh, a wound near her vagina, and a wound to her right hip. The bullet that caused the wound to her hip injured her iliac artery and vein, and caused her to bleed to death.

Bifurcated Trial

At the bifurcated trial, Gabriel testified that Ortega’s use of the word “dog” and the red bandana he wore on his face led Gabriel to believe that Ortega and defendant were in the Bulldog gang. Due to this belief, Gabriel mentioned the name of his cousin, “Donkey,” who was a known Bulldog, hoping his life would be spared if they knew he was related to someone in their gang.

The gang expert testified there are no “shot caller[s]” in the Bulldog gang; the mentality is every man for himself. Bulldog gang tattoos include the words “Fresno” and “Bulldogs,” the letters “FS,” and pictures of actual bulldog faces and bodies. There are three main sub-groups of the Bulldog gang: the Fresno Bulldogs, the East Side Fresno Bulldogs, and the North Side Fresno Bulldogs. Each sub-group uses a tattoo to differentiate themselves such as “FB,” “ESF,” and “NSF,” respectively. Each sub-group has further sub-groups; the Bond Street Bulldogs are the largest sub-group of the East Side Fresno Bulldogs. In addition to the general Bulldog tattoos noted above, Bond Street Bulldog tattoos consist of the words “Bond” and “Bond Street,” the letters “BSD,” and the numbers “007.” Primary activities of the Bond Street Bulldogs include assault with a deadly weapon, murder, arson, robbery, vehicle theft, assault, battery, and numerous other crimes. In the expert’s opinion, the Bond Street Bulldogs are a criminal street gang.

The expert testified that a hypothetical crime, very similar to the crime at hand, would benefit a criminal street gang because it would bolster the gang's reputation for using violence to regain respect, and defendant's actions benefitted the gang because he was acting as "crowd control." Respect is everything to a gang member; committing a crime to avenge a fellow gang member who was ripped off increases that respect. As a result of this type of crime, other drug dealers would know not to sell their gang "cut" drugs. In the expert's opinion, this crime was associated with the Bond Street Bulldogs.

The expert translated Ortega's voice-mail. "Aye, Bulldog man" meant "How are you doing[?]" or "What's up, Bulldog?" "Bond up and call me back" meant "[G]et ready, I might need you to do something, commit a crime or [a] number of things." "I need the strap at least, man" meant that Ortega was looking for a gun. The expert further explained that the phrase "[B]ond up" is not normally used in casual conversation, nor is it used by or towards a non-gang member. "[B]ond up" is normally used only among gang members to discuss perpetrating criminal acts or taking care of business for their gang.

The police use several criteria to determine whether or not someone is an active participant in a criminal street gang. If three of the criteria are met, a person could be classified as an active gang participant. The criteria include self-admission of membership to an officer, gang tattoos, association with known gang members on a regular basis, gang graffiti on documents, correspondence with gang members, arrest in the company of known gang members, identification as a gang member by a reliable source (teachers, law enforcement, parents, rival gangs), name on graffiti or roll call list, and appearance in a photograph with known gang members.

Ortega, with whom defendant committed the crimes, repeatedly admitted that he was an "ESF" gang member, including during five different jail classification proceedings. His tattoos included the word "FRESNO" with the letters "ES"

emphasized, the letters “ESF” and “BDS,” the letter “B,” one bulldog body, two bulldog faces, and three “dog paws.”

In the expert’s opinion, defendant was a current, active participant in the Bond Street Bulldog gang. On eight different occasions, defendant admitted being in the Bulldog gang, and on five of those occasions, he specifically indicated he was a Bond Street Bulldog. Defendant’s tattoos included the words “FRESNO,” “BULLDOG,” and “BOND STREET,” and three bulldog faces. He also had the letter “B” on his face, which was “like a billboard” because he was showing his level of commitment to the gang. Defendant was in two photographs with known Bond Street Bulldog gang members. In one of the photographs, defendant was “throwing” gang signs.

Defense Evidence

The expert testified that two active gang participants could commit a crime together for non-gang-related purposes—for example, to obtain more drugs. The word “dog” is not specific to gang members, but is also used in popular culture. Similarly, the color red is not exclusive to the Bulldog gang. Also, a non-active gang member could claim to be in a gang during jail classification for protection purposes.

DISCUSSION

I. Gang Enhancements

A. Sufficiency of the Evidence

Defendant contends insufficient evidence supported the finding that the robberies were committed with the intent to benefit or promote criminal gang activity; therefore, the gang enhancements under section 186.22, subdivision (b) and, consequently, section 12022.53, subdivision (e), should not apply. Rather, he asserts the crimes were committed to obtain drugs and/or money to buy drugs. We disagree. There was ample evidence to support the finding that defendant was involved in a gang, and intended to advance criminal gang activity within the meaning of section 186.22, subdivision (b).

“To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Bolden* (2002) 29 Cal.4th 515, 553.) “It is not our function to reweigh the evidence, reappraise the credibility of witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact.” (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955.) We may not reverse a conviction for insufficiency of the evidence unless it appears “that upon no hypotheses whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We must draw all reasonable inferences in support of the judgment. (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Although we review the whole record, “[t]he uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable.” (*People v. Scott* (1978) 21 Cal.3d 284, 296; *People v. Panah* (2005) 35 Cal.4th 395, 489.) This standard equally applies to a claim of insufficiency of the evidence to support a gang enhancement. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 660.)

For a gang enhancement under section 186.22, subdivision (b) to properly apply, the defendant must have committed a felony “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).)

In *People v. Vasquez* (2009) 178 Cal.App.4th 347 (*Vasquez*), expert witness testimony “that violent crimes ... increase ‘respect’ for the gang and facilitate its criminal activities by intimidating members of rival gangs and law-abiding neighborhood residents” was sufficient evidence to support a finding under section 186.22, subdivision (b). (*Vasquez, supra*, at pp. 353.) The *Vasquez* court further noted that

intimidation benefits the gang by “elevat[ing] the status of the gang within gang culture.” (*Id.* at p. 354.)

“Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]” (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1197-1199 [intending to commit and/or aid and abet a robbery in association with fellow gang members was sufficient evidence that the defendant intended to assist criminal gang activity].) “[I]f substantial evidence establishes that the defendant is a gang member who intended to commit the charged felony in association with other gang members, the jury may fairly infer that the defendant also intended for his crime to promote, further or assist criminal conduct by those gang members. [Citation.]” (*Vazquez, supra*, 178 Cal.App.4th at pp. 353-354.)

Here, sufficient evidence supported the gang enhancement under section 186.22, subdivision (b). The expert testified that the crimes committed would benefit a criminal street gang because other drug dealers would not sell the gang “cut” drugs, and the gang’s reputation would be bolstered by using violence to regain respect. Defendant committed the crime in association with Ortega, a known gang member, and that alone was sufficient to support a finding that he had the specific intent to “promote, further or assist” under section 186.22 subdivision (b). (*People v. Villalobos, supra*, 145 Cal.App.4th at p. 322; *People v. Morales, supra*, 112 Cal.App.4th at pp. 1197-1199.)

Similarly, the enhancement under section 12022.53, subdivision (e) was also properly imposed on both robberies. Section 12022.53, subdivision (e), states: “enhancements provided in this section shall apply ... if [¶] (A) *The person violated subdivision (b) of Section 186.22* [and ¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d) [which involve using a firearm in the commission of a felony].” (Italics added.) In this case, because the use of a firearm by a

principal was not in dispute, a finding under section 186.22, subdivision (b) supported a finding under section 12022.53, subdivision (e). Both enhancements were sufficiently supported by evidence and properly applied to both robberies.

B. Expert Testimony

Defendant further argues that the enhancements were based solely on improper expert opinion testimony regarding defendant’s specific intent—particularly, the expert’s testimony that, “[defendant and Ortega] knew exactly what they were intending to do when they went inside the apartment.” Assuming, without deciding, that this portion of the expert’s testimony did constitute error, we find it harmless.

Here, it is not reasonably probable that the result would have been more favorable to defendant in the absence of this alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Even without the challenged testimony, there was overwhelming evidence that defendant intended to benefit and promote criminal conduct by a gang within the scope of section 186.22 subdivision (b). The expert properly testified to defendant’s and Ortega’s membership in the Bond Street Bulldog gang, their motivation for the crime (avenging a “homeboy” who was sold “cut” drugs), and the benefit this type of crime would have on the Bond Street Bulldogs (intimidating and notifying rivals that violence would be used to regain respect). (See *People v. Killebrew, supra*, 103 Cal.App.4th at pp. 656-657 [citing cases that refer to expert testimony about the ““culture and habits”” of criminal street gangs].) In addition, the prosecution presented evidence of several admissions of gang membership by defendant and Ortega, and their numerous gang-related tattoos. Due to the abundance of evidence presented, the trier of fact properly inferred that defendant committed a felony within the meaning of sections 186.22, subdivision (b) and 12022.53, subdivision (e).

II. Gang Participation—Sufficiency of the Evidence

Defendant asserts that insufficient evidence supported the finding that he actively participated in a criminal street gang. Specifically, he argues he lacked knowledge that

crimes were committed by other Bulldog gang members, and he did not promote, further, or assist felonious conduct by members of the gang.

Section 186.22, subdivision (a) states that, “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”

“Active participation is defined as ‘involvement with a criminal street gang that is more than nominal or passive.’ [Citation.] It does not require that ‘a person devot[e] “all ... or a substantial part of his time and efforts” to the gang. [Citation.]’ [Citation.]” (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.) It is well established that the following constitutes sufficient evidence to support a finding under section 186.22, subdivision (a): expert testimony that the defendant was an active gang member, gang tattoos, self-admission of gang membership, many contacts with a criminal street gang and/or its members, gang-related contacts with police, wearing gang colors, and being in the company of a known gang member while committing the charged offense. (*People v. Williams* (2009) 170 Cal.App.4th 587, 626; *People v. Martinez, supra*, at p. 1331; *People v. Castenada* (2000) 23 Cal.4th 743, 753; *In re Jose P.* (2003) 106 Cal.App.4th 458, 466-468.)

Here, there was substantial evidence that defendant participated in a gang within the meaning of section 186.22, subdivision (a). Defendant had several gang tattoos; he admitted being in the Bulldog and/or Bond Street Bulldog gang on eight different occasions; he had many contacts with other known gang members; he was in two photographs with known gang members where he “[threw] gang signs”; he committed the crimes at issue with Ortega, a known gang member; and finally, the expert testified that, in his opinion, defendant was a member of the Bond Street Bulldog gang. From this

evidence, a rational trier of fact could find beyond a reasonable doubt that defendant participated in a criminal street gang.

III. Cruel and/or Unusual Punishment

Defendant contends his state and federal constitutional rights protecting him against cruel and/or unusual punishment were violated by the trial court's sentence for three reasons: (1) his 156-year-to-life sentence was grossly disproportionate to the crime, (2) the trial court refused to exercise its discretion by striking a prior conviction and/or imposing concurrent terms on the robberies, and (3) his ultimate sentence distorts the intent of the Three Strikes law. We conclude defendant's constitutional rights were not violated by his sentence or the trial court's actions, and his sentence is entirely within the intent of the Three Strikes law.

A. Disproportionality

In considering unconstitutional punishment claims, the Supreme Court set out three relevant factors in *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*): (1) the nature of the offense and the offender, (2) how the punishment compares with punishments imposed for more serious crimes in California, and (3) how the punishment compares with punishments imposed for the same crime in other jurisdictions. (*Id.* at pp. 425-427.) In *Harmelin v. Michigan* (1991) 501 U.S. 957, the court held that "one factor may be sufficient to determine the constitutionality of a particular sentence." (*Id.* at p. 1004.) In addressing whether comparative analysis within and between jurisdictions is relevant in determining whether a punishment is proportional to the crime, the court in *Solem v. Helm* (1983) 463 U.S. 277 (*Solem*) stated "it *may* be helpful to compare the sentences imposed on other criminals in the same jurisdiction" and "courts *may* find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." (*Id.* at p.291, italics added.) The court in *Solem* "did not mandate such inquiries." (*Harmelin v. Michigan, supra*, at p. 1005.) "[In] conclusion[,] ... intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold

comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” (*Ibid.*)

“A penalty offends the proscription against cruel and unusual punishment when it is ‘so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.’” (*People v. King* (1993) 16 Cal.App.4th 567, 571.) “[I]n applying the Eighth Amendment[,] the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.” (*Solem, supra*, 463 U.S. at p. 290, fn. 16.) Therefore, successful challenges to proportionality are an “exquisite rarity.” (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.)

To determine whether defendant’s punishment is proportionate to the crime, we focus on the first *Lynch* factor—the nature of the offense and the offender. (*Lynch, supra*, 8 Cal.3d at p. 425.) In our analysis, we must take into account the degree of danger the offense and offender present to society, the offender’s individual circumstances, his criminal history, and his general recidivist nature. (*Ibid.*; *People v. Poslof* (2005) 126 Cal.App.4th 92, 109.)

Here, defendant was convicted of crimes violent in nature, namely, two felony home invasion robberies with another gang member involving the discharge of a firearm, which ultimately resulted in Regina’s death. Defendant’s individual circumstances included being a user of methamphetamine and a member of the Bond Street Bulldogs, a criminal street gang whose primary activities include the violent crimes of assault with a deadly weapon, battery, and murder. In addition to his current convictions, defendant’s criminal record was substantial. His past offenses included felony assault, and misdemeanor vandalism (graffiti), vehicle thefts, burglary, possession of a weapon, and driving under the influence. Defendant showed no signs of slowing down or halting this

recidivist criminal activity. The 156-year-to-life sentence was not grossly disproportionate to the serious crimes committed, and was within constitutional parameters. We conclude that defendant's sentence does not shock the conscience, nor offend fundamental notions of human dignity. (*Lynch, supra*, 8 Cal.3d at p. 424.)

B. Refusal to Strike Prior Felony and/or Impose Concurrent Terms

A court's decision to reject defendant's invitation to dismiss or strike a prior serious felony conviction is reviewed under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374, 375.) "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice[,] a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) When two or more felony convictions were committed on the same occasion, as they were here, "consecutive sentencing is not required under the three strikes law, but is *permissible* in the trial court's sound discretion." (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 994, italics added.)

Here, the trial court did not abuse its discretion when it refused to strike defendant's prior serious felony conviction in light of defendant's long criminal history, membership in a gang, status as a drug user, prior strike for felony assault, and current felony robbery convictions. Also, the court did not err in imposing consecutive terms because such a sentence is permissible in its discretion. Taking into consideration the circumstances before it, neither of the trial court's actions exceeded the bounds of reason or indicated a clear case of abuse or miscarriage of justice; the court properly imposed the sentence in response to defendant's criminal history and current serious violent crime convictions. (*Denham v. Superior Court, supra*, 2 Cal.3d at p. 566.)

C. Intent of Three Strikes Law

“The Three Strikes law makes clear the Legislature’s intent ‘to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.’ (§ 667, subd. (b).)” (*People v. Trujillo* (2006) 40 Cal.4th 165, 187.) “Under the three strikes law, defendants are punished not just for their current offense but for their recidivism. Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses. [Citation.]” (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824.) Recidivism is not defined in the Penal Code, ““but its common meaning is very clearly defined by Webster to mean “a tendency to relapse into a previous condition or mode of behavior; [a] *repeated relapse into criminal or delinquent habits.*” [Citation.]” (*People v. McClanahan* (1992) 3 Cal.4th 860, 867, italics added.)

Defendant is incorrect in asserting that his 156-year-to-life sentence “distort[s] the intent” of the Three Strikes law. As a recidivist charged with yet another serious and/or violent felony, defendant was precisely the type of person intended to be affected by a longer sentence under this law. He had been convicted of two felony home invasion robberies, felony assault, and misdemeanor vandalism (graffiti), vehicle thefts, driving under the influence, burglary, and possession of a weapon. Defendant was a member of the Bond Street Bulldogs, a user of methamphetamine, and he showed no signs of slowing down or halting his criminal activity. Defendant could not be deemed outside the spirit of the scheme, and his sentence did not distort the intent of the Three Strikes law; he was a danger to society, and imposition of a longer sentence was justified. (*People v. Cooper, supra*, 43 Cal.App.4th at pp. 823-826.)

IV. Sentencing Error

Defendant argues the trial court erred in doubling the enhancement terms pursuant to his second strike, imposing full, consecutive terms on each robbery conviction and

imposing a five-year prior serious felony enhancement on each count. The People concede that the doubling of the enhancement and imposition of consecutive, full terms for each robbery conviction was error, but they do not agree that the court improperly imposed two five-year enhancements.

The trial court sentenced defendant to two identical and consecutive terms on the two home invasion robbery convictions in counts 2 and 3: the upper term of nine years for the robbery conviction (§§ 211, 213, subd. (a)(1)(A)), plus five years for the prior serious felony conviction enhancement (§ 667, subd. (a)), plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (e)(1)). The court then doubled the entire term based on defendant's prior strike, resulting in a determinate term of 28 years to life, plus a consecutive indeterminate term of 50 years to life.

First, the People agree that defendant should not have been sentenced to two full terms on the two robbery convictions. On one of the two counts, he should have been sentenced to nine years and, on the other, only two years, which is one-third the midterm of six years. (§ 1170.1, subd. (a).)

Second, both the principal term and subordinate term should then be doubled pursuant to the "second strike" sentencing provision of the Three Strikes law. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1); *People v. Dominguez* (1995) 38 Cal.App.4th 410, 424; *People v. Sok* (2010) 181 Cal.App.4th 88, 93-94.) Thus, the nine-year term and the two-year term should both be doubled.

Third, enhancements are not doubled pursuant to the second strike sentencing provision. (*People v. Dominguez, supra*, 38 Cal.App.4th at p. 424; *People v. Sok, supra*, 181 Cal.App.4th at pp. 93-94.) Thus, the serious felony enhancements and the firearm enhancements should not have been doubled on counts 2 and 3.

On the fourth point, however, the People differ, correctly arguing that a serious felony enhancement was properly applied to each count of defendant's second strike

sentence. (*People v. Williams* (2004) 34 Cal.4th 397, 402-405; *People v. Misa* (2006) 140 Cal.App.4th 837, 846.)

In summary, the court properly imposed the multiple five-year serious felony enhancements. But on either count 2 or 3, defendant should be sentenced to nine years, doubled to 18 years, plus a five-year serious felony enhancement and a 25-year-to-life firearm enhancement. And on the other count, defendant should be sentenced to two years, doubled to four years, plus a five-year serious felony enhancement and a 25-year-to-life firearm enhancement. We will remand for resentencing.

V. Abstract of Judgment

Defendant asserts that the abstract of judgment should be amended for two reasons: (1) it does not accurately reflect the 60 days of presentence conduct credit awarded by the court, and (2) although the court imposed determinate terms enhanced by indeterminate terms under section 12022.53, subdivision (e), the entirety of defendant's sentence is reflected on an "indeterminate" form, when a "determinate" form should have been used. The People concede both points.

In addition, we noticed in our review of the record that defendant's abstract of judgment erroneously refers to the firearm enhancement as section 12022.53, subdivision (g), when it should refer to subdivision (e)(1).

These errors shall be corrected on remand.

DISPOSITION

Defendant's sentence is vacated and the matter is remanded for resentencing consistent with this opinion. The trial court is directed to amend the abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

Kane, Acting P.J.

WE CONCUR:

Poochigian, J.

Detjen, J.