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Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KEJUAN DARCELL CLARK, Defendant and Petitioner.	Court of Appeal No. E075532 Superior Court No. RIF 1503800

APPEAL FROM THE RIVERSIDE COUNTY
SUPERIOR COURT

Honorable Bambi J. Moyer, Judge

PETITION FOR REVIEW

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Questions Presented

1. Whether the trial court violated Evidence Code section 1103 and petitioner's constitutional rights to due process, to present evidence, and to confront his accuser by excluding evidence that the accuser had previously had sex with various members of petitioner's gang after she denied knowing him or knowing anything about his gang?

2. Whether the Court of Appeal erred in interpreting Assembly Bill No. 333, disagreeing with the only published case on the issue (*People v. Delgado* (2022) 74 Cal.App.5th 1067, 1089) when finding the word "collectively" in Penal Code section 186.22(f) did not mean "committed by more than one person."

Necessity for Review

The case presents two important legal questions, and petitioner asks that this court grant review to resolve the questions, or in the alternative remand the case back to the Court of Appeal with orders to correct the judgment.

The first issue involves the proper interpretation of the rape shield law. This is not simply a question of whether the lower courts erred in the present case, but rather the proper interplay between the rape shield law and a defendant's constitutional rights.

Evidence Code section 1103(c)(1) prohibits evidence of the prior sexual history of a complaining witness to establish consent to the charged act. However, section 1103(c)(5) allows the admission of such evidence if relevant to the accuser's credibility.

In the present case, petitioner was convicted of the rape of a woman he had known most of his life — it was his good friend's mother. She denied knowing petitioner and denied knowing anything about his gang, a gang in

which both of her sons were long-time members. The defense sought to admit reputation evidence that the victim had slept with many of the gang's members, and this would show she lied when denying knowledge of the gang.

The only real issue at trial was her credibility, not her promiscuity. The Court of Appeal found the evidence was inadmissible because it referred to the accuser's sexual history, and the defense could simply have asked whether members of the gang knew her. While that may have been admissible, the question for this court to address is whether the described evidence is admissible under section 1103(c)(5) when sex-related content directly detracts from the accuser's credibility.

Petitioner argues the exclusion of such important evidence also violated his Sixth Amendment rights to present a defense and to confront his accuser and his Fourteenth Amendment right to due process.

Next, this court is asked to address newly enacted Penal Code section 186.22(f), which was a part of Assembly Bill 333. The new provision says that a gang's predicate crimes must be committed by multiple members of the gang "collectively." In *People v. Delgado* (2022) 74 Cal.App. 5th 1067, 1088, the court found the term "collectively" required that the offenses be committed by multiple gang members, unlike the present case where the predicate offenses were committed by gang members acting alone. The

Court of Appeal found *Delgado* was wrongly decided, and the predicate acts may be committed by lone gang members on separate occasions.

Petitioner respectfully asks that this court grant review to resolve these issues, or in the alternative remand the case back to the Court of Appeal with directions to reconsider its position on the section 1103 issue, and to follow *Delgado* on the AB 333 issue.

Introduction

Petitioner was convicted of the rape of the mother of his life-long friend and gang associate. He claimed he had known her for most of his life and his accuser had consented to the sex after they had flirted for a while. She claimed she did not know petitioner and had never heard of his gang, even though both of her sons were long-time members of the gang.

The sex took place at night in her home, but petitioner's gang friends got bored while waiting in the car, entered the house and stole her television. At that point, she got angry and reported a burglary and rape.

The defense sought to present two witnesses who would testify to the accuser's reputation for having sex with members of the gang, but the trial court excluded the evidence as violative to the rape shield law (Evidence Code section 1103(c)(1).)

The Court of Appeal rejected petitioner's claim that the exclusion of

evidence showing the accuser had lied about such a critical fact violated section 1103(c)(5) (use of sex history to impeach credibility), and at the same violated petitioner's constitutional rights to present evidence, to confront witnesses and to due process. The court found the defense could have impeached the accuser with statements from the witnesses that did not mention the accuser's sexual history. This was significant error.

The Court of Appeal also erred in its interpretation of Assembly Bill 333. In *People v. Delgado* (2022) 74 Cal.App. 5th 1067, 1088 another court interpreted the term "collectively" used in Penal Code section 186.22(f) to mean that proving a gang's predicate crimes for purposes of the enhancement required evidence that each offense was committed by more than one person. The court in the present case rejected that interpretation and found evidence that lone gang members committing gang crimes on separate occasions would meet the predicate offense requirement of section 186.22(b).

I

The rape shield law should not be interpreted to exclude sex-related evidence that is relevant to credibility.

Petitioner was convicted of the rape of his friend's mother — a woman he had known for many years while growing up, but who testified that she did not know him. In fact, the state's theory was that petitioner

and his gang friends were out committing a random burglary, and as coincidence would have it, the person petitioner chose to rape during the burglary was his friend's mother —total coincidence. (6 RT 1266, 1270.)

All of the parties in the case had been connected to the gang life, as petitioner and Jane Doe's two adult sons were members of the Sex Cash Money gang in Moreno Valley, and as younger boys had been members of a Los Angeles gang in which her husband at the time was a gang leader. (6 RT 1222.)

There was available evidence showing that Jane Doe had had sexual relations with members of the SCM gang, members who were friends of her son Brandon. And petitioner testified that he had flirted with Jane Doe, which resulted in her inviting him to her house for consensual sex. (6 RT 1251-1252.) The situation changed when Doe realized that her house was being burglarized by petitioner's friends. (7 RT 1415.) The SCM gang was known to commit burglaries. (5 RT 1009.)

The question for the jurors at trial was whether they should believe petitioner, who testified that the act was consensual sex with an older woman he had known for a long time, or Jane Doe, who testified that she did not know petitioner and had never heard of the SCM gang.

Witnesses were available to testify that Doe had previously had sex with SCM gang members. These included Layelle Hayes, an SCM member

or former member who was a close friend of Doe's older son, Craig, and Eric Parker, one of the other males involved in the burglary of Doe's house. (1 RT 23-24.) The former would also testify that he had seen Doe drop petitioner and Brandon off at Brandon's father's house a few years earlier. (1 RT 30.)

There had been two other defense witnesses who could have testified about a flirtatious relationship between Doe and petitioner. One was a former Riverside Sheriff's deputy and former school resource officer who knew petitioner and Brandon from Moreno Valley High School, knew Jane Doe from meetings regarding Brandon's gang activity, knew she frequented Bahama Mama's (where she allegedly flirted with petitioner), and knew that SCM members spoke of having sexual relations with her. (1 RT 20-23.) Dixon was not called by the defense due to the fact that he had misidentified Doe in a photo shown by the police, and had visited petitioner in the jail. (7 RT 1069.) There was no indication that the jail visits were anything other than the act of a good Samaritan cop looking to testify truthfully on behalf of a person he believed to be innocent. The other witness, SCM member Terry King said he observed Doe flirting with petitioner in Bahama Mamas. (1 RT 19.) However, King failed to appear after leaving the state before trial. His absence was consistent with the prosecution's gang expert's testimony that gang members will be punished for testifying at trial. (5 RT

955.)

The trial court ruled that evidence from Parker and Hayes that Doe had previously had sexual relationships with SCM members related to her promiscuity rather than her credibility, and was therefore inadmissible under Evidence Code section 1103(c)(1). (1 RT 23-24.)

Applicable Law

(A)

The rape shield law provisions

Evidence Code section 1103, subdivision (c)(1), provides that a defendant cannot introduce opinion evidence, reputation evidence, and evidence of specific instances of the alleged victim's previous sexual conduct with persons other than the defendant to prove the victim consented to the sexual acts alleged. In adopting this provision the Legislature recognized that evidence of the alleged victim's consensual activities with others has little relevance to whether consent was given in a particular instance. (*People v. Chandler* (1997) 56 Cal.App.4th 703, 707.)

While strictly precluding admission of the alleged victim's past sexual conduct for purposes of proving consent, Evidence Code section 1103, subdivision (c)(5), allows the admission of evidence of prior sexual history relevant to the credibility of the victim. Because the victim's credibility is often at issue in sexual assault cases, Evidence Code section 782 specifies a

procedure requiring an in camera review of the proffered evidence to diminish the potential abuse of section 1103 (c)(5).

The defense may offer evidence of the victim's sexual conduct to attack the victim's credibility if the trial judge concludes following the hearing that under Evidence Code section 352, the probative value of the impeaching evidence outweighs its prejudicial effect (in terms of consuming too much time or confusing the jurors). (*People v. Chandler*, *supra*, 56 Cal.App.4th at p. 708.)

In *Chandler*, the defense argued the victim voluntarily engaged in sex with the defendant in exchange for drugs, and sought to admit prior instances of similar conduct to attack the victim's credibility under section 1103 (c)(4). The court found the trial court did not abuse its Evidence Code section 352 discretion in limiting evidence that she had previously provided sex for drugs. The trial court did allow the defense to cross-examine the victim about two such incidents but precluded several witnesses from testifying on the topic. (*Id.* at pp. 710-711.) (See also *People v. Steele* (1989) 210 Cal.App.3d 67, where the court found section 1103 (b)(1) prevented evidence of the victim's predisposition (one prior act) to have sex with strangers in vehicles, even though the evidence might have some bearing on her credibility.)

Other cases deal more specifically with the issue of prior sex acts

accompanied by the victim's false complaint that the defendant committed rape. This is in contrast to the above cited cases where it is essentially the prior sex itself which is used to attack the victim's credibility.

In *People v. Franklin* (1994) 25 Cal.App.4th 331, the court held the trial court erred in excluding evidence that the alleged child molest victim had once falsely accused her mother of sexual misconduct. The court determined that under section 1103 a prior false accusation is relevant on the issue of the molest victim's credibility. "The instance of conduct being placed before the jury as bearing on credibility is the making of a false statement, not the sexual conduct which is the content of the statement." (*Id.* at p.35.)

Finally, in *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, the court ruled the trial court abused its Evidence Code section 352 discretion in excluding the evidence of the prior alleged false accusation. (*Id.* at. p. 599.) The court found the balance between probative value and prejudice "is particularly delicate and critical where what is at stake is a criminal defendant's liberty.... Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense." (*Ibid.)*

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(B)

The Sixth Amendment right to present a defense

In addition to the abuse of the trial court's section 352 discretion, the *Burrell-Hart* court suggested the trial court's ruling also violated the defendant's Sixth Amendment right to present evidence. (*People v. Burrell-Hart*, *supra*, 92 Cal.App.3d at p. 599.) "The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324.)

In *Washington v. Texas* (1976) 388 U.S. 14, the Supreme Court addressed a defendant's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor. "The right to offer the testimony of witnesses and compel their attendance if necessary, is in plain terms the right to present a defense, *the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.* Just as an accused has the right to confront the prosecution's witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law. (*Id.* at p. 19, emphasis added.)

In *People v. Mizchele* (1983) 142 Cal.App.3d 686, 691, the court reversed defendant's murder conviction after finding the trial court violated

defendant's right to present evidence by excluding evidence of the victim's violent history.

(C)

The Sixth Amendment right of confrontation

The confrontation clause of the Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. Of particular importance here is that exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. (*Davis v. Alaska* (1974) 415 U.S. 308, 317.)

In *Olden v. Kentucky* (1988) 488 U.S. 227, 232, the court found a prejudicial confrontation clause violation where the trial court prohibited the cross-examination of an alleged rape victim on the issue of whether the consensual sex with the defendant would have jeopardized her other interracial relationship.

(D)

The Fourteenth Amendment right to due process

In addition to the foregoing fundamental constitutional rights, the right to due process of law is also relevant to the present question.

In *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, the court recognized that the rights to confront and cross-examine witnesses and to

call witnesses in one's own behalf have long been recognized as essential to due process. In *Chambers*, the court found a due process denial where the defendant was prohibited from cross-examining a witness regarding that witness's confession and subsequent renunciation of that confession. (*Id.* at p. 292.)

Primacy of federal constitutional rights

The court in *Chambers* found a state's laws that exclude certain evidence must bow to a defendant's right to a fair trial. (*Id*. at p. 302; and see *Rock v. Arkansas* (1987) 483 U.S. 51, and *Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324, where the court has repeated that a defendant's fundamental constitutional rights to present a defense and confront his accuser outweigh a state's rules of evidence that otherwise require the exclusion of evidence.)

Legal Analysis

There were two versions of the incident presented to the jurors, and the only issue for them to decide was who was telling the truth. If jurors had even a reasonable doubt about Doe's version of the events, it would have to acquit petitioner of the charged rape offenses, and likely the burglary as well.

The primary fact for the jurors to decide was whether Doe lied when she told the police and jurors at trial that she had never seen petitioner

before and didn't know him. She made this claim knowing the evidence showed that petitioner had been close friends with her younger son Brandon as 10 year-olds in Los Angeles, then again a few years later at Moreno Valley High School where they were involved in the local SCM gang, and still again while hanging around the Segovia Apartments, where the SCM gang members congregated and Doe visited her friend Coco. The evidence also showed that petitioner knew Doe's older son Craig, Jr., a SCM gang member (or a member of the gang's subset), and finally, Doe's former husband, had been a "big homie" with the Los Angeles gang that petitioner and Brandon had associated with, and he had looked after petitioner when he was younger. Doe testified not only that she did not know petitioner, but that she had never heard of the SCM gang before the incident.

Doe was described by the officer as "very very collected" when describing the rape, and did not want to go to the hospital for a medical exam. She testified that petitioner was a "different kind of rapist" who used a condom, did not hide his appearance, did not force himself on her, and agreed when she asked him not to perform anal sex. The SART test showed no evidence of rape, and Doe seemingly joked with the detective when comparing the size of petitioner's penis to a water bottle or a banana.

The state's theory was that petitioner and his confederates were out looking to burglarize the houses of strangers, and randomly selected Doe's

house out of all of the thousands of homes in Moreno Valley, even though she had a sign in her yard showing the home was protected by a security system. And the house they selected was just down the street from petitioner's mother's house.

The state's theory required the jury to accept the remarkable coincidence that the perpetrators randomly selected the home of a mother of SCM gang members, and that she had no idea who petitioner was despite the fact that he had long term relationship with her former husband and two sons, most notably Brandon, who he had been close to at various times in their lives.

The defense theory was that petitioner knew Doe, saw her at the Segovia Apartments when he was 20 years old, and the two began flirting. The flirting continued at Bahama Mama's nightclub (where Doe also said she had never been) and the two later arranged for a late night meeting at her house.

Petitioner was a gang member, his gang was known to commit burglaries of strangers' houses and he had a prior conviction for an attempted burglary.

The prosecution was allowed to present substantial evidence regarding petitioner's gang membership, and how frightening the gang was, but it asked the jurors to ignore the gang expert's testimony that gang

members who commit sex offenses would be hurt or killed.

The problem in the present case arose when he was having sex with Doe, and his bored friends entered her house through a window to steal from her.

There was evidence available to show that Doe was lying. The trial court ruled that evidence showing petitioner and Doe were flirting in Bahama Mama's was admissible to impeach her claim that she did not know him and had never been to the club. But that evidence was to be presented by SCM member Terry King who left town before the trial and could not be located. The gang expert had testified that gang members like King, who testified at a trial, would face consequences from the gang and King's absence was consistent that theory. (5 RT 955.)

But the court ruled that other evidence was inadmissible because its admission would violate the rape shield law as described in Evidence Code section 1103 (c)(1).

Eric Parker was prepared to testify that Doe, was known to have sex with SCM members at the Segovia Apartments, but the court precluded the admission of that testimony. (1 RT 23.) The court found evidence that Doe had been "hood winked" (an unspecified sex practice with gang members) was inadmissible. (1 RT 22.)

Testimony from former deputy Dixon that Doe was known to have

relationships with younger SCM members was inadmissible as was evidence that the SCM members joked about Doe in a sexual way. (1 RT 22.) The court also precluded Layelle Hayes from testifying that Doe "messed around" with friends of her two sons. (1 RT 22.)

The court found that all of that evidence was inadmissible under the rape shield law. (1 RT 22-24.)

The evidence was admissible under section 1103 (c)(5).

The trial court erred by finding the evidence was precluded by section 1103 (c)(1). Instead, the evidence was admissible under section 1103 (c)(5) because it related to Doe's credibility.

The evidence largely involved Doe's sexual history but the purpose of its admission was to show that her version of the incident was a lie. The point was not to show that because Doe had been promiscuous with other SCM gang members, she consented to sex with petitioner. Rather, the point was to show that she was lying by denying that she knew him, and denying that she knew whether her sons were SCM gang members or that she knew anything about the gang before the incident. The excluded evidence was directly admissible to show that she lied about her connections to the SCM gang.

This incident was embarrassing to Doe as she was an older woman (44 years old) having sex with young gang members — her sons' friends.

That would be the reason for setting up the rendevous at midnight when it could be done discreetly. But the evidence directly impeached her testimony that she knew nothing about SCM. If the jurors believed she was lying about this, they would almost certainly have rejected her rape story.

If the evidence was admissible under section 1103 (c)(4), the court still had to conduct a section 352 analysis. The court did so and found that even if relevant, the evidence was more prejudicial than probative. (1 RT 29.) It would be "distracting to the jury" and dealt with "side issues that are not really focused on the issues in this particular case." (1 RT 29.)

This evidence wouldn't have been overly distracting. The jurors would try and determine whether Doe was lying, and the evidence that she had been having sex with members of the gang she claimed not to know would have been very persuasive on the issue. Even though Terry King disappeared, and he was the witness who would have described seeing petitioner and Doe flirting in Bahama Mama's, this other evidence would have been devastating to her credibility.

Assuming the evidence of prior sex with SCM members was inadmissible under section 1103, petitioner's constitutional rights to present a defense, to cross-examine adverse witnesses, and to a fair trial would have trumped the relevant portions of the rape shield law.

The defense that petitioner needed to establish was that he flirted

and had sex with Doe, who was then burglarized by his "idiotic" gang member friends. Evidence that Doe had previously "messed around with" SCM members would have supported his defense, and he had a right under the Sixth Amendment compulsory process claim to present facts supporting that defense to the jury. (See *Washington v. Texas*, *supra*, 388 U.S. at p. 19.) The court's ruling also prevented him from cross-examining his accuser in violation of his right of confrontation. (See *Olden v. Kentucky*, *supra*, 488 U.S. at p. 232, where the court found that prohibiting cross-examination of the victim on the issue of consensual sex with the defendant would have jeopardized her other relationship, and a reasonable jury might have had a different impression of the witness's credibility if the court had permitted the questioning.) And the adverse ruling violated petitioner's right to due process under *Chambers* where the court emphasized that a defendant's right to present evidence and cross-examine witnesses is essential to a fair trial. (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 294.)

The Court of Appeal Opinion

The court rejected the petitioner's state law arguments based on its conclusion that the defense could have presented the same witnesses it sought to present who could have testified that the accuser had a reputation for spending time with gang members — without mentioning her sexual

encounters with the gang members. (Opinion, p. 17.) "The evidence of the victim's alleged reputation for promiscuity was not necessary for impeachment..." (*Ibid.*)

But the question is not whether the defense could have presented the evidence in a way that more clearly avoided the rape shield law. Rather the issue is whether the attempt to rebut the accuser's claim that she did not know petitioner's gang with evidence of her reputation for sleeping with members of the gang violated section 1103(c)(5) or the constitutional provisions.

Petitioner argues the evidence was admissible because it showed the accuser was lying on the critical issue of whether she knew the gang.

Regarding the constitutional issues, the court finds the accuser's "alleged reputation for promiscuity with the gang members... was not relevant to contradicting her claim that she did not know of the Sex Cash Money gang." (Opinion, p. 19.) However, evidence that she was known to associate with members of her sons' gang would have devastated her credibility.

Absent this evidence, the state was allowed to portray the accuser as an innocent suburban single mother who was the victim of burglary and home invasion rape. The state was permitted to argue that it was sheer coincidence that petitioner chose her home to burglarize. The truth was

that she made up the allegation of rape only because she was upset with petitioner who allowed his friends to burglarize her house while she was having consensual sex with him. Of course she knew petitioner and members of the gang. She was not an innocent suburban single mom but the court's ruling prevented the jurors from learning the true facts that would have almost certainly led to an acquittal on the rape charge. Petitioner would still have had liability for the burglary based on the actions of his friends.

II

AB 333 requires that the gang's predicate offenses be committed in concert with other gang members.

Petitioner argued that under the newly enacted Penal Code section 186.22(f), the state has to prove the defendant belonged to a "criminal street gang," which is an "ongoing, organized association or group of three or more person... whose members collectively engage in, or have engaged in, a pattern of criminal activity." The word "members" is plural, which means more than one member of the gang must have engaged in criminal conduct. And the term "collectively" suggests the members must have acted together.

Petitioner argues the new statute impacts the present case where the predicate crimes were shown to have been committed by members of the gang acting alone. Petitioner's argument is supported by the only published

opinion of the topic — *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1088-1089.

The Court of Appeal in petitioner's case found that *Delgado* was wrongly decided, and the gang predicates can be established where two gang members separately committed crimes on different occasions, or two members committed a crime together on the same occasion. (Court of Appeal Opinion, p. 22.)

Petitioner asks that the case be returned to the Court of Appeal with an order to follow *Delgado*. In the alternative, petitioner asks that this court grant review and decide the proper interpretation of newly enacted section 186.22(f).

Conclusion

Petitioner respectfully requests that this court address these two important legal issues in one of the manners suggested.

Dated: July 27, 2022

Respectfully submitted,

s/Patrick Morgan Ford
PATRICK MORGAN FORD,
Attorney for Petitioner
KEJUAN DARCELL CLARK

Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 5,328 words, as determined by the word count feature of the program used to produce the brief.

Dated: July 27, 2022

s/Patrick Morgan Ford
PATRICK MORGAN FORD

DECLARATION OF SERVICE BY U.S. MAIL

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. On July 27, 2022, I served a *Petition for Review Opening Brief*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

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Additionally, I electronically served a copy of the above document as follows: 1) Court of Appeal, www.truefiling.com, and 2) Attorney General electronic notification address, sdag-docketing@doj.gov. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on July 27, 2022, at San Diego, California.

Esther F. Rowe
Esther F. Rowe

Court of Appeal Opinion

Filed 6/28/22; Certified for Partial Pub. 7/14/22 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEJUAN DARCELL CLARK, Defendant and Appellant.	E075532 (Super.Ct.No. RIF1503800) OPINION

APPEAL from the Superior Court of Riverside County. Bambi J. Moyer, Judge. Affirmed with directions.

Patrick Morgan Ford for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

On the twelfth day of a jury trial, the jury found defendant and appellant Kejuan Darcell Clark, guilty of (1) rape (Pen. Code, § 261, subd. (a)(2)[1]; (2) forced oral copulation (§ 287, subd. (c)(2)(A))[2]; (3) false imprisonment (§ 236)[3]; (4) first degree burglary (§§ 459, 460, subd. (a)); and (5) robbery in concert inside an inhabited dwelling (§§ 211, 213, subd. (a)(1)(A)). The jury found true the allegations that (A) the rape and forced oral copulation were committed during the burglary (§ 667.61, subd. (e)(2)); (B) during the burglary, a person other than an accomplice was present in the residence (§ 667.5, subd. (c)(21)); and (C) the false imprisonment, burglary, and robbery were committed in association with a criminal street gang with the specific intent to assist criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)). Defendant admitted (i) suffering a prior strike conviction (§§ 667, subd. (c)&(e)(1), 1170.12, subd. (c)(1); and (ii) committing the charged "felony offenses while released

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[1] All subsequent statutory references will be to the Penal Code unless otherwise indicated.

[2] The record reflects defendant was convicted under section 287, subdivision (c)(2)(A). The prosecutor alleged that the forced oral copulation occurred on July 25, 2015. In 2015, the relevant law for forced oral copulation was section 288a, subdivision (c)(2)(A). In the trial court, defendant argued that he was wrongly charged under section 287, subdivision (c)(2)(A), because that statute did not exist in 2015. The prosecutor conceded that the proper statute was section 288a. The trial court also determined that section 288a was the relevant law in 2015 but concluded that citing section 287 was an error that was "de minimis in nature." Thus, the record reflects a conviction under section 287, subdivision (c)(2)(A), despite the offense having been committed in 2015. We will direct the trial court to correct the indeterminate abstract of judgment.

[3] After finding defendant not guilty of kidnapping (§ 207, subd. (a)), the jury found defendant guilty of false imprisonment, as a lesser included offense.

from custody prior to the judgment becoming final on the primary offense"[4] (§ 12022.1). The trial court sentenced defendant to prison for a determinate term of 20 years plus an indeterminate term of 90 years to life.[5] Defendant contends (1) the trial court erred by excluding evidence of the victim's sexual history; and (2) Assembly Bill No. 333 changed the requirements for gang enhancements (§ 186.22, subd. (b)), and the

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[4] " 'Primary offense' means a felony offense for which a person has been released from custody on bail or on his or her own recognizance prior to the judgment becoming final, including the disposition of any appeal, or for which release on bail or his or her own recognizance has been revoked." (§ 12022.1, subd. (a)(1).) All the offenses in the instant case were alleged to have occurred on July 25, 2015. The primary offense was derived from defendant's prior strike conviction case (Riverside Superior Court case No. RIF1407110).

Defendant's conviction for his prior strike offense occurred on October 7, 2014, i.e., prior to July 25, 2015. Defendant was granted 36 months of formal probation, with the condition that he serve 178 days in the work release program. On November 25, 2014, defendant was terminated from the work release program with an outstanding balance of 178 days. The following day, the trial court revoked defendant's probation. On March 5, 2015, defendant posted bail. In the instant case, the trial court imposed a consecutive two-year prison term for the on-bail enhancement.

Because the issues are not argued on appeal, we leave for another day the questions of (1) whether bail posted due to a work release probation violation meets the definition of being on bail for "a felony offense" "prior to the judgment becoming final" (§ 12022.1, subd. (a)(1); see also *People v. McClanahan* (1992) 3 Cal.4th 860, 868 [" '[S]ection 12022.1 enhancements . . . are not imposed unless there has been a conviction of both the "primary offense" and the "secondary offense." Thus, section 12022.1 enhancements are never imposed unless the defendant has been convicted of a prior felony as well as a subsequent felony' "]); and (2) whether one trial court case can constitute the basis for both a prior strike conviction and an on-bail enhancement (*People v. McClanahan, supra,* 3 Cal.4th at p. 869 ["[T]he Legislature did not intend on-bail enhancements to operate in the same manner as 'prior felony conviction' enhancements"]).

[5] Defendant asserts the trial court sentenced him to a determinate term of 20 years eight months. The eight months were imposed in the prior strike case, i.e., Riverside Superior Court case No. RIF1407110. Because the eight months were imposed in a different trial court case, we do not include them herein.

evidence in the instant case does not satisfy the new legal requirements, so the gang enhancement must be reversed. We affirm the judgment with directions.

FACTUAL AND PROCEDURAL HISTORY

There was little dispute regarding the facts that (A) defendant was a gang member; (B) defendant was in the victim's house on July 25, 2015; (C) defendant engaged in intercourse with the victim; (D) the victim orally copulated defendant; (E) defendant's associates in the gang stole the victim's television while defendant and the victim were engaged in intercourse; (F) defendant stopped engaging in intercourse with the victim when her house alarm sounded a warning chirp due to one of defendant's associates opening a door; and (G) defendant and his gang associates sold the victim's television, laptop, and cell phone on July 25, 2015.

The primary disputes in this case pertained to (1) whether the victim knew defendant prior to July 25, 2015; (2) whether the victim had knowledge of the Sex Cash Money street gang prior to July 25, 2015; (3) whether the victim invited defendant to her house; (4) whether the victim consented to intercourse and oral copulation with defendant; and (5) whether defendant stole the victim's laptop and cell phone. We focus our presentation of the facts on the issues that were in dispute.

A. PROSECUTION'S CASE IN CHIEF

1. *DEFENDANT'S CRIMES*

In December 2013, the victim moved to a house in Moreno Valley with her youngest son (Child)[6]. In July 2015, the victim was 44 years old, and Child was two years old. Child and the victim slept in separate bedrooms. On the night of July 24, 2015, the victim put Child to bed, set the house alarm, and went to sleep. In order to cool the house, the victim left open a downstairs window in the back of the house. When the victim went to sleep, she was wearing a T-shirt and shorts.

At approximately 1:00 a.m. on July 25, 2015, the victim woke because she felt that someone was in her bedroom. Either the victim or defendant turned on the light in the bedroom. The victim had never seen defendant before.

Defendant asked where the victim's jewelry was located as he went through her dresser drawers and closet. The victim heard "noises like bumping around" and realized "someone was downstairs." The victim feared for herself and Child. The victim did not try to escape because she "wasn't going to leave [Child]." Defendant took the victim's cell phone and laptop.

Defendant directed the victim to find a condom. The victim located condoms in the master bathroom and gave them to defendant. The victim prayed aloud, and defendant told her "to shut up." Defendant told the victim, "[Y]ou need to suck this"—directing her to orally copulate him. The victim complied. At the time, the victim was

[6] We omit the victim's sons' names to aid in protecting the victim's identity.

afraid because she "didn't know who else was in [her] house. [She] didn't know who else was coming up[stairs]."

Defendant put a condom on his penis. The victim was terrified; she could still hear movement downstairs, she was thinking "of getting shot or hurt or other people coming [upstairs]." The victim thought that if she screamed it would "make things worse, and [she] knew [Child] was in the other room." The victim did not resist because she "didn't want to bring more attention to the upstairs," and she "felt like if [she] was quiet and cooperated that maybe [she] would be okay somehow." The victim believed that if she physically resisted, then she would be hurt. Defendant moved the victim's shorts and underwear to the side, and he raped the victim.

The victim's house alarm began sounding a warning chirp because a person downstairs opened the garage door. Defendant left. The victim was unable to call the police because defendant took her cell phone, and she did not have a house phone. The victim went to her house alarm panel and pressed the button for the police. The victim went to neighbors' houses and knocked on their doors. One neighbor came to the door but did not open it. The victim yelled for the neighbor to call the police. The neighbor called 911.

The nurse who conducted the sexual assault examination of the victim, on the morning of July 25, 2015, did not see any injuries on the victim's body. The nurse explained that there may not be injuries after a sexual assault if the person attacked does not physically resist.

2. *SELECTING THE VICTIM'S HOUSE*

Defendant burglarized the victim's house along with Demario Mosely (Mosely), Eric Parker (Parker), and M.M.[7] Defendant, Parker, and M.M. were members of the Northside Parkland street gang which is a subset of the Sex Cash Money street gang.

During an interview with law enforcement, M.M. explained that he, defendant, Mosely, and Parker (collectively, the Group) were drinking and smoking marijuana together at the Segovia Apartments, in Moreno Valley, waiting for night to fall in order to burglarize a home. The Group planned to find "a house that looks like they have money."

The Group drove to the victim's neighborhood. Because M.M. was the youngest, he knocked on doors, and if a person answered, he would "ask if somebody was there" or "ask to use their phone . . . [because he was] stranded." For example, he would ask, " '[I]s Steve there,' " and then pretend he was at the wrong address. M.M. would then "just go to another house." After knocking on "a few" doors, M.M. knocked on the victim's door and no one answered.

Defendant, Mosely, and M.M. went into the victim's backyard, while Parker waited in the car as the lookout. M.M. removed the screen from the open window. Defendant, Mosely, and M.M. entered the house through the window, and defendant went upstairs to see if the house was empty. Mosely instructed M.M. to help him remove the television from the wall. After Mosely and M.M. placed the television in

[7] M.M. was 16 years old at the time of the burglary. Therefore, we are not using his full name.

the car, they went back to the house to get defendant, but defendant was already leaving with the victim's laptop and cell phone.

3. *THE VICTIM'S FAMILY*

The victim's former husband (Husband) was a member of the Eight Trey Crips street gang in Los Angeles. In 2000, the victim divorced Husband. After the divorce, the victim moved from Moreno Valley to Los Angeles. In 2000, the second of the victim's three sons (Son), was approximately five years old, i.e., he was born in approximately 1995. Son moved to Los Angeles with the victim. In approximately 2008, when Son was approximately 13 years old, he moved back to Moreno Valley to reside with Husband.

In 2015, Son was still residing with Husband, in Moreno Valley. The victim estimated that from January 2015 to July 2015, she saw Son less than five times because she had a strained relationship with him. The victim denied having heard of the gang Sex Cash Money prior to the burglary. The victim denied knowing if Son and her eldest son were gang members. The victim denied knowing defendant prior to the burglary.

B. DEFENDANT'S CASE

Defendant was born in November 1994. Defendant is a member of the Eight Trey street gang. Husband was defendant's "original big homie from Eight Trey" in Los Angeles. Husband was "like a father figure" to defendant."

Defendant is also a member of Sex Cash Money and the Northside Parkland clique. Son is also a member of the Eight Trey gang in Los Angeles and the Sex Cash

Money gang in Moreno Valley. Son and defendant were "dang near best friends" who have known each other since they were 11 or 12 years old.

Defendant used to see the victim at Saint Andrews Park in Los Angeles when defendant played with Son as a child. Son and defendant both attended Moreno Valley High School. The two were together during the school day and after school. In 2010, on three or four occasions, the victim drove defendant and Son from school to Husband's house and dropped them off.

In early 2014, the victim often dropped Son off at the Segovia Apartments, in Moreno Valley, and then spent a few minutes talking with her friend, Coco, who lived at the apartments. Over time, the victim began spending more time with Coco at Coco's apartment. Defendant also spent time at Coco's apartment; he was visiting Coco's nephews. When defendant and the victim were at Coco's apartment, the victim recognized defendant from "back in the day." Defendant and the victim talked while defendant waited for Coco's nephews.

One night, in June 2015, the victim and defendant were both at a sports bar in Moreno Valley. The victim was there with Coco. Defendant was there with his friend, Terry. While at the bar, defendant and the victim kissed.

After that night, when defendant saw the victim alone at the Segovia Apartments, he flirted with her. Defendant would say things like, "[S]top playing, you gonna let me." In other words, "[A]re you going to let me have sex with you?" The victim did not say no, but she expressed concerns about defendant having "baby mama drama" and defendant gossiping if they did engage in intercourse.

On July 24, 2015, defendant saw the victim in her car at the Segovia Apartments and approached her. Defendant asked her, "[I]s today the day? Like stop playing, you always teasing me and stuff. Is today that day? And she's all like, well, just come to the house later on. What she was sayin' is we'll talk about it, basically." The victim told defendant to come to her house at midnight.

Around 11:00 p.m., defendant asked Mosely to give him a ride to the victim's house. The plan for the night of July 24, 2015, was for Mosely, M.M., and Parker to take defendant to the victim's house, then go to a bar in Riverside, and then go to defendant's house.

In the car, defendant directed Mosely to the victim's house. Defendant had been to the victim's house approximately three times before to spend time with Son. When the Group arrived, the garage door was open. Defendant told Mosely to honk the horn, which he did, and the victim came out into the garage. The victim greeted defendant and they walked into the house through the garage.

Inside the house, defendant and the victim joked and flirted with one another. The victim wanted to check on Child, so defendant and the victim went upstairs. Defendant waited on the landing while the victim was in Child's room. When the victim exited Child's room, she went to her bedroom and defendant followed. The two sat down on the victim's bed and discussed whether defendant planned to tell anyone if they engaged in intercourse. Defendant said he could keep a secret. The two engaged in consensual sexual activity.

Mosely, who had been waiting in the car, became bored. Mosely decided to "go inside while [defendant was] upstairs and see what [he] can get." Mosely and M.M. climbed through the open window at the back of the victim's house. Mosely carried a television, which had been mounted on a wall, to the car where Parker was waiting, and M.M. carried the victim's phone and laptop out of the house.

After defendant and the victim stopped engaging in intercourse, due to the house alarm chirping, the victim went downstairs, and defendant followed. The victim saw her television was missing. The victim asked if defendant knew who stole her television. Defendant conceded that his friends "took the TV," and the victim said, "[W]ell you set me up then." Defendant denied planning the burglary, but "[f]rom there on [the victim] started cussing [defendant] out," saying things like, "I should never have messed with your young a-s-s" and that she would "get [Husband] on [defendant's] ass." The victim also said that if defendant did not return her television, then she would accuse him of rape.

At that point, defendant said, "I'm gonna go out there, I'll be right back." Defendant went to the car. Defendant was angry. Defendant said, "Y'all trippin'. Maybe we should bring the TV back. And [Mosley said], bro, it's already sold, it's already sold." Mosley was "the big homie," meaning he had more clout in the gang, so he had "some say-so over the little dudes," like defendant. Thus, in regard to the television, there was "nothin[g defendant] could really do" without starting "problems with the big homies against [defendant]." Defendant entered the car, and the Group "just left it at that and kinda drove off."

C. PROSECUTION'S REBUTTAL CASE

The victim denied knowing anyone named Coco. The victim denied spending time with a person named Coco at the Segovia Apartments. The victim denied ever having seen defendant at the Segovia Apartments. The victim denied that she let defendant into her house. The victim denied that she invited defendant to her house. The victim denied that she agreed to sexual activity with defendant on the night of July 24 or 25, 2015.

D. SON AND COCO

Son and Coco did not testify at trial. The prosecutor did not include Son or Coco on the prosecution's witness list. Defense counsel did not include Son or Coco on the defense's witness list.

E. MOTION IN LIMINE

Prior to trial, defense counsel moved to admit evidence of the victim's sexual history. Defense counsel argued that a victim's sexual history cannot be used to prove consent (Evid. Code, § 1103, subd. (c)(1)), but it can be used to impeach credibility (Evid. Code, § 1103, subd. (c)(5)). Further, defense counsel asserted, "Evidentiary rules may impermissibly interfere with a defendant's constitutional rights when they prevent the defendant from presenting his defense." Defense counsel contended the evidence of the victim's sexual history was "crucial to Defendant's claim of innocence."

Defense counsel made an offer of proof in a declaration[8] that was based on information and belief.[9] In the declaration, defense counsel asserted, among other things, that (1) "Parker will testify that [the victim] had a reputation of having sex with guys from the Segovia Apartments," and (2) Layelle Hayes, who is a friend of the victim's eldest son, would "offer reputation evidence that [the victim] likes to 'Mess' with younger guys and she has been known to mess around with other friends of [Son] and [the victim's eldest son]."

At the hearing on the motion, the trial court explained the statutory scheme for attacking a witness's credibility. The court said, "[Evidence Code section] 786 says, and I think this is extremely important, ['E]vidence of traits of his character other than honesty or veracity[,] or their opposites[,] is inadmissible to attack or support the credibility of a witness.[']" The trial court remarked that the evidence described in defense counsel's offer of proof "goes to . . . character with respect to promiscuity as opposed to honesty, and I think that is my primary difficulty with some of what the Defense is proffering."

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[8] Defense counsel labeled the document as an affidavit, but it was in the form of a declaration. (*Fairbanks, Morse & Co. v. Getchell* (1910) 13 Cal.App.458, 461 [an affidavit is a written statement verified by an oral oath sworn before an official competent to administer oaths]; Code Civ. Proc., § 2003.)

[9] In general, a "declaration . . . made on information and belief . . . [does] not provide competent evidence of the facts stated therein. [Citation.] 'An affidavit based on "information and belief" is hearsay and must be disregarded.' " (*Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1275, fn. 5.)

Defense counsel argued, "But it all goes under the umbrella of attacking her credibility. . . . [S]he was out there, she was having sex, and she did have a reputation for having sex with younger men, particularly gang members." The trial court responded, "It's not directly relevant to truth and veracity. What it is relevant to is whether she sleeps around and whether she sleeps around with other gang members." The court explained, "It goes right back to consent. . . . [The] rape shield law is there for a reason, and it seems that this is the exact reason why [the] rape shield law is in effect. So that we're not bringing up a complaining witness's entire sexual history, which essentially is she had sex with lots of people all the time so she probably consented." Defense counsel replied, "I understand that's what it does, but I'm more using this to impeach her and to attack her credibility on the fact that she said that she doesn't."

The trial court said the evidence would also be inadmissible under Evidence Code section 352 because "[i]t's distracting to the jury. It's talking about side issues that are not really focused on the issues in this particular case . . . ." The trial court excluded Parker's testimony about the victim's reputation for engaging in intercourse with men from the Segovia Apartments and Hayes's testimony about the victim's reputation for "messing" around with younger men and her sons' friends.

During the trial, defense counsel said he wanted to ask a potential witness questions that would "imply a relationship between [the victim] and [defendant]." The trial court responded, "Well, as I said in the original 402s, I do not want the jury speculating as to a relationship between the two by someone who has seen one or seen

the other but not seen them together. That having been said, there are a number of areas that were asked of [the victim] . . . [¶] . . . [¶] . . . on cross-examination that she denied. I think those areas can be inquired into by way of impeachment of her veracity with respect to the answers to those statements. So it goes to truth and veracity regarding those."

DISCUSSION

A. STATE LAW ERROR

Defendant contends the trial court erred by excluding evidence of the victim's alleged sexual history because such evidence was relevant to the victim's credibility. (Evid. Code, § 1103, subd. (c)(5).)[10]

We review a ruling excluding evidence under the abuse of discretion standard of review. (*People v. Johnson* (2019) 32 Cal.App.5th 26, 46.) In a rape prosecution, "reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness." (Evid. Code, § 1103, subd. (c)(1).) However, the foregoing law, does not make inadmissible any evidence offered to attack

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[10] Defendant asserts, "[T]he evidence was admissible under [Evidence Code] section 1103 (c)(4) because it related to [the victim's] credibility." Now and at the time of defendant's trial, Evidence Code section 1103, subdivision (c)(4), provides, "If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness." The People inferred, and we also infer, that defendant intended to cite Evidence Code section 1103, subdivision (c)(5), which concerns credibility.

the credibility of the complaining witness." (Evid. Code, § 1103, subd. (c)(5).) "One proper method of impeachment of any witness is to call other witnesses who contradict him." (*People v. Kinkichi Watanebe* (1928) 91 Cal.App. 290, 292.)

Our Supreme Court has "emphasize[d] that '[g]reat care must be taken to insure that this exception to the general rule barring evidence of a complaining witness' prior sexual conduct . . . does not impermissibly encroach upon the rule itself and become a "back door" for admitting otherwise inadmissible evidence.' " (*People v. Fontana* (2010) 49 Cal.4th 351, 363.)

Defendant contends the evidence of the victim's reputation for engaging in intercourse with members of Sex Cash Money was relevant "to show that she was lying by denying that she knew [defendant], and denying that she knew whether her sons were [Sex Cash Money] gang members or that she knew anything about the gang before the incident."

In seeking to attack the victim's credibility, defendant could have called members of Sex Cash Money to testify that they spent time with the victim, that they told the victim about their gang membership, that they told the victim about Sex Cash Money, and that they told the victim about Son's gang membership. The gang members could provide that testimony without testifying that they engaged in intercourse with the victim. That testimony would serve the purpose of contradicting the victim's testimony without violating the rape shield law (Evid. Code, § 1103, subd. (c)(1)).

To the extent defendant was unable to find such gang members to testify, and thus had to rely upon reputation evidence as circumstantial evidence of the victim's

knowledge, there was still no need to discuss the victim's alleged sexual history. Defense counsel could have asked witnesses if the victim had a reputation for spending time with gang members. (See Evid. Code, § 1101, subd. (c) ["Nothing in this section affects the admissibility of evidence offered to . . . attack the credibility of a witness"]; but see Evid. Code, § 786 ["Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack . . . the credibility of a witness"].) That the victim may or may not have had sexual intercourse during the time she reportedly spent with gang members is irrelevant to the inference that she knew defendant, "knew whether her sons were [Sex Cash Money] gang members, or that she knew anything about the gang before the incident."

Defendant's appellant's reply brief reads, "And the sexual part could have been sanitized so the witnesses would have testified that [the victim] had many contacts or experiences with [Sex Cash Money] members." That is precisely what defense counsel could have done in seeking to attack the victim's credibility without violating the rape shield law (Evid. Code, § 1103, subd. (c)(1)).

At oral argument in this court, defendant asserted that, while the excluded evidence could have been sanitized, it would have been more effective for the defense to provide evidence of the victim's alleged reputation for promiscuity with gang members, and, because it was impeachment evidence, the trial court erred by excluding it. We are not persuaded. The evidence of the victim's alleged reputation for promiscuity was not necessary for impeachment, and thus, it was within the bounds of reason to exclude it.

In sum, the trial court did not abuse its discretion by excluding the evidence of the victim's alleged sexual history because the victim's alleged sexual history was irrelevant to her credibility.

B. FEDERAL CONSTITUTION

Defendant asserts the exclusion of evidence pertaining to the victim's alleged sexual history violated his federal "constitutional rights to present a defense, to cross-examine adverse witnesses, and to a fair trial."

" 'Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right.' [Citation.] 'A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.' " (*People v. Bautista* (2008) 163 Cal.App.4th 762, 783.)

A "[d]efendant's entitlement to due process of law does not encompass a right to any process of his own choosing, including the right to introduce irrelevant evidence of sexual history." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1249.) As concluded *ante*, the evidence of the victim's alleged sexual history was irrelevant to attacking her credibility. Therefore, defendant did not have a due process right to introduce the evidence. Further, because the evidence was irrelevant, it did not impact defendant's

right to present a defense or his right of cross-examination. We conclude defendant's constitutional rights were not violated.

At oral argument in this court, defendant asserted that the issue of the victim's credibility was not a minor issue—it was a critical issue in this case. To be clear, we are not concluding that the issue of the victim's credibility was a minor issue. Rather, we are concluding that the victim's alleged reputation for promiscuity with gang members is a subsidiary point because that evidence was not relevant to contradicting her claim that she did not know of the Sex Cash Money gang.

C. GANG ENHANCEMENT

Defendant contends that, after his trial, Assembly Bill No. 333 (2021-2022 Reg. Sess.) changed the requirements for gang enhancements (§ 186.22, subd. (b)). In particular, defendant contends the revised law requires that predicate offenses be committed in concert with other gang members.[11] Defendant asserts that the evidence in the instant case does not meet that new requirement.

" ' "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.]" [Citation.] " 'When the language of a statute is clear, we need go no further.' [Citation.] But where a statute's terms are unclear or ambiguous, we

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[11] The changes at issue here made to the gang enhancement statute by Assembly Bill No. 333 have been held to apply retroactively. (*People v. Sek* (2022) 74 Cal.App.5th 657, 667; *People v. E.H.* (2022) 75 Cal.App.5th 467, 478.) The People do not dispute that holding.

may 'look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' " ' " (*People v. Scott* (2014) 58 Cal.4th 1415, 1421.)

" '[C]riminal street gang' means an ongoing, organized association or group of three or more persons . . . whose members collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) The word "members" is plural, which means more than one member of the gang must have engaged in criminal conduct.

" '[P]attern of criminal gang activity' means the commission of, . . . , or conviction of, two or more of the following offenses, . . . [and] the offenses were committed on separate occasions or by two or more members." (§ 186.22, subd. (e)(1).) Given that multiple members of the gang must be involved in the pattern of criminal gang activity, the plain meaning of the phrase "the offenses were committed on separate occasions or by two or more members" means there are two options for establishing the requisite pattern: (1) prove two different gang members separately committed crimes on two occasions; or (2) prove two different gang members committed a crime together on a single occasion. It would not suffice to prove, for instance, that one gang member committed two crimes on two different occasions. Because it must be demonstrated that "members" (plural) of the gang are collectively involved in criminal activity—one individual gang member on a crime spree would be insufficient to prove a collective pattern of criminal activity.

There are cases that disagree with the foregoing interpretation. In *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1088 and 1089 (*Delgado*), the appellate court concluded that the word "collectively" (§ 186.22, subd. (f)) meant "committed by more than one person." Without identifying an ambiguity in the plain language of the statute, the court turned to legislative history and concluded that the Legislature "inten[ded] to significantly limit the scope of the gang enhancement" when modifying the statute, and a significant limitation would only occur if "collectively" were interpreted to mean in concert, because that interpretation would make the gang enhancement more difficult to prove. (*Ibid.*) Thus, the appellate court concluded that, in order to prove a pattern of criminal activity, the predicate offenses had to be committed by gang members acting in concert. (*Ibid.*)

We do not find the *Delgado* analysis to be persuasive because it turned to legislative history after merely defining the word "collectively." (*Delgado*, *supra*, 74 Cal.App.5th at pp. 1088-1089.) It did not, with respect to our colleagues, devote sufficient attention to the plain language of the statute. If "collectively" means the prior crimes must have been committed in concert, then the first alternative in subdivision (e)(1) is rendered surplusage. The two alternatives are proving that "[(1)] the offenses were committed on separate occasions or [(2)] by two or more members." (§ 186.22, subd. (e)(1).) If "collectively" means the predicate crimes had to be committed in concert, then the prosecutor must always prove the predicate crimes were committed "by two or more members." The alternative option that "the offenses were committed on separate occasions" would be surplusage. (§ 186.22, subd. (e)(1).) We avoid

interpreting the statute in a manner that would render one of the explicit options surplusage. (*People v. Loeun* (1997) 17 Cal.4th 1, 9.) In sum, we disagree with *Delgado*'s interpretation of the statute.

In *People v. Lopez* (2021) 73 Cal.App.5th 327, 344-345, the court wrote, "At trial, the People introduced evidence that gang member William Vasquez committed two murders in 2005 and gang member Guillermo de Los Angeles committed a carjacking and robbery in 2005. . . . Assembly Bill 333 will require the prosecution to prove collective, not merely individual, engagement in a pattern of criminal gang activity. No evidence was introduced at trial to establish that the crimes committed by Vasquez and de Los Angeles constitute collective criminal activity by the 18th Street gang." We do not find *Lopez* to be persuasive authority because it did not provide a plain language analysis of the statute pertaining to the phrases (A) "members collectively" (§ 186.22, subd. (f)); and (B) "the offenses were committed on separate occasions or by two or more members" (§ 186.22, subd. (e)(1)).

In sum, a pattern of criminal gang activity may be established by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion. Next, we examine whether, beyond a reasonable doubt, the jury would have found the predicate offense requirements were satisfied. (*Delgado, supra,* 74 Cal.App.5th at p. 1090.)

In the instant case, one of the predicate offenses was a robbery committed on October 13, 2014, by Damon Ridgeway, a member of Sex Cash Money.[12] Another predicate offense was an attempted residential burglary committed by defendant on April 7, 2014. Thus, there was evidence that two members of Sex Cash Money committed crimes on separate occasions. Given that evidence, we conclude beyond a reasonable doubt that the jury would have found that members of Sex Cash Money "collectively . . . have engaged in[] a pattern of criminal gang activity." (§ 186.22, subd. (f).)

DISPOSITION

The trial court is directed to amend the indeterminate abstract of judgment to reflect the statute in Count 5 is Penal Code section 288a, subdivision (c)(2)(A), and send the amended abstract of judgment to the appropriate agency/agencies. In all other respects, the judgment is affirmed.

MILLER
Acting P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.

[12] Damon Ridgeway was part of a different subset of Sex Cash Money than defendant. Defendant does not assert there is a lack of substantial evidence for the gang enhancement due to Mr. Ridgeway being part of a different subset.

Filed 7/14/22

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ORDER

THE PEOPLE, Plaintiff and Respondent, v. KEJUAN DARCELL CLARK, Defendant and Appellant.	E075532 (Super.Ct.No. RIF1503800)

THE COURT

Requests having been made to this court pursuant to California Rules of Court, rule 8.1120, for publication of a nonpublished opinion filed in the above entitled matter on June 28, 2022, and it appearing that the opinion meets the standard for publication as specified in California Rules of Court, rule 8.1105(c),

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of "DISCUSSION" sections "A" and "B."

IT IS ORDERED that said opinion be certified for partial publication pursuant to California Rules of Court, rule 8.1105(b).

CERTIFIED FOR PARTIAL PUBLICATION

MILLER
Acting P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **People v. Kejuan Darcell Clark**
Case Number: **TEMP-L1JOP6Z1**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

7/28/2022
Date

/s/Patrick Ford
Signature

Ford, Patrick (114398)
Last Name, First Name (PNum)

Law Office of Patrick Morgan Ford
Law Firm