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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER ISAAC TURNER,

Defendant and Appellant.

E062549

(Super.Ct.No. FVI1300425)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed as modified with directions.

Lizabeth Weis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Scott C. Taylor and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Peter Isaac Turner, a member of the Grape Street Watts gang, was shot in the right hand by a member of a rival gang. Three days later, defendant and a

companion went to an apartment where, as defendant knew, his assailant often stayed. His assailant was not there, but his companion shot two other people in the apartment, killing one and wounding the other.

After a jury trial, defendant was found guilty on one count of first degree murder (Pen. Code, §§ 187, subd. (a), 189) and one count of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664). As to each count, both a 25-years-to-life firearm enhancement (Pen. Code, § 12022.53, subds. (d), (e)(1)) and a gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) were found true. In a bifurcated proceeding, after defendant waived a jury, one strike prior (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and one prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)) were found true.

Defendant was sentenced to a total of 160 years to life in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

Defendant now contends:

1. There was insufficient evidence that the crimes were committed for the benefit of, at the direction of, or in association with a gang.
2. Defendant's trial counsel rendered ineffective assistance by failing to object to the gang expert's testimony.
3. The trial court could not impose both (1) firearm enhancements of 25 years to life under Penal Code section 12022.53, subdivisions (d) and (e) and (2) gang enhancements under Penal Code section 186.22, subdivision (b).

4. There was insufficient evidence that defendant's prior convictions qualified as serious felonies to support the strike finding and the prior serious felony conviction finding.

5. The trial court violated defendant's Sixth Amendment rights by resolving disputed factual questions as to whether his prior convictions qualified as serious felonies.

The People concede that the trial court could not impose both the firearm enhancements and the gang enhancements. Moreover, we agree that there was insufficient evidence that defendant had a prior serious felony conviction. We find no other error. Hence, we will modify the judgment; this will reduce the sentence to a total of 82 years to life.

## I

### FACTUAL BACKGROUND

The facts of the underlying crimes are not particularly pertinent to the issues in this appeal, except to provide context. We summarize these facts in the light most favorable to the judgment. However, we go into more detail regarding the gang evidence, which is relevant to several appellate issues.

#### A. *The January 5 Shooting.*

On January 5, 2013, at an apartment complex in Adelanto, Raymond "Knuckles" Grey fired several shots at defendant. One bullet hit defendant in the right hand.

Defendant's girlfriend lived at the complex and saw the shooting. She told the police that Grey said, "Blood" and "L.A. Lanes." At trial, however, she denied this.

Angela Looman also lived at the apartment complex, along with her sons, Matthew Barry and Sebastian Farnsworth. Grey had been friends with Looman and her children for about three years; he was at her apartment “every day, every night.” When the police interviewed defendant, he admitted knowing that Grey hung out in Looman’s apartment.

Looman heard the shooting; she told the police that someone used the word, “Crip.” At trial, however, she denied this.

*B. The January 8 Shooting.*

After the January 5 shooting, defendant said he was going to shoot Grey in retaliation.

On January 8, 2013, there was loud knocking on the door of Looman’s apartment. Farnsworth opened the door and saw defendant and a second man. The second man was holding a handgun; he immediately started shooting. Two bullets hit Farnsworth, in the face and chest, but he survived. Three bullets hit Barry, in the thigh, left shoulder, and upper back, killing him.

According to Farnsworth, the shooter said, “Come on, Cuz,” and he and defendant left. Crips call each other “Cuz.”

According to Looman, immediately before the shooting, she heard someone say, “This is on Crip.” However, she had not told the police that.

Defendant’s sister texted defendant about the shooting. Defendant replied, “[A]ll I can say is I was high as a mother-fucker and the wrong person answered the door.” He added that he “just let off.” To “let off” means to shoot.

Defendant told his sister where he had hidden a gun and asked her to get rid of it for him. She found it but turned it over to the police instead. Testing revealed that it was the gun used to shoot Barry and Farnsworth.

C. *Gang Evidence.*

When the police interviewed defendant, he said he was “from” Grape Street Watts (Grape Street). He also said that Grey was a Blood gang member. He claimed that one Joker, a member of Grape Street, committed the shooting, “thinking [he] was doing [defendant] a favor . . . thinking [he]’d get brownie points.”

Deputy Scott Hamilton testified as a gang expert. According to Deputy Hamilton, Grape Street is a gang affiliated with the Crips. Its members wear purple. It has common signs and symbols, including “GS.”

Grape Street’s “primary purpose” was committing crimes; its members had committed vehicle theft, assault with a deadly weapon, assault with a firearm, unlawful possession of a firearm, drug sales, attempted murder, and murder.

A pattern of criminal gang activity was shown by the following three convictions:

1. In 2011, Mabon James, a Grape Street member, was convicted of grand theft from the person, allegedly committed in 2011.<sup>1</sup>

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<sup>1</sup> Deputy Hamilton testified that Mabon was convicted of possession of a deadly weapon. Court records admitted into evidence, however, showed that, although Mabon was initially charged with possession of a deadly weapon, among other things, he agreed to amend the complaint and to plead guilty to grand theft from the person.

2. In 2012, Bobby McGruder, a Grape Street member, was convicted of attempted murder, allegedly committed in 2011.

3. Also in 2012, Dominic Evans, a Grape Street member, was convicted of possession of a controlled substance for sale, allegedly committed in 2012.

According to Deputy Hamilton, defendant was an active member of Grape Street. His moniker was “Pete” or “Peter LOC.” “LOC” stands for “Love other Crip[s].” Thus, it is a term that only Crips use. Defendant also had gang tattoos, including “Peter LOC,” “Watts,” and “Crip.” Deputy Hamilton had talked to some of defendant’s friends and family members, who said he was a member of Grape Street.

In 2012, defendant admitted to Deputy Hamilton that he was a member of Grape Street. At the time, he was in a Grape Street area. He had purple plastic braided into his hair, he was wearing a purple necklace, and he had purple thread in his pants. Defendant did say that he had been inactive for about 10 years. Nevertheless, in Deputy Hamilton’s opinion, he was actually an active member, because he was in a gang area and he was wearing purple. Gang members sometimes use the word “inactive” to mean “they don’t . . . have to put in work anymore” because they are an “OG” or a “big homie.”

Also according to Deputy Hamilton, Grey was an active member of Pasadena Denver Lanes (Denver Lanes). Grey had admitted several times that he was a member of Denver Lanes, and he had a “Denver Lanes” tattoo. Denver Lanes is a gang affiliated with the Bloods. Grape Street and Denver Lanes are rivals.<sup>2</sup>

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<sup>2</sup> Another police officer with “gang team” experience testified that because Grape Street was a Crip gang, it would “[d]efinitely” be rivals with a Blood gang.

In Deputy Hamilton’s opinion, the crimes were committed for the benefit of, at the direction of, or in association with Grape Street. He also testified:

“Q How would Mr. Turner benefit within his gang by committing this crime?

“A Gang members benefit individually and the gang itself. Crimes are from theft on up to murder. When you’re in the gang, it’s all about fear, respect, and intimidation to others. Whether or not he did it himself or was there, it boosts the ego for him and/or the others within the gang. Again, putting fear and intimidation into the community.”

The prosecutor asked whether the crimes would “help Mr. Turner’s standing in Grape Street Watts criminal street gang”; Deputy Hamilton said, “Yes.” The prosecutor also asked whether the crimes would “show that Mr. Turner is able to handle his own business”; Deputy Hamilton agreed. Finally, the prosecutor asked, “Would you agree that if Mr. Turner had been shot by a Blood and then did not retaliate, that he would lose respect from fellow gang members . . . ?” Deputy Hamilton said, “Yes.”

## II

### THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE GANG

#### ALLEGATIONS

Defendant contends that there was insufficient evidence that the crimes were committed for the benefit of, at the direction of, or in association with a gang.

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the

defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] “A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.” [Citation.] [Citation.]” (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170.)

One of the elements of a gang enhancement is that the underlying crime was “committed for the benefit of, at the direction of, or in association with a[] criminal street gang” (the benefit/direction/association element). (Pen. Code, § 186.22, subd. (b)(1).)

“Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) Moreover, “[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of [Penal Code] section 186.22(b)(1). [Citations.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 63.)<sup>3</sup>

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<sup>3</sup> In *People v. Ochoa* (2009) 179 Cal.App.4th 650, we stated: “A gang expert’s testimony alone is insufficient to find an offense gang related. [Citation.]” (*Id.* at p. 657.) If this conflicts with the Supreme Court’s later statements that an expert’s testimony *can* be sufficient, the Supreme Court’s pronouncements must, of course, control.

In *People v. Vazquez* (2009) 178 Cal.App.4th 347, the appellate court found sufficient evidence to support a gang enhancement, partly “because violent crimes like murder elevate the status of the gang within gang culture and intimidate neighborhood residents who are, as a result, ‘fearful to come forward, assist law enforcement, testify in court, or even report crimes that they’re victims of for fear that they may be the gang’s next victim or at least retaliated on by that gang . . . .’ This intimidation, obviously, makes it easier for the gang to continue committing the crimes for which it is known, from graffiti to murder.” (*Id.* at p. 354.)

We may say, with all due respect for Deputy Hamilton’s training, experience, and expertise, that he was not exactly eloquent. For example, when asked the basis for his opinion that the benefit/direction/association element was satisfied, he answered, “I believe that this was either at the direction of and alone by himself and/or with another suspect possibly involved.” This seems to mean that the crime was *not* committed at the

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*[footnote continued from previous page]*

However, we believe they can be reconciled in light of the principle that “[a]n expert’s opinion is only as good as the facts upon which his or her opinion is based.” (*In re Welch* (2015) 61 Cal.4th 489, 510.) Thus, “when an expert bases his or her conclusion on factors that are ‘speculative, remote or conjectural,’ or on ‘assumptions . . . not supported by the record,’ the expert’s opinion ‘cannot rise to the dignity of substantial evidence’ . . . .” [Citations.]” (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1191-1192.)

For example, in *Ochoa* itself, a gang expert opined that the defendant committed a carjacking for the benefit of his gang, even though there was no evidence that the gang ever used the vehicle for transportation and no evidence that the defendant ever claimed responsibility for the crime on behalf of his gang. (*People v. Ochoa, supra*, 179 Cal.App.4th at p. 656.) We held that the expert’s testimony was insufficient evidence that the crime was gang-related because it was unduly speculative. (*Id.* at pp. 661-663.) We believe this holding is still good law. (See also part III, *post.*)

direction of the gang, and perhaps not even *in association with* the gang; it sheds no light on benefit. The problem was compounded by the fact that the prosecutor persistently asked how the crime benefited *defendant*, rather than how the crime benefited the *gang*. Nevertheless, Deputy Hamilton did manage to explain how the crime benefited the gang: “Gang members benefit individually *and the gang itself*. . . . When you’re in the gang, it’s all about fear, respect, and intimidation to others. Whether or not he did it himself or was there, it boosts the ego for him and/or the others within the gang. Again, putting fear and intimidation into the community.” (Italics added.) This was sufficient evidence of the crucial element.

Defendant argues that the crimes could not possibly benefit Grape Street because there was no evidence that Farnsworth or Barry knew that he was a member of Grape Street.<sup>4</sup> Defendant, however, overlooks the fact that Farnsworth and Barry were not the intended victims. Defendant intended to shoot Grey. It is fairly inferable that Grey — a member of a rival gang who had shot defendant just three days earlier — knew that defendant was a member of Grape Street. Moreover, even though defendant did not succeed in shooting Grey, Grey would know that defendant was the shooter, and thus he would be intimidated.

Although we conclude that there was sufficient evidence that the crimes were committed to *benefit* a gang, we also conclude, alternatively, that there was sufficient

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<sup>4</sup> Although there was evidence that defendant and the second man identified themselves as Crips, the record falls short of establishing that the umbrella Crip organization constituted a gang. (*People v. Prunty* (2015) 62 Cal.4th 59, 82-84.)

evidence that they were committed in *association* with a gang. According to Farnsworth, defendant was not the shooter; he arrived with a second man, who did the shooting. One of them called the other Cuz. Thus, it is fairly inferable that they were both members of the same gang. Committing a crime with a fellow gang member could constitute the requisite association. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

Defendant complains that the prosecutor asked Deputy Hamilton questions about defendant and about this case, when he should have asked hypothetical questions. The Supreme Court has declined to decide whether a gang expert must be questioned in hypothetical form, although at the same time, it stated: “It appears that in some circumstances, expert testimony regarding the specific defendants might be proper. [Citations.]” (*People v. Vang, supra*, 52 Cal.4th at p. 1048, fn. 4.)

Even assuming, however, that the prosecutor was required to ask hypothetical questions, defense counsel did not object on this ground. (See part III, *post*.) If he had, the prosecutor could have asked essentially the same questions, albeit in hypothetical form, and gotten the same answers. In the absence of any such objection, the jury could properly rely on the expert testimony.

We therefore conclude that there was sufficient evidence that the crimes were gang-related.

### III

#### FAILURE TO OBJECT TO THE GANG EXPERT’S TESTIMONY

Defendant contends that his trial counsel rendered ineffective assistance by failing to object during the prosecution’s direct examination of the gang expert.

A. *Additional Factual and Procedural Background.*

Deputy Hamilton testified:

“Q Now, would a gang member from Pasadena Denver Lanes rival with a gang member from Grape Street Watts?

“A Yes.

“Q Why?

“A From what I’ve heard on the street, one of the issues with Grape Street and Pasadena was that there was some type of gambling rivalry debt where the Crip was disrespected. One of the derogatory terms is called a Crab for a Crip. And word is that in this Lancaster Palmdale area, the Blood called the Crip that, a Crab, and from then on it’s been a little bit of rivalry between Pasadena Lane [*sic*] and Grape Street.”

B. *Discussion.*

“The two-prong standard governing claims of ineffective assistance of counsel is well settled. ““In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]”” [Citations.]” (*People v. Johnson* (2016) 62 Cal.4th 600, 653.)

““[I]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. [Citations.]” [Citations.]” (*Ibid.*)

“Expert testimony in the form of an opinion may be based on hearsay or facts outside the personal knowledge of the expert. [Citation.]” (*People v. Harris* (2013) 57 Cal.4th 804, 847.) “Thus, a gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes, and on information obtained from colleagues and other law enforcement agencies. [Citations.]” (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1121-1122.) However, “ . . . the matter relied on must provide a reasonable basis for the particular opinion offered, and . . . an expert opinion based on speculation or conjecture is inadmissible.” [Citation.]” (*Environmental Law Foundation v. Beech-Nut Nutrition Corp.* (2015) 235 Cal.App.4th 307, 325.)

Defendant argues that what Deputy Hamilton had “heard on the street” was “unreliable hearsay.” However, because the prosecutor did not ask him to specify his source, and because defense counsel did not cross-examine him about this, we have no way of knowing whether the information was reliable or not. “[A] gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes, and on information obtained from colleagues and other law enforcement agencies. [Citation.]” (*People v. Hill, supra*, 191 Cal.App.4th at pp. 1121-1122.) As Deputy Hamilton was testifying about the history of the two gangs, it seems most likely that his information came from one of these sources. While this could be described as “the word on the street,” gang experts can and do rely on it.

Thus, we cannot say that there could be no satisfactory explanation for defense counsel’s failure to object. For all we know, he had discovery showing that the basis for

Deputy Hamilton's opinion was reliable. Alternatively, he may have reasoned that, if he objected, the prosecutor would ask Deputy Hamilton more specific questions about the source of his information, which were likely to reinforce its reliability.

We also note that the challenged testimony went to a very tangential point. Defendant claims that it was the "primary" evidence that the gangs were rivals, and hence that the crimes benefited defendant's gang. But not so. Another officer testified that a Crip gang and a Blood gang would normally be rivals. Moreover, Deputy Hamilton had already testified specifically that Grape Street and Denver Lanes were rivals. It was only when he was asked *why* they were rivals (not *why he had come to the conclusion* that they were rivals) that he recounted what he had heard on the street. The *fact* that they were rivals was relevant to the gang enhancement; *why* they were rivals was not particularly relevant. Accordingly, even if defense counsel had objected, and even if the challenged testimony had been excluded, we see no reason to suppose that the outcome would have been any different.

In a three-sentence argument, defendant also claims that defense counsel should have objected to the prosecutor's failure to use hypothetical questions in Deputy Hamilton's direct examination. The only authority he cites in support of this argument is *People v. Vang, supra*, 52 Cal.4th 1038; as already mentioned, *Vang* specifically declined to decide whether a gang expert must be questioned in hypothetical form. (*Id.* at p. 1048, fn. 4.) Defendant does not discuss whether defense counsel could have had a satisfactory explanation nor whether the failure to object was prejudicial. We therefore conclude that

defendant has forfeited this argument by failing to support it with reasoned argument and citation of authority. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Separately and alternatively, we also reject this argument on the merits. Again (see part II, *ante*), if defense counsel had objected, and if the trial court had sustained the objection, the prosecutor would have asked essentially the same questions in hypothetical form. Accordingly, the failure to object did not affect the outcome.

#### IV

#### THE IMPOSITION OF BOTH GANG ENHANCEMENTS AND 25-YEARS-TO-LIFE FIREARM ENHANCEMENTS

Defendant contends that, under the circumstances of this case, the trial court could not impose both (1) firearm enhancements of 25 years to life under Penal Code section 12022.53, subdivisions (d) and (e) and (2) gang enhancements under Penal Code section 186.22, subdivision (b). The People concede the error. Accordingly, we will discuss it only summarily.

##### A. *Additional Factual and Procedural Background.*

On each count, the jury found true a firearm enhancement under Penal Code section 12022.53, subdivisions (d) and (e)(1)) and a gang enhancement under Penal Code section 186.22, subdivision (b)(1). Accordingly, on each count, the trial court imposed a term of 25 years to life on the firearm enhancement, plus a term of 10 years on the gang enhancement.

##### B. *Discussion.*

Penal Code section 12022.53, subdivisions (d) and (e), as relevant here, provide:

“(d) Notwithstanding any other provision of law, any person who, in the commission of a [specified] felony . . . , personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.

“(e)(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved:

“(A) The person violated subdivision (b) of Section 186.22.

“(B) Any principal in the offense committed any act specified in subdivision . . . (d).

“(2) *An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.*” (Italics added.)

The jury was not instructed to find, and it did not find, that defendant personally used or discharged a firearm. Instead, it found that a principal personally discharged a firearm. It also found the gang enhancements true — i.e., it found that defendant violated Penal Code section 186, subdivision (b).

Because there was no finding that defendant personally used or discharged a firearm, once the trial court imposed a firearm enhancement, it could not also impose a gang enhancement. The 10-year gang enhancements must be stayed. (See *People v.*

*Gonzalez* (2008) 43 Cal.4th 1118, 1129-1130; *People v. Lopez* (2004) 119 Cal.App.4th 355, 364-365.)

While Penal Code section 12022.53, subdivision (e)(2) refers to an “enhancement,” the Supreme Court has held that it also applies to the penalty provisions in Penal Code section 186.22, subdivisions (b)(4) and (b)(5). (*People v. Brookfield* (2009) 47 Cal.4th 583, 591, 595.) Thus, the trial court also erred by setting a 15-year minimum parole period on count 2 under Penal Code section 186.22, subdivision (b)(5).

## V

### THE SUFFICIENCY OF THE EVIDENCE OF A PRIOR SERIOUS FELONY CONVICTION

Defendant contends there was insufficient evidence that his prior convictions qualified as serious felonies to support the strike finding and the prior serious felony conviction finding. He also contends that trial court violated his Sixth Amendment rights by resolving disputed factual questions as to whether his prior convictions qualified as serious felonies. Because we agree with the first contention, we need not decide the second.

#### A. *Additional Factual and Procedural Background.*

##### 1. *Prior conviction allegation.*

The information in this case alleged a 1996 conviction for burglary, both as a strike (Pen. Code, § 667, subds. (b)-(i), 1170.12) and as the basis for a prior serious felony conviction enhancement. (Pen. Code, § 667, subd. (a).)

2. *Evidence at the hearing on the prior.*

At the hearing on the prior, the prosecution introduced documents that showed the following.

In 1996, defendant was charged with two counts of “burglary of an inhabited dwelling house,” in violation of Penal Code section 459. (Capitalization altered.) As to each count, the information alleged that “the above offense is a serious felony within the meaning of Penal Code Section 1192.7(c)(18).”

Defendant signed and initialed a plea form which stated that he was pleading no contest “to the following violations charged against me in this case: 2 x 459.” It provided for him to be placed on probation. In the space for the maximum sentence, six years had been written in but then crossed out; two years four months had been written in the margin, and defendant had initialed it.

The plea form stated: “My attorney has explained that other possible consequences of this plea may be: . . . [¶] . . . [¶] . . . [I]f life prison term under a habitual offender, ‘Three Strikes,’ or ‘One Strike’ law for any future conviction.”

At a sentencing hearing, defendant pleaded no contest to two felony counts of “459” and was placed on probation.

Defendant did not expressly admit or deny the allegations that the crimes were serious felonies.

The minute order of the sentencing hearing stated: “[I]f defendant assists in recovery of weapon, defendant may motion court to reduce count 2 to a misdemeanor.” (Capitalization altered.)

3. *Argument at the hearing on the prior.*

At the hearing on the prior, defense counsel argued that there was no evidence that the conviction was for first degree burglary. He conceded that the information alleged a residential burglary, but he argued that defendant had never admitted that it was residential.

The prosecutor admitted that she could not figure out how the maximum sentence could have been two years four months. However, she argued that the recital that defendant was subject to a life term for any future conviction indicated that the burglary was a serious felony.

The trial court agreed. It therefore found that defendant had a prior serious felony conviction.

B. *Discussion.*

A prior serious felony conviction enhancement applies to any person “convicted of a serious felony who previously has been convicted of a serious felony . . . .” (Pen. Code, § 667, subd. (a).) Similarly, a strike requires a prior conviction for either a serious or violent felony. (Pen. Code, §§ 667, subds. (c), (e)-(f), 1170.12, subds. (a), (c)-(d).)

First degree burglary is a serious felony; however, second degree burglary is neither a serious nor a violent felony. (Pen. Code, §§ 667.5, subd. (c)(21), 667, subd. (a)(4), 1192.7, subd. (c)(18).) Burglary of “an inhabited dwelling house” is first degree burglary. (Pen. Code, § 460, subd. (a).)

“Where . . . the mere fact of conviction under a particular statute does not prove the offense was a serious felony, otherwise admissible evidence from the entire record of

the conviction may be examined to resolve the issue. [Citations.]” (*People v. Miles* (2008) 43 Cal.4th 1074, 1082.) “[T]he trier of fact may draw *reasonable inferences* from the record presented.” (*Id.* at p. 1083.)

“When . . . a defendant challenges on appeal the sufficiency of the evidence to sustain the trial court’s finding that the prosecution has proven all the elements of the enhancement, we must determine whether substantial evidence supports that finding. The test on appeal is simply whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the enhancement beyond a reasonable doubt.’ [Citation.] In making this determination, we review the record in the light most favorable to the trial court’s findings. [Citation.]” (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 129.)

Here, the record is ambiguous and open to interpretation. Some of the evidence points toward first degree burglary. As the trial court found, this includes the recital in the plea form that the plea could result in a future life term under the three strikes law. It also includes the fact that the information, to which defendant pleaded no contest, alleged “burglary of an inhabited dwelling house.”

On the other hand, some of the evidence points toward second degree burglary. This includes the fact that a maximum sentence of six years was crossed out and replaced with two years four months. It also includes the fact that defendant did not admit or deny the serious felony allegations. (See Pen. Code, § 969f, subd, (a) [“If the defendant pleads guilty of the offense charged, the question whether or not the defendant committed a serious felony as alleged shall be separately admitted or denied by the defendant.”].)

Finally, it also includes the provision in the sentencing minute order that defendant could move to reduce count 2 to a misdemeanor. The trial court could do this only if the crime was a wobbler. (Pen. Code, § 17, subd. (b)(3).) Second degree burglary is a wobbler; first degree burglary is not. (Pen. Code, § 461.)

The fact that defendant was placed on probation is simply inconclusive. “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person who is convicted of a burglary of an inhabited dwelling house . . . .” (Pen. Code, § 462, subd. (a).) If the trial court does grant probation for burglary of an inhabited dwelling house, it must state reasons on the record. (Pen. Code, § 462, subd. (b).) Here, the trial court placed defendant on probation and did not state any reasons. However, the fact that the plea bargain called for probation was, in itself, a sufficient reason (Cal. Rules of Court, rule 4.412(a)); moreover, it obviated the need to state reasons on the record. (*People v. Stewart* (2001) 89 Cal.App.4th 1209, 1215, disapproved on other grounds in *People v. Buttram* (2003) 30 Cal.4th 773, 791.)

Ordinarily, when the evidence would support conflicting inferences, we must apply the substantial evidence rule and uphold whatever inference the trial court drew. Here, however, even assuming that defendant intended to plead guilty to first degree burglary, the trial court never determined the degree. Thus, under Penal Code section 1192, the conviction must be deemed to be for second degree burglary as a matter of law.

Penal Code section 1192, as relevant here, provides: “Upon a plea of guilty . . . of a crime . . . divided into degrees, the court must, before passing sentence, determine the

degree. Upon the failure of the court to so determine, the degree of the crime . . . of which the defendant is guilty[] shall be deemed to be of the lesser degree.”

Of course, defendant pleaded no contest rather than guilty. However, “[t]he legal effect of such a plea, to a crime punishable as a felony, [is] the same as that of a plea of guilty for all purposes.” (Pen. Code, § 1016, subd. 3.)

We recognize that “[s]ection[] 1192 . . . do[es] not require a court to repeat some ancient magical incantation.” (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 580.) “[T]he judgment need only indicate that the court has fixed the degree of the crime prior to the pronouncing of judgment, and no particular or formal language is required.” (*In re Hammond* (1937) 24 Cal.App.2d 18, 19.) Here, however, in the 1996 judgment, the trial court did not fix the degree at all. “That there are sufficient facts disclosed by the record, *including the information and the plea . . .*, to justify the trial court in fixing the degree of the offense, does not obviate the requirement of the code that such degree must be fixed prior to the pronouncing of sentence.” (*Id.* at p. 20, italics added.)

We therefore conclude that the trial court erred by finding that defendant had a prior conviction for first degree burglary. We must reverse the strike prior and the prior serious felony enhancement and modify the judgment accordingly.

## VI

### DISPOSITION

If we were to remand for resentencing, the only discretionary aspect of the sentence would be whether to run count 2 concurrently or consecutively. The trial court,

however, already ran every element of the sentence consecutively, thus manifesting its intention to impose the longest possible sentence. Hence, we see no need to remand.

The terms of imprisonment are modified as follows:

Count 1, first degree murder: 25 years to life. (Pen. Code, § 190, subd. (a).)

Count 2, willful, deliberate, and premeditated attempted murder: Life, with a minimum parole period of seven years, to be served consecutively. (Pen. Code, §§ 664, subd. (a), 3046, subd. (a)(1).)

Firearm enhancements: 25 years to life on each, to be served consecutively. (Pen. Code, § 12022.53, subds. (d), (e)(1).)

Gang enhancements: 10 years, stayed. (See part IV, *ante*.)

Prior serious felony conviction enhancement and strike prior: Stricken. (See part V, *ante*.)

Accordingly, the effective total term of imprisonment is life with a minimum parole period of 82 years. Except as modified, the judgment is affirmed.

The clerk of the superior court is directed to prepare an amended sentencing minute order and an amended abstract of judgment reflecting these modifications and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, subd. (a), 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

HOLLENHORST  
J.

SLOUGH  
J.