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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRYL ALVIN FLINT-SPIVEY,

Defendant and Appellant.

D058910

(Super. Ct. No. RIF150502)

APPEAL from a judgment of the Superior Court of Riverside County, Joe O. Littlejohn, Judge. (Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.) Affirmed in part, reversed in part and remanded for resentencing.

A jury convicted Darryl Flint-Spivey of numerous counts arising from a shooting involving rival gangs. The jury found Flint-Spivey guilty of four counts of attempted voluntary manslaughter of Does 1 through 4 (Pen. Code,¹ § 664/192, counts 1-4) and

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

four counts of assault with a firearm on Does 1 through 4 (§ 245, subd. (a)(2), counts 7-10), one count of shooting at an occupied vehicle (§ 246, count 6), and one count of actively participating in a criminal street gang (§ 186.22, subd. (a), count 12). The jury also found true the special allegations that Flint-Spivey personally used a firearm in connection with counts 1 through 4 and 7 through 10 (§ 12022.5, subd. (a)), and that he committed the offenses alleged in counts 1 through 4 and 6 through 10 for the benefit of a criminal street gang (§ 186.22, subd. (b)). The court sentenced Flint-Spivey to an indeterminate term of 15 years to life on count 6, which it deemed the principal count, and to concurrent terms for the remaining counts and enhancements.

On appeal, Flint-Spivey argues his conviction on count 12 must be reversed because the evidence was insufficient to establish that he had the requisite "knowledge" required by section 186.22, subdivision (a). Alternatively, he argues his conviction on count 12 must be reversed because there was instructional error in connection with that count. He also asserts there was sentencing error.

I

FACTUAL BACKGROUND

A. The Shooting

On January 16, 2009, Flint-Spivey was an active member of the Sex Cash street gang. On that date, several members of the Edgemont gang (a rival gang to the Sex Cash gang) attacked Messer's Tweede and Redmond (who the Edgemont members believed were members of the Sex Cash gang) at a Carl's Jr. fast food restaurant. Flint-Spivey was

summoned to the scene when he received a text message on his phone stating "the dukies be here at Carl's."²

The attack on Redmond waned and several of the Edgemont attackers got into a vehicle preparing to leave the scene of the attack. Flint-Spivey ran up to the vehicle, yelling "Web Blocc,"³ and then said, "Where are you going? Stay right here." He then fired a handgun four or five times at the vehicle.

B. The Gang Evidence

A gang expert testified that the Sex Cash gang, to which Flint-Spivey belongs, is a gang centered in Moreno Valley and formed around 2001. The Sex Cash gang's biggest rival is the Edgemont gang. They have competed for turf for many years, and since 2001 the Edgemont/Sex Cash conflict has resulted in at least six homicides against each other as well as numerous attempted homicides, drive-by shootings, fights and assaults. The gangs have an "on-site" rule, which requires members of the gang to immediately confront and challenge each other upon seeing a member of the opposing gang, and they would face internal discipline from their own gang if they did not adhere to the on-site rule.

The expert testified to a number of "predicate crimes," which are necessary for the Sex Cash gang to qualify as a gang within the meaning of section 186.22, committed by Sex Cash members. These included a 2004 attempted murder conviction suffered by Sex

² "Dukies" is a derogatory reference to a subset of the Edgemont gang.

³ "Web Blocc" is one of the common names used by the Sex Cash gang.

Cash member Rander, a 2007 robbery conviction suffered by Sex Cash member Conelly, and a 2008 possession of a firearm conviction suffered by Sex Cash member Henderson. However, the prosecutor also asked the expert, as to these specific predicate crimes, whether these crimes had anything to do with Flint-Spivey, and the expert replied "[t]hose particular [predicate] crimes, [no]."

Another officer described Flint-Spivey's numerous contacts with police. In December 2008 Flint-Spivey was contacted (at a location Sex Cash members frequented) in the company of at least one other gang member and where alcoholic beverage containers were found. Flint-Spivey was wearing gang paraphernalia, had a gang tattoo, and his telephone had gang symbols on it, and he told the officer he was a member of Sex Cash. The gang expert testified Flint-Spivey was an active member of the Sex Cash gang based on numerous factors, including "reviewing criminal reports where [Flint-Spivey has] committed crimes with other validated members of the gang." These included a trespassing complaint involving Flint-Spivey and two other Sex Cash members, a May 2008 report in which Flint-Spivey was heard shouting "Sex Cash" during a fight at a Moreno Valley high school, the December 2008 alcohol incident, and a later December 2008 incident in which Flint-Spivey (along with two other Sex Cash members) committed a burglary.

II

ANALYSIS

Flint-Spivey argues that for two reasons the conviction for the section 186.22, subdivision (a), offense must be reversed. First, he argues the evidence is insufficient to

support a finding that he had actual knowledge the Sex Cash gang was involved in a pattern of criminal gang activity. Second, he argues the instructions on the question of his actual knowledge were so fatally flawed that the conviction must be reversed.

A. Legal Background

The Gang Offense

The California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq., hereafter the STEP Act) provides for a substantive offense under section 186.22, subdivision (a) (the substantive offense), as well as for an enhancement under section 186.22, subdivision (b)(1) (the enhancement), for members of criminal street gangs under specified circumstances.

The STEP Act defines a criminal street gang as an organization having as one of its principal activities the commission of certain enumerated offenses, with a common name or identifying symbol, whose members have engaged (individually or collectively) in a "pattern of criminal gang activity." (§ 186.22, subd. (f).) The term "pattern of criminal gang activity" is defined to mean "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated predicate offenses. (§ 186.22, subd. (e); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

A person is guilty of the substantive offense (§ 186.22, subd. (a)) when he or she "actively participates in [a] criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and . . . willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang"

(*Ibid.*) The "actively participates" element is shown by evidence that a defendant's involvement with the gang " 'is more than nominal or passive.' " (*People v. Castenada* (2000) 23 Cal.4th 743, 752 (*Castenada*)). The "willfully promot[ed], further[ed], or assist[ed]" element can be shown when the defendant is either "the perpetrator of felonious gang-related criminal conduct [or the] aider and abettor." (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.)

The "knowledge" element of a substantive offense under section 186.22, subdivision (a), has received limited judicial attention. In *People v. Green* (1991) 227 Cal.App.3d 692 (disapproved on other grounds by *Castenada, supra*, 23 Cal.4th at p. 748) the defendant challenged section 186.22, subdivision (a), as void for vagueness, and the court was required to examine the elements of that offense to determine whether the statute gave sufficient notice of the proscribed conduct to satisfy the due process clause. (*Green*, at p. 695.) Addressing the "knowledge" element, the court observed that "[t]he term 'knowledge' poses little difficulty. It is a term often used in the criminal law, and it means 'awareness of the particular facts proscribed in criminal statutes.' (*People v. Lopez* (1986) 188 Cal.App.3d 592, 598) . . . 'Knowledge' means actual knowledge." (*Green*, at p. 702.)

In *People v. Robles* (2000) 23 Cal.4th 1106 (*Robles*) and *Castenada, supra*, 23 Cal.4th 743, our Supreme Court briefly mentioned the "knowledge" element in connection with aspects of the STEP act. In *Castenada*, the defendant challenged the sufficiency of the evidence to support a conviction for the section 186.22, subdivision (a), offense, and the court was principally concerned with the "actively participates" element

of that offense. (*Castenada*, at p. 746.) However, when discussing that element, the court observed generally that:

" 'In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.' [Quoting *Scales v. U.S.* (1961) 367 U.S. 203, 224-225.] This standard is 'duly met,' the court said, 'when the statute is found to reach only "active" members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.' " (*Id.* at p. 748.)

Similarly, in *Robles*, the court examined whether carrying a loaded firearm (a misdemeanor under former Pen. Code, § 12031, subd. (a)(2)(G)) was properly charged as a felony under former Penal Code section 12031, subdivision (a)(2)(C) where the prosecution alleged the defendant was "an active participant" of a gang within the meaning of section 186.22, subdivision (a), but proved only that the defendant was a member of the gang and did not provide evidence of either of the other two elements (e.g., that he knew of the gang's pattern of criminal conduct or that he promoted, furthered, or assisted in any felonious criminal conduct by members of that gang). (*Robles, supra*, 23 Cal.4th at pp. 1109-1110.) The court concluded the absence of proof of those two elements precluded prosecution of the offense under former Penal Code section 12031, subdivision (a)(2)(C). (*Robles*, at p. 1115.) Neither of those cases, nor any other reported cases of which we are aware, contain any further refinement of the

element that a defendant must have "knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity."

The Substantial Evidence Test

When a criminal defendant challenges the sufficiency of the evidence on appeal, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*Ibid.*) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

We apply the same deferential standard to determine the sufficiency of the evidence of STEP Act offenses. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 660, disapproved on other grounds by *People v. Vang* (2011) 52 Cal.4th 1038, 1047-1048 & fn. 3.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusion. (*People v. Arcega* (1982) 32 Cal.3d 504, 518.)

B. The Substantial Evidence Claim⁴

Flint-Spivey, noting there was no evidence that he was aware of any of the three specific predicate crimes described by the expert (see fn. 4, *ante*), asserts there was no evidence from which a jury could have found he actually knew Sex Cash engaged in a pattern of criminal gang activity. The People counter that, because there was evidence Flint-Spivey was an active member of Sex Cash, the evidence showed his sufficiently substantial involvement in the gang, which in turn permitted the jury to infer the "actual knowledge" element without further evidence.

We are not persuaded by the People's argument that evidence sufficient to show a defendant actively participates in the gang automatically suffices to show the knowledge element. This argument appears irreconcilable with the observations of *Castenada*, *supra*, 23 Cal.4th 743, that due process protections require that the "'statute is found to reach only "active" members having *also* a guilty *knowledge* and *intent*.'" (*Id.* at p. 746, italics added.) Thus, *Castenada* appears to treat knowledge as an *additional* element, rather than one subsumed by the active participation element. Because "our STEP act does not criminalize mere gang membership" (*People v. Gardeley* (1996) 14 Cal.4th 605, 623), but instead requires proof of both membership and additional elements, mere proof that Flint-Spivey admitted to membership in Sex Cash (and had tattoos and writings

⁴ Although we conclude Flint-Spivey's conviction for the section 186.22, subdivision (a), substantive offense must be reversed for instructional error, we reach the substantial evidence argument because of double jeopardy considerations. (*Burks v. U.S.* (1978) 437 U.S. 1, 15-16 [unlike reversal for trial error, reversal for insufficient evidence bars retrial under the double jeopardy clause].)

demonstrating his alignment with that gang) cannot alone suffice to convict him of the section 186.22, subdivision (a), offense.

Although we are not persuaded by the People's theory of the adequacy of the evidence, neither do we embrace Flint-Spivey's argument. His theory is that, because there was no evidence he was aware of any of the three *specific* predicate crimes described by the expert (attempted murder, robbery and possession of a firearm) for purposes of whether Sex Cash qualified *organizationally* as a criminal street gang, there was necessarily no substantial evidence from which a jury could have found he actually *knew* Sex Cash engaged in "a pattern of criminal gang activity." We believe this theory rests on a misreading of the statute.

Section 186.22 requires, for both the substantive offense under subdivision (a) and the enhancement under subdivision (b), that the prosecutor prove, *separately as to the organization*, that it qualifies as a "criminal street gang" by showing (among other things) that its members have committed least two predicate crimes. The three specific predicate crimes described by the expert (attempted murder, robbery and possession of a firearm) satisfied this organizational showing. However, the substantive offense under section 186.22, subdivision (a), *also* requires the prosecution *separately* prove, as to the *defendant*, that (among other things) the defendant *knew* gang members had engaged in a "pattern of criminal gang activity," which means the prosecution must show the defendant actually knew gang members had engaged in at least two predicate crimes. However, nothing in the statute requires the prosecutor to prove the defendant had knowledge of the *same* predicate crimes introduced by the prosecution to show the

organization qualified as a criminal street gang. Instead, the statute requires only that the prosecution show (as to the knowledge element) the defendant knew gang members had engaged in a pattern of criminal gang activity, which may be satisfied by evidence the defendant knew gang members engaged in two or more *different* predicate offenses than were used to show the organization qualified as a street gang.

Here, there was substantial evidence from which the jury, had it been given proper instructions, could have concluded Flint-Spivey knew gang members had committed two predicate offenses (albeit different offenses from the crimes used to prove the organizational element of § 186.22), and therefore knew gang members had engaged in a pattern of criminal gang activity as defined by section 186.22, subdivision (e). First, there was testimony Flint-Spivey committed a burglary⁵ (along with two other Sex Cash members) in 2008. Second, there was evidence Flint-Spivey committed the current set of offenses as part of a gang confrontation, and there is no dispute the current offenses are qualified predicate offenses. (See, e.g., § 186.22, subds. (e)(3) [attempted voluntary manslaughter], (e)(1) [assault with a firearm] & (e)(5) [shooting at an occupied vehicle].) This evidence was sufficient to prove the requisite *pattern* of criminal gang activity (see *People v. Gardeley, supra*, 14 Cal.4th at pp. 624-625 [evidence of one prior predicate offense, coupled with evidence of current qualifying offense, sufficient to show "pattern of criminal gang activity" under § 186.22]), and Flint-Spivey's participation in those

⁵ Burglary is a listed predicate offense. (§ 186.22, subd. (e)(11).)

crimes provided sufficient evidence from which a jury could conclude Flint-Spivey had *knowledge* of the pattern.

C. The Instructional Claim

Although we conclude there was evidence to support a finding of actual knowledge by a *properly instructed* jury (Part II.B., *ante*), we agree with Flint-Spivey's alternative argument that the instructions were prejudicially inadequate. The instructions on the substantive offense under section 186.22, subdivision (a), did not separately define the "pattern of criminal gang activity" of which he was required to have actual knowledge under section 186.22, subdivision (a), and therefore the jury was without any guidance when it determined whether there was evidence showing, beyond a reasonable doubt, that Flint-Spivey had actual knowledge the Sex Cash gang engaged in a pattern of criminal gang activity.

Background

The court instructed the jury with CALCRIM No. 1400 on the section 186.22, subdivision (a), substantive offense. As relevant here, the instruction provided that the substantive offense required proof that "[w]hen the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity." However, the version of CALCRIM No. 1400 given to the jury mistakenly omitted a paragraph in the standard instruction defining the meaning of "[a] pattern of criminal gang activity."

Because the charges against Flint-Spivey included the gang enhancement appended to numerous counts, the court also instructed the jury with CALCRIM

No. 1401 addressing the gang enhancements (§ 186.22, subd. (b)(1)). Unlike the substantive offense under section 186.22, subdivision (a)—which required that the People show the defendant had *knowledge* members of the gang "engage in or have engaged in a pattern of criminal gang activity" (§ 186.22, subd. (a))—the elements necessary to proving the gang enhancement do not include any requirement that the defendant knew members engaged in a pattern of criminal gang activity. (See § 186.22, subd. (b)(1).) Instead, to prove the gang enhancement, the People needed to show the crime was committed "for the benefit of, at the direction of, or in association with any criminal street gang." (§ 186.22, subd. (b)(1).) Accordingly, CALCRIM No. 1401 defines a "criminal street gang" as requiring, among other things, that its members "whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity." The instruction then defines the term "pattern of criminal gang activity" for the purposes of determining whether the organization (for whose benefit a defendant allegedly committed an underlying offense) qualified as a criminal street gang.

The version of CALCRIM No. 1401 provided to the jury in this case stated that: "A pattern of criminal gang activity, *as used here*, means the commission of, or attempted commission of, or conviction of: [(A)] any combination of two or more of the following crimes or two or more occurrences of one or more of the following crimes: *Robbery, attempted murder, or carrying a concealed weapon . . .*"

The Instruction Was Erroneous

The instruction on the substantive offense under section 186.22, subdivision (a), asked the jury to determine whether Flint-Spivey actively participated in a criminal street

gang and, when doing so, *knew* members of the gang were engaged in a pattern of criminal gang activity. However, the instruction omitted, for purposes of that offense, any definition of what the term "pattern of criminal gang activity" meant *in relation to the actual knowledge* Flint-Spivey was required to possess. An instruction that omits (or improperly describes) an element of an offense is error (*People v. Miller* (1999) 69 Cal.App.4th 190, 208-209 [failure to instruct on definition of "dangerous fireworks" is error]), and we must assess whether the error is harmless beyond a reasonable doubt. (*Ibid.* [applying *Chapman*⁶ standard of review to instruction omitting essential definition], following *People v. Flood* (1998) 18 Cal.4th 470, 489-490, 504.)

The Error Was Not Harmless

We assess whether the omission of an instruction defining the term "pattern of criminal gang activity," as it related to the alleged actual knowledge Flint-Spivey was required to possess, was harmless beyond a reasonable doubt. (*People v. Flood, supra*, 18 Cal.4th at pp. 503-504.) Under *Chapman*, a judgment must be reversed unless the People prove beyond a reasonable doubt that the error did not contribute to the verdict in the case at hand (*Chapman v. California, supra*, 386 U.S. at p. 24) or, stated differently, that there was no " 'reasonable possibility that the [error] complained of might have contributed to the conviction.' " (*Ibid.*, quoting *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.) The relevant inquiry under *Chapman* is not whether the jury's verdict was supported by substantial (or even overwhelming) evidence, but instead examines the

⁶ *Chapman v. California* (1966) 386 U.S. 18.

impact of the error on the verdict actually rendered, and is whether there is a reasonable possibility the error might have contributed to the verdict. (*People v. Lewis* (2006) 139 Cal.App.4th 874, 885-887.) Thus, "[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; accord, *People v. Kobrin* (1995) 11 Cal.4th 416, 430.)

Thus, under *Chapman* and its progeny, the harmless error inquiry is directed at determining whether there is any reasonable possibility the error actually contributed to the jury's verdict under consideration. "The test is not whether a hypothetical jury, no matter how reasonable or rational, would render the same verdict in the absence of the error, but whether there is any reasonable possibility that the error might have contributed to the conviction in this case. If such a possibility exists, reversal is required." (*People v. Lewis, supra*, 139 Cal.App.4th at p. 887.)

The People assert that, because the court eventually defined "pattern of criminal gang activity" in the instruction pertaining to the gang *enhancements*, the instructions as a whole were adequate. Certainly, the instructions as a whole must be examined (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248) considering the specific language used (*People v. Cain* (1995) 10 Cal.4th 1, 36) to determine their adequacy. However, we are unconvinced a jury would have understood the court's instruction on "pattern of criminal gang activity," given after the court had just instructed on the section 186.22, subdivision (b), *enhancements*, was *also* applicable to the section 186.22, subdivision (a), *substantive*

offense. First, it sequentially followed the instruction on the enhancement and stated that "[a] pattern of criminal gang activity, *as used here*, means," rather than using words (such as "as used in these instructions") that would suggest a more global application than merely the preceding instruction on the section 186.22, subdivision (b), enhancements.

More importantly, in the context of this trial, the instruction appeared to be limited to the jury's determination of whether the prosecution had met its burden of proof *as to the organization* (i.e. that Sex Cash qualified as a "criminal street gang"). Significantly, the gang enhancement instruction said "[a] pattern of criminal gang activity, *as used here*, means the commission of, the attempted commission of, or conviction of: [(A)] any combination of two or more of the following crimes or two or more occurrences of one or more of the following crimes: *Robbery, attempted murder, or carrying a concealed weapon . . .*" (Italics added.) The three crimes used in the gang enhancement instruction tracked the predicate offenses the prosecution showed had been committed by Sex Cash members, but that the prosecution's expert conceded had *not* involved Flint-Spivey. (See fn. 4, *ante*.) Accordingly, the jury here could not rely on the definition used in the gang enhancement instruction to determine Flint-Spivey's *knowledge* as to the section 186.22, subdivision (a), substantive offense.

While the People correctly assert closing arguments may be examined to determine whether it is likely the jury was misled by the instructional error (see, e.g., *People v. Cain, supra*, 10 Cal.4th at p. 37), the prosecution's closing argument only reinforced the limited application of the "pattern of criminal gang activity" instruction. The prosecutor stated, "In order to actively participate in a gang, we actually have to

describe what a gang is" and, after discussing the "common name, sign, or symbol" and "primary activities" elements, said, "And more definitions. A pattern of criminal gang activity is the commission of two or more crimes And for this, simply refer to those last exhibits, the certified case prints where I asked [the gang expert] if there were some convictions. *And I told you they had nothing to do with [Flint-Spivey]. It has to do with the gang.* . . . [The exhibits are] all the documentation as to three convictions by members of that gang. . . . That's active participation. That's what a gang is and whether Sex Cash is a gang." (Italics added.)

Thus, we cannot conclude the People have shown the "guilty verdict actually rendered in *this* trial was surely unattributable to" (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279) the absence of any instruction defining the term "pattern of criminal gang activity" as it related to the *actual* knowledge Flint-Spivey was required to possess. To the contrary, the *only* instruction on "pattern of criminal gang activity" involved three predicate crimes that (1) the expert admitted had not involved Flint-Spivey and (2) the prosecution conceded "had nothing to do with [Flint-Spivey]," but the jury nevertheless found beyond a reasonable doubt Flint-Spivey "knew that members of the gang . . . engaged in a pattern of criminal gang activity." This finding, made without any evidence Flint-Spivey knew of the *only* predicate crimes from which the instructions would have permitted a finding of "a pattern of criminal gang activity," was at least equally likely to have been attributable to the prosecution's argument that Flint-Spivey, as an active participant, "knew about their criminal conduct" and "knows what this gang is all about." As previously discussed, the STEP act "does not criminalize mere gang membership"

(*People v. Gardeley*, *supra*, 14 Cal.4th at p. 623), but instead imposes the additional elements of guilty knowledge and intent (*Castenada*, *supra*, 23 Cal.4th at p. 748). Thus, it is at least equally likely the jury convicted Flint-Spivey of the section 186.22, subdivision (a), count based on an erroneous view of the applicable law. Accordingly, we reverse the guilty verdict on the section 186.22, subdivision (a), substantive offense.

D. The Section 654 Sentencing Claims

Flint-Spivey argues there was sentencing error because there were only four victims, and the court was therefore limited to imposing only one unstayed term for each of the four victims connected with the offenses and enhancements alleged in counts 1 through four and 6 through 10.⁷

Background

The jury found Flint-Spivey guilty of one count of shooting at an occupied vehicle (count 6), plus four counts each of attempted voluntary manslaughter (with attendant enhancements) and assault with a firearm (with attendant enhancements) for each of the four victims (Does 1-4) at whom Flint-Spivey's gunfire was directed (counts 7-10), plus one count under section 186.22, subdivision (a). The court sentenced Flint-Spivey to an indeterminate term of 15 years to life on count 6 (shooting at an occupied vehicle), which it deemed the principal count, and sentenced him to concurrent one-year six-month terms on each of counts 1 through 4, to concurrent two-year terms on each of counts 7 through

⁷ On appeal, he also argued section 654 required the court to stay execution of any term for the section 186.22, subdivision (a), count under the rationale of *People v. Sanchez* (2009) 179 Cal.App.4th 1297. Because we have reversed the conviction on that count, we need not address that section 654 claim.

10, to a concurrent one-year four-month term on count 12, and to concurrent three-year and 10-year terms on the enhancements appended to counts 1 through 4 and 7 through 10.

Analysis

Flint-Spivey asserts that the court, after selecting count 6 as the principal term and imposing a 15-year-to-life term for that count, erred by imposing terms for *all* of the remaining offenses to run concurrently with the principal term. Flint-Spivey argues section 654 permits a court to impose only one unstayed term for each of the four victims, and therefore the court should have stayed execution of any terms except for count 6 (for one victim) and for three counts of attempted voluntary manslaughter and the enhancements appended to those counts. The People agree only one separate unstayed term may be imposed for each of the four victims, and concedes the trial court's sentence imposing nine unstayed terms for the four victims exceeds the limits imposed under section 654 because the evidence showed all nine crimes were committed as part of one indivisible transaction and there was no evidence Flint-Spivey harbored different intents or objectives for the various crimes. The People agree with Flint-Spivey that imposition of unstayed sentences should be limited to count 6 and three of counts 1 through 4.

When punishment for two or more offenses is limited by section 654, the court should impose sentence (including enhancements) on the offense for which the longest sentence is applicable and stay execution of sentence on the other offenses. (*People v. Kramer* (2002) 29 Cal.4th 720, 723.) Accordingly, based on the concession by the People, we vacate the sentence and remand the matter for resentencing with directions to resentence Flint-Spivey within the limitations imposed by section 654.

DISPOSITION

The conviction on count 12 is reversed, and in all other respects the convictions are affirmed. The sentence is vacated and the matter is remanded for resentencing consistent with this opinion.

McDONALD, J.

I CONCUR:

McINTYRE, J.

BENKE, Acting P.J.

I respectfully dissent. I disagree with my colleagues in two respects. First, I think they err in failing to fully consider the probative value of Flint-Spivey's admission he was a member of the Sex Cash gang. The admission, along with other evidence of Flint-Spivey's gang participation, supports the inference he was fully aware of the gang's criminal acts, including the crimes described by the gang expert. However, because the majority nonetheless concludes Flint-Spivey's own crimes are sufficient as predicates to his gang participation conviction, this aspect of the majority's analysis does not have a direct impact on the result it reaches and does not warrant further elaboration on my part.

My second disagreement with the majority—its analysis of the prejudice caused by the admitted instructional error—does bear directly on the result it reaches and merits some further discussion. I agree with the majority the trial court's instruction on the substantive gang participation charge was defective in not fully defining the term "pattern of gang activity." Under Penal Code section 186.22, subdivision (e), that term has a particular technical meaning and the jury should have been given that meaning in the trial court's instruction on the substantive crime of gang participation.

However, given the particulars of this record and the majority's determination that Flint-Spivey's own crimes support the jury's guilty verdict on the gang participation allegation, the majority nonetheless concludes Flint-Spivey was somehow prejudiced by the trial court's instructional error. I note the jury was properly instructed that gang participation required that Flint-Spivey know that Sex Cash members engaged in "a pattern of criminal gang activity." I also note that, albeit in the context of instructions the

jury received on the related gang enhancements, the term "pattern of criminal conduct" was fully and accurately defined for the jury. To conclude the jury would somehow be disinclined to use the definition it received with respect to the enhancements in considering the substantive crime strikes me as somewhat unrealistic and unfair to the jurors.

However, even if I were to adopt the majority's constrained view of how a jury would read the instructions as a whole, in considering whether a second definition of the term "pattern of criminal conduct" would have had the slightest impact on the jury's determination of Flint-Spivey's culpability for gang participation, the majority ignores *its own* conclusion that Flint-Spivey's crimes themselves show the requisite pattern of criminal conduct. Flint-Spivey plainly was aware of the crimes he committed. If those crimes constitute a pattern of criminal conduct—and the majority concludes that it does—Flint-Spivey was plainly aware of them and thus plainly aware of the gang's pattern of criminal conduct. In this context—where it is Flint-Spivey's own crimes which support his conviction—an instruction requiring that he know about his own crimes would have been entirely superfluous. Thus I have no reasonable doubt that had the statutory definition been repeated a second time, the jury would have concluded Flint-Spivey was aware of the crimes he committed and was therefore aware that Sex Cash had engaged in a pattern of criminal conduct.

I would affirm the judgment of conviction in its entirety.

BENKE, Acting P. J.