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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FELIPE ROSALES RUIZ, Defendant and Appellant.	F049430 (Super. Ct. No. 27903 & 27906) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Merced County. Frank Dougherty, Judge.

Barbara Michel, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, John G. McLean and R. Todd Marshall, Deputy Attorneys General.

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Defendant Felipe Rosales Ruiz was convicted by jury trial of various crimes arising from two separate shootings of members or associates of rival gangs. On appeal, defendant contends (1) insufficient evidence supported the conviction for shooting at an inhabited vehicle because he opened the door to the vehicle before shooting into it; (2) insufficient evidence supported the gang enhancements; and (3) his sentence violated *Blakely v. Washington* (2004) 542 U.S. 296 and its progeny. In light of the recent case of *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856 (*Cunningham*), we find merit in defendant's third claim. We therefore vacate the sentence on count 7 and remand for resentencing. We affirm in all other respects.

PROCEDURAL SUMMARY

Defendant was convicted of attempted murder (Pen. Code, §§ 664, 187; count 1),[1] shooting a gun at an occupied motor vehicle (§ 246; count 2), being a felon in possession of a firearm (§ 12021, subd. (a)(1); count 3), and four other related crimes. Seven of the nine charges included a special allegation that, among other things, the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(5).) The trial court sentenced defendant to a total of 55 years to life plus 45 years.

FACTS

Halloween Crime

At about 4:00 p.m. on October 31, 2002, Mr. V. pulled up and parked his car on the street outside his friend's house in Merced. The neighborhood was largely affiliated with Norteño gangs, but Mr. V. and his friend associated with Sureño gang members. Mr. V. was wearing a blue shirt with a Mexican flag on the back and green shorts. Mr. V.'s friend came out and approached the passenger door, but Mr. V. told him to get a screwdriver so they could fix his car's fuse. Mr. V. sat in the driver's seat of his car

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

while his friend went into the garage. Some of the car windows were down, including the rear window on the driver's side, but the driver's window was up because it did not work.

As Mr. V. was waiting, defendant and another Hispanic male walked toward his car and approached the driver's side. Mr. V. recognized defendant because Mr. V. previously had lived in the neighborhood, had seen defendant many times, and had had a confrontation with him once in the past.[2] Through the closed driver's window, defendant asked loudly, "[W]here are you from?" Mr. V. said, "I don't bang, nothing." Defendant asked him what he was doing there and Mr. V. said he was waiting for his friend. Defendant called him a southerner and said, "You fuckin' scrap," lifted up his shirt and pulled a gun from his waistband.[3] Mr. V. closed his eyes and turned his face away. He wanted to jump into the backseat but did not have time. He heard the car door open and then heard gunshots. Defendant shot him several times, including in the face. Mr. V. estimated that defendant was standing about a foot and one-half from the car when he fired. When Mr. V. opened his eyes, he saw defendant and the other person running across the street. Mr. V. was treated for gunshot wounds to his mouth, arm and both legs. He was missing several teeth, some of which were later found inside his car.

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[2] When Mr. V. worked in a local store, defendant had once tried to start a fight with him. Mr. V. and his uncle were outside the store talking. Mr. V. was playing with the broom he was using to clean the store mats. Defendant and some others were outside too. When Mr. V. spun the broom, the top plastic piece broke off and landed near defendant, who was standing 15 to 20 feet away. Defendant was angry and wanted to fight. He approached and accused Mr. V. of intentionally throwing the piece at him. Both Mr. V. and his uncle told defendant it was an accident. They went back inside the store and defendant left.

[3] "Scrap" is a derogatory term used by Norteño gang members toward a Sureño gang member.

When the police responded to the hospital, Mr. V. did not inform them that defendant had committed the shooting because he was afraid for his family. The police kept coming to Mr. V.'s house and he finally told them what had happened. Prior to that, he had told his family, but no one else. The police showed Mr. V. a photographic lineup and he identified defendant as the shooter. He testified that he was still afraid for his family but he did not want to give in anymore.

Mr. V.'s friend testified that while he was inside his garage looking for a screwdriver, he heard four gunshots. He ran out and saw Mr. V. getting out of the car, bleeding.

Mr. V. testified he had never been a gang member. He had a three-dot tattoo he had gotten in Mexico, but it only signified "My crazy life." It was very common in Mexico and really did not mean anything. After he got the tattoo, he discovered it could be considered a gang tattoo. He was also aware that blue was considered a gang color.[4] He did not know whether he associated with any gang members; he associated with people because they spoke Spanish and English.

Mr. V.'s friend said that neither he nor Mr. V. were gang members, but they both associated with members of the South Side Locs, a Sureño gang. He said he had been threatened several times and had even been assaulted regarding his testimony. He had been placed in the witness protection program.

Ms. A. testified she was in her house sitting on the sofa that afternoon. Her family and her sister, Ms. B., were also in the house. The front door was open, but the screen door was closed. Through the screen door, Ms. A. saw Mr. V. sitting in his car. He had his leg out of the car to hold the door open. Ms. A. saw defendant pull a gun out of his waistband, point it at Mr. V. and start shooting. First he shot with his right hand, then

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[4] The number 13 and the color blue were claimed by Sureño gang members. The number 14 and the color red were claimed by Norteño gang members.

switched to his left hand and continued shooting back toward Mr. V. as he ran away. Defendant fired four or five shots. He ran through her driveway as he fled. When the police came, Ms. A. did not tell the police what she had seen because she was afraid of retaliation.

In January 2005, however, Ms. A.'s husband, who associated with Norteño gang members, was arrested in connection with the shooting. Ms. A. then decided to talk to the police because she knew her husband was not involved.

In June 2005, Ms. A. was arrested for failure to appear in court. She had been threatened and was afraid to testify. Her husband was told that something would happen to her if she appeared in court. On July 18, 2005, when she and her family were at home, shots were fired at her house. She and her children narrowly escaped being hit. She believed the shooting was related to her testimony in this case. At the time of the trial, she was willing to come forward and testify because she had gained the courage to say something and she had been placed in the witness protection program. She finally felt safe.

Ms. A.'s sister, Ms. B. , who was in Ms. A.'s house on the afternoon of the shooting, heard yelling so she walked outside. She saw defendant, whom she knew, and another person. Then she saw defendant pull out a gun and shoot at Mr. V., whom she also knew. Defendant was about four feet from Mr. V. when he fired the shots. Ms. B. went back inside.

Following the incident, Ms. B. received threats regarding testifying at the trial. Some gang members walked by her and gestured as though they were pointing a gun at her and pulling the trigger. They were wearing red and baggie pants and their arms were tattooed. She was afraid to testify because she had young children and because her sister, Ms. A., had been the victim of a drive-by shooting.

Mr. C. was ten years old. He was sitting on a porch in the neighborhood. He saw two people walk across the street to the car, say something, open the door and shoot

someone sitting inside the car. The person in the car had been inside the car the entire time.

Mr. D. was thirteen years old. He was also sitting on a porch in the neighborhood when he heard arguing followed by gunshots.

Thanksgiving Crime

About one month later, on November 28, 2002, in an alley in the neighborhood, three Black males were arguing with defendant and another Hispanic male. Defendant went into an apartment complex and returned with a gun. He lifted the gun to eye level and shot at the three Black males, who split up and ran in two different directions. Defendant continued shooting at them as they ran. His cohort tried to calm him, but defendant said, "They're Crips."

Defendant's cohort testified that he did not see the Black men with any type of weapon. Defendant's cohort stated that appellant was a Norteño gang member.

Ms. E. lived in the neighborhood. She heard gunshots, then her window shattering.

The police conducted a probation search of defendant's residence and found a revolver in the trash can inside the bathroom.

Defendant was interviewed by the police that day. He admitted that the gun and ammunition the police found belonged to him. He was having disputes with Black people and felt he needed to carry a gun. He said the three Black males had their hands under their shirts and he thought they were going to pull something out. He shot at them because he believed they posed a threat to him. He denied pointing the gun directly at them. After the shooting, he took the gun home and hid it. He claimed he had never fired a gun before and, although he was a validated Westside gang member, he was trying to stay out of gang activities. He believed, however, that the altercation with the three Black males was gang related.

Gang Evidence

The gang expert testified that defendant admitted he was a member of the Merced Ghetto Boys (MGB), a Norteño gang. He also admitted associating with Westside Merced, another Norteño gang.

On March 10, 1998, officers conducted a probation search of defendant's nephew's house, where defendant and his nephew shared a room. In that room the officers located a knife with a red bandana around it. The letters "WSM" were written on the dresser. The nephew was wearing a hat with "XIV" written on the inner bill. He said he "kick[ed] it" with Westside Merced. Defendant had four dots tattooed on his right hand.

On July 9, 1998, an officer contacted defendant when he was with three validated Westside Merced gang members. Defendant was wearing a red belt, red hat, black shorts, and a white shirt. He stated he had been "kicking it" with Westside Merced for a couple of months. He said he had "walked in." He had four dots tattooed on his right hand.

In 2000, when defendant was a minor, he admitted possessing a handgun.

On March 21, 2001, officers conducted another probation search of defendant's residence, where they found defendant with two validated gang members.

On March 29, 2001, an officer contacted defendant at his residence. He stated he had been associating with Dead End Locs and Merced Ghetto Boys (MGB). He showed the officer his new tattoos. He had gotten one dot next to his right eye and four dots next to his left eye, and the number "14" on his left leg.

At the time of the trial, defendant recently had enhanced and added to his gang-related tattoos while he was in jail.

The gang expert testified that he had listened to a telephone call made by defendant from jail to a validated gang member. In the call, defendant told him "to get at" Ms. A., a witness.

The gang expert explained that Norteños and Sureños were rival gangs. Norteños also experienced periods of conflict with members of the Crips gang, most of whom were Black.

On cross-examination, the gang expert testified that Mr. V.'s friend was a Sureño living in a Norteño neighborhood. Mr. V.'s friend was a validated South Side Loc member.

DISCUSSION

I. Sufficiency of Evidence -- Shooting at Occupied Vehicle

Defendant contends there was insufficient evidence to support the conviction for shooting at an occupied motor vehicle because he opened the door to the car before shooting.

In reviewing a claim of insufficiency of the evidence, we consider the entire record in a light most favorable to the People and we determine whether it contains substantial evidence -- i.e., evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could have found the required elements beyond a reasonable doubt. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1083.)

Section 246 is violated when a person intentionally discharges a firearm either directly at a proscribed target (e.g., an occupied vehicle or inhabited dwelling house) or in close proximity to the target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it. (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1361.) No specific intent to strike the target, kill or injure persons, or achieve any other result beyond shooting at or in the general vicinity or range of the target is required. (*Ibid.*)

The statute prohibits shooting at the specified targets from the outside. In *People v. Stepney* (1981) 120 Cal.App.3d 1016 (*Stepney*), upon which defendant bases his argument, the defendant forced his way into the victim's home, demanded money, and while standing in the living room, fired his gun at the television set to prove he was "not

playing any games." (*Id.* at p. 1018.) The court interpreted section 246, which prohibits shooting *at* an inhabited dwelling, as not including a shooting that occurred *inside* the building. The defendant's conviction under section 246 was not supportable because he did not fire the gun *at* the house. (*Stepney, supra,* at p. 1021.)

Here, there was no evidence defendant was *inside* the car and therefore this case is factually distinguishable from *Stepney*. Neither the fact that defendant's bullets traveled through an open door, nor the fact that defendant opened the car door himself before firing, amounted to evidence that defendant was inside the car when he fired the gun. By all accounts, he was outside the car when he fired. By one account, he was about one and one-half feet from the car when he fired; by another account, he was about four feet from the car when he fired. Furthermore, he continued firing at the car as he fled the scene. We conclude there was sufficient evidence defendant shot at the car.

II. Sufficiency of Evidence -- Participating in Criminal Gang

Defendant asserts that the evidence to support the gang enhancements under section 186.22, subdivision (b)(1) was insufficient because the trial court did not expressly qualify Trinidad as an expert and because Trinidad was not able to recall the specifics of the prior crimes of the MBG gang members.[5] Defendant contends Trinidad's testimony failed to establish the primary activity of defendant's gang was the commission of certain crimes because the evidence did not show that the gang's members had consistently and repeatedly committed criminal activity listed in section 186.22, subdivision (e).

The Street Terrorism Enforcement and Prevention (STEP) Act (§ 186.20 et seq.) was enacted to impose increased punishment for gang-related felonies. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) Under the STEP Act, the court may impose

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[5] We agree with the People that the trial court implicitly qualified Trinidad as an expert.

an enhancement upon "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members ...." (§ 186.22, subd. (b)(1).) The prosecution bears the burden of proving that the defendant committed the offense for the benefit of the criminal street gang and with the requisite intent. (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617 (*Gardeley*).) "In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) *has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute* [italics added]; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. (§ 186.22, subds. (e) and (f).)" (*Gardeley, supra,* at p. 617.)

The California Supreme Court elaborated on the "primary activities" element: "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.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) To prove the primary activities element, the prosecution may offer evidence that the gang's members consistently and repeatedly have committed crimes enumerated in the gang statute (*id*. at p. 324), or the prosecution may offer expert testimony of the type found in *Gardeley, supra,* 14 Cal.4th 605, where a police gang expert testified that the defendant's gang "was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.]" (*Sengpadychith, supra,* at p. 324; *Gardeley, supra*, 14

Cal.4th at p. 620; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9 and cases cited therein.)

"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." (*Sengpadychith, supra,* 26 Cal.4th at p. 323.) Such evidence alone, however, is not necessarily sufficient to establish the primary activities requirement. (*Id.* at p. 324.) Indeed, "evidence sufficient to show only *one* offense [enumerated under section 186.22, subdivision (e)] is not enough." (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 945; see also *People v. Perez* (2004) 118 Cal.App.4th 151 (*Perez*) [beating six years before subject crime and crime spree of four shootings less than a week before the subject crime held insufficient to establish predicate crimes were one of "primary activities" of gang].)

In this case, Trinidad testified that the primary activities of the MGB gang members were assault with a firearm, shooting at an inhabited dwelling, selling drugs, witness intimidation, auto theft, and residential and commercial burglary. The evidence established that defendant, a Norteño gang member, shot at Mr. V., who associated with rival Sureño gang members. The evidence also established that, about a month later, defendant shot at some rival Crip gang members. In addition, Trinidad testified that other gang members had committed one or more of the offenses enumerated in section 186.22, subdivision (e). Specifically, defendant had been convicted of burglary in 2001. Validated MGB gang member, Eldorio Martinez, had been convicted of assault with a firearm and burglary of a vehicle in 2003.[6] Defendant had also been arrested for being a minor in possession of a firearm in 2000. Validated MGB gang member, Luis Canelo, recently had been arrested for witness intimidation.

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[6] These two convictions were shown by the admission of abstracts of judgment.

Defendant relies on *Perez, supra,* 118 Cal.App.4th 151, cited above, to support his claim. In *Perez,* the defendant, a member of a Hispanic gang, was prosecuted for the attempted murder of an Asian youth. The prosecutor did not present any expert testimony to establish that one of the gang's primary activities was engaging in the commission of the offenses listed in section 186.22, subdivision (e). Instead, the prosecution presented evidence that six years earlier gang members had been involved in the attempted murder of a youth and that a few weeks prior to the charged offense, after a fellow gang member was murdered by members of an Asian gang, three Asian men were shot one night and a fourth was shot a second night. In finding the evidence insufficient to show that the primary activities of the gang was the commission of enumerated crimes, the *Perez* court noted that no expert testimony was presented on the issue and stated, "Even if we assume that the … gang was responsible for the shootings of Asians on February 16 and 18, as well as the shooting of [the victim in the case before the court], such evidence of the retaliatory shootings of a few individuals over a period of less than a week, together with a beating six years earlier, was insufficient to establish that 'the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute.' [Citation.]" (*Perez, supra,* 118 Cal.App.4th at p. 160.)

Perez is easily distinguishable because the offenses in the present case occurred over a greater period of time than a week, none of the predicate offenses was six years old, and here an expert testified that the primary activities of defendant's gang were various enumerated criminal activities. We conclude the evidence was sufficient, and specific enough, to establish that the MGB gang was engaged primarily in the commission of certain enumerated crimes. (*Sengpadychith, supra,* 26 Cal.4th at p. 324; *Gardeley, supra,* 14 Cal.4th 605, 620.)

III. Sentencing

Defendant contends the consecutive sentences imposed on various counts and the upper-term sentence imposed on count 7 violated *Blakely v. Washington, supra,* 542 U.S.

296 and its progeny.[7] We address his argument in light of the recent United States Supreme Court decision in *Cunningham, supra,* 549 U.S. __, 127 S.Ct. 856.

Cunningham held that aggravating factors, other than a prior conviction, used to impose an upper term for a criminal offense must be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham, supra,* 549 U.S. at p. __, 127 S.Ct. 856.) As a result, California's Determinate Sentencing Law violates a defendant's Sixth and Fourteenth Amendment right to a jury trial to the extent that it permits a trial court to impose an upper term based on facts found by the court rather than by a jury beyond a reasonable doubt. (*Id.* at p. __.)

In this case, the trial court reached its decision to impose the upper term based on the following findings: (1) defendant's prior convictions as an adult and his sustained petitions as a juvenile were numerous and increasing in seriousness; (2) defendant was on probation when he committed the offense; (3) defendant's prior performance on probation or parole was unsatisfactory; and (4) defendant attempted to interfere with the judicial process as demonstrated by a taped discussion played in court. The court therefore considered aggravating factors that were both acceptable and apparently unacceptable under *Cunningham*.

Although we might simply reduce the imposed upper term to the middle term,[8] we cannot say for certain on this record that the trial court would not have sentenced, and

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[7] The trial court imposed a four-year term on count 7, violation of section 245, subdivision (a)(2), which provides: "Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years …."

[8] In an analogous situation, "'[a]n appellate court is not restricted to the remedies of affirming or reversing a judgment. Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial. (See Pen. Code, § 1260; *People v. Harris* (1968) 266 Cal.App.2d

would not now sentence, defendant to the upper term based on his prior convictions alone. Such a sentence would be consistent with *Cunningham.* For this reason, we vacate the sentence on count 7 and remand to the trial court for resentencing.

Accordingly, the judgment of sentence on count 7, assault with a firearm (§ 245, subd. (a)(2)), is vacated with directions as follows: If the People do not bring the matter before the trial court for a contested resentencing hearing within 60 days after the filing of the remittitur in the trial court, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a sentence of the middle term and shall so modify the abstract of judgment.[9] The People shall in writing notify the trial court and defendant's trial counsel of their intentions in this regard within 30 day after the filing of the remittitur; should the People state an intention to not contest the modification to the middle term or fail to timely notify the trial court, and unless the trial court on its own decides to set a resentencing hearing, the trial court shall promptly modify the abstract of judgment as provided herein.

As for defendant's consecutive sentences, the California Supreme Court has held that "a jury trial is not required on the aggravating factors that justify imposition of consecutive sentences." (*People v. Black* (2005) 35 Cal.4th 1238, 1262; see also *id.* at pp. 1262-1265 [judge's imposition of consecutive sentences does not impermissibly increase penalty for a crime beyond prescribed statutory maximum]; accord *State v. Kahapea* (Hawaii 2006) 141 P.3d 440, 451-453 [collecting cases].) That holding was not overturned by *Cunningham*, which did not address the distinct issue of imposition of

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426, 434-435.)' (*People v. Alexander* (1983) 140 Cal.App.3d 647, 666.)" (*People v. Edwards* (1985) 39 Cal.3d 107, 118.)

[9] The resentencing court could either consider only the prior convictions as aggravating factors or, at the option of the People, the court could consider additional aggravating factors, but only after they are found true beyond a reasonable doubt by a jury as required by *Cunningham.*

consecutive sentencing for separate crimes (*People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1269-1271), and it remains binding on this court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

DISPOSITION

The sentence imposed on count 7, assault with a firearm (§ 245, subd. (a)(2)) is vacated. The case is remanded for resentencing in light of *Cunningham, supra*, 549 U.S. __. In all other respects, the judgment is affirmed.

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Kane, J.

WE CONCUR:

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Harris, Acting P.J.

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Dawson, J.