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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GEORGE KARAVOLOS, Defendant and Appellant.	B266184 (Los Angeles County Super. Ct. No. VA125009)

Appeal from a judgment of the Superior Court of the County of Los Angeles, Raul A. Sahagun, Judge. Affirmed and remanded with instructions.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General and Michael Katz, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant George Karavolos guilty of extortion, torture, false imprisonment, possession of base cocaine for sale, and being a felon in possession of a firearm and found true certain gang and firearm enhancement allegations. The trial court sentenced him to a term of 40 years and 4 months to life. On appeal, defendant raises ten challenges to his convictions based on the sufficiency of the evidence, instructional error, and Penal Code section 654.[1] The Attorney General raises two sentencing errors that defendant does not contest.

We hold that none of defendant's challenges on appeal has merit and agree with the Attorney General that the two sentencing errors must be corrected on remand. We therefore remand the matter with instructions to correct the two sentencing errors and otherwise affirm the convictions.

FACTUAL BACKGROUND

A. Prosecution's Case

The prosecution based its case on the testimony of victims Andrew Jones and Luz Valenzuela, as well as several other witnesses as described below.

1. Jones

Jones and his fiancée, Valenzuela, moved to California "to get away from" his drug problems. In October 2011, he met a man named Rock and developed "an acquaintance kind of business relationship" with him. At the time, Jones was "doing fraud" to support his drug habit, and Rock was "kind of interested in making money off of [Jones] doing that fraud."

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

Jones began paying "taxes"[2] to Rock on the money Jones made cashing counterfeit checks. In January 2012, however, Jones ended his relationship with Rock and moved with Valenzuela, who was pregnant, to live with her mother. But in April 2012, Jones relapsed and resumed taking crystal methamphetamine. He went back to Rock and his associates because he wanted to make money to support his renewed drug usage. Jones assumed that Rock and the people he associated with were gang members because of their tattoos.

In mid-April, Rock introduced Jones to defendant. Defendant and "a couple of girls" were in a detached garage at the back of defendant's property. It appeared to Jones that defendant and Rock had a business relationship.

In mid-May, Rock took Jones back to defendant's house because Jones was "looking at getting back into doing [i]llicit things with checks again." Defendant had all the equipment that Jones needed to print counterfeit checks.

On the Thursday or Friday before Mother's Day, Jones went to defendant's house without Rock. Jones understood that Rock expected him to be working with defendant in the counterfeiting business and that the three men would "split the proceeds three ways." That day, Jones had "printed out a fresh check under [his] name . . . ." He and defendant went to a gas station next to a Wells Fargo Bank in Santa Fe Springs. While defendant waited in his truck at the gas station, Jones went to the bank and cashed a $600 check. Jones and defendant split the $600 with the understanding that each of them would give Rock $100 so that the final division of the check proceeds would be $200 each.

Jones left defendant, checked into a hotel room, and went to sleep. The next day, Jones bought some clothes and waited for defendant to come to the hotel and do drugs with him. When defendant did not come to the hotel as arranged, Jones went to visit Valenzuela, but they argued, so he left. At some point, the $140 that Jones had left from the money he had split with defendant fell out of Jones' pocket.

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2 Jones explained that in the southeast Los Angeles gang culture, if a person was conducting illegal activity for profit in an area claimed by a gang, that person had to pay the local gang members a certain percentage of whatever he made.

Jones called defendant and told him he had lost the $100 that he owed Rock. Defendant told Jones to come to his house so they could talk to Rock and "figure this out." On Mother's Day in 2012, Jones drove his truck to defendant's house. When Jones explained to defendant "what was going on," defendant told him to pick up Valenzuela so they could spend the day with defendant and his wife and child. After Jones and Valenzuela spent the day with defendant and his family, defendant told Jones they would take Valenzuela home and "then . . . come back and . . . deal with this whole thing." The two men took Valenzuela home and returned to defendant's house where defendant told Jones that he had "talked to Rock," and to "expect to get a little bit of an ass whooping" because Jones had "messed up." Jones expected he might get "punched a couple of times, beat up a little bit . . . ."

Jones waited in the backyard by the garage for Rock, who arrived with a gang member named Rascal and Rock's son. Defendant greeted the men, and they told Jones to go into the garage. Jones went into the garage followed by the four men. Rock was larger than Jones, and Rascal had a "scary demeanor." Inside the garage, Jones turned around and was confronted by Rock, who punched him in the face, causing him to crash into a door and fall onto the ground. Jones "ball[ed] up" and was hit numerous times with kicks and punches. The assault lasted about 40 seconds, "[l]ong enough to bust open [the top of Jones'] head . . . ." Jones "was bleeding quite profusely."

Rock stopped the assault, pulled a chair into the middle of the garage, and made Jones sit down. Rock asked Jones "what the F happened to the money, . . . did you think I was some little bitch, did you think you were going to disrespect me like that and get away with it?" Rock then taped Jones to the chair. Rascal said, "'Let's kill this mother fucker and dump him in the river bed.'" Rock poured "some kind of cleaning solution on [Jones'] head" and it "burned quite a bit." Rascal produced a handgun, smashed Jones' taped hand with the gun, and pointed it at the back of Jones's head.

Rock and defendant went outside the garage to talk and returned to tell Jones that nothing further was going to happen to him that night. Rock asked Jones if he had someplace other than home to stay so they could "watch [him], make sure everything

[was] going to be cool." Jones called his friend Lewis, who lived in a garage near where Valenzuela lived and asked if he could stay there. Rock told Jones to tell Lewis that Jones would "'give [Lewis] dope when [he got] there to [pay for the] stay.'"

Using a knife, Rock cut the tape holding Jones in the chair. He told Jones to go and stay at Lewis's house. Rock then drove Jones to Lewis's house in Jones's truck. Jones spent the night there, and the next day Rascal and Rock's son came and took him back to Rock's house where Jones' truck was. Rock called defendant, who came to Rock's house and spoke with him. Rock then instructed Jones "to go with [defendant]. And [they would] work out what [Jones] owed [Rock] through that."

When Jones entered defendant's truck, defendant told Jones that he had saved Jones's life because Rock and the other men were going to kill Jones. Defendant said Jones owed Rock $6,000, and that, if Jones "didn't come up with that money," Jones "was going to be killed." Defendant also warned Jones that Valenzuela and her unborn child could be harmed as well.

Defendant informed Jones that he knew someone who owned a tire store that would take checks from a business. Defendant, posing as a business man, called the tire store and ordered expensive industrial tires. Jones printed out checks for the purchase of the tires and went to the tire store to pick up the load of tires. At the store, Jones spoke to the manager who told him to back up his truck so they could load the tires. Jones gave the manager a $6,500 check, loaded the tires, and took them to defendant's house. Defendant called a friend who arrived, paid defendant cash for the tires, and took them away. Defendant told Jones he had made $3,000 on the tire sale. At that point, Jones felt that defendant was trying to be his friend and help him make money to pay off Jones's debt to Rock. Defendant told Jones, "'Okay, we got this money. [W]e're almost there to paying him off. . . . This will all be over soon. You can go home. . . . And everything will be fine. You don't have to worry about nothing happening to you, happening to your family.'"

The next day, defendant asked Jones if he wanted to bring Valenzuela over to defendant's house. According to defendant, they "'need[ed] to calm [Valenzuela] down

because she's tripping. She [did not] hear from [Jones] for days before this.'" Valenzuela drove to defendant's house and spent some time there. Jones told her he had "messed up" and owed Rock money that defendant was helping him obtain so he could pay Rock off. Valenzuela was upset with Jones for putting himself in that situation. During Valenzuela's visit, defendant and Jones were doing drugs, but not in her presence. Defendant did not want her or anyone else to know he was using drugs. That night, defendant and Jones did drugs in the garage while Valenzuela stayed in the house with defendant's family.

The next day, defendant followed Jones to the same tire store to pick up more tires. Jones gave another counterfeit check to the manager, loaded his truck with tires, and left.

Defendant and Jones returned to defendant's house, and defendant told Jones he was going to rent a hotel room for Jones and Valenzuela so they could spend some time together. Defendant then left and locked Jones and Valenzuela in the garage. Defendant returned with food, an Asian-looking female friend named Arlene (Morales), and another man called Little Man. Defendant and Little Man went outside to talk and then came back to the garage. While Jones talked to Little Man, defendant left again. Jones noticed that Little Man had a pistol in his waistband. The gun was similar to the gun Rascal had. Jones was feeling tired, so he took a hit from a meth bong that was hidden in the garage, notwithstanding Little Man's admonition not to do so.

When defendant returned, he and Little Man went outside and talked. Defendant came back inside, looking upset. Defendant walked up to Jones who was seated and hit him in the face. Valenzuela grabbed her stomach and said, "'Oh my God, what's that for.'" Defendant told her that Jones should not be doing drugs in front of her. Defendant took Valenzuela to his house to stay with his wife. Defendant came back to the garage, told Jones he had "'fucked up,'" and that defendant did not "'know what he was going to do with [him].'" Arlene appeared agitated and scared. Defendant began doing dope in front of Jones and taunted him saying, "'I can do dope now and you fucked up. You can't do dope no more.'"

A short time later, a female friend of Rock's, Chacha, arrived. Jones had met her before and believed she was a gang member. Defendant told Chacha that Jones had "disrespected defendant" when he "hit the meth bong" after defendant had told him not to and when he "'ripped off [her] homeboy . . . Rock.'" He pulled out a pocket knife, held it to Jones's throat, and said, "[W]hat the fuck should I do with this mother fucker . . . ?" Defendant then sliced the back of Jones' left ear with the knife.

At that point, Little Man pulled his gun out, chambered a round, and stood by the door. Defendant told Jones to sit down. Jones was bleeding, so he picked up a dirty shop towel and held it to his ear. Defendant pulled out another blunt knife and began to heat it with a blow torch. Defendant told Jones, "'You better lift up your fucking shirt and you better not make any noises because if you do I'm going to bring your pregnant ass bitch to you and I'm going to do worse to her in front of you.'" Chacha turned up the volume on the radio, and Jones bit down on the towel and lifted his shirt. Defendant told Jones, "'I'm going to teach you a fucking lesson. Never disrespect me again.'" The heated knife was glowing bright orange and it scared Jones. Defendant began to burn Jones's stomach, writing the word "'lame'" across it. Defendant reheated the knife 13 to 14 times during the incident. When Jones jumped up during the burning, Little Man pointed the gun at him and said, "'Sit down. Get the fuck away.'"

When defendant finished burning Jones, he made Jones clean up his own blood from the floor and wall. Defendant cursed at Jones and spit on him while Jones was on his hands and knees cleaning the floor. After Jones finished cleaning, the others in the room were "partying" and "doing drugs," but Jones was not allowed to participate. Jones was "talked down to [as] if [he] was not even a real person." Defendant "was just kind of flexing his machismo in front of everybody."

Before Jones was burned, defendant asked him for the truck he was driving, but Jones said no because the truck belonged to Valenzuela. The day after the burning, Jones showed Valenzuela his stomach, but told her not to say anything or they would do the same thing to her. That afternoon, Jones saw defendant speaking to Valenzuela, telling

her that if she wanted to put the whole incident behind her, she should sign over title to the truck. Jones then saw her sign the title and hand it to defendant.

That night, defendant and Jones drove Valenzuela home and, as she was leaving the SUV, Jones quietly told her to call his brother. Jones went with defendant and they attempted to cash more counterfeit checks. After several failed attempts, Jones tried cashing a check at a "check cashing place," but was again unsuccessful. When he came outside, defendant handed him a tool and some gloves. Defendant told Jones that a woman had just parked a white BMW, left her purse inside, and went into a store. Defendant wanted Jones to break the car window and steal the purse. When Jones refused, defendant said, "'You need to do it, dude. Do you want something fucking bad to happen to you or your wife. You need to do this. Let's just get it done, dude, get this over with.'" Jones took the tool, put on the gloves, and broke the car window. Jones "took [his] time" because he "wanted to get caught." He "figured that would be the fastest way to attract police attention . . . ." The car alarm went off and, because defendant was waiting in the SUV behind him, Jones grabbed the purse and began running. Bystanders chased Jones as he ran toward defendant. Defendant drove away, but then stopped. Jones turned around, handed the owner her purse, showed her his stomach, and asked her to call the police. Because "other guys that were kind of mad" at him were still chasing him, Jones ran to a fast food restaurant. As Jones's pursuers surrounded him, he said, "'Look, just call the cops. Just bring the cops here. I'm waiting for the cops, please.'"

When Jones first spoke to the police, he was unsure whether Valenzuela was safe, so he did not give them defendant's true name, referring to him instead as Doug. Jones was given immunity for his testimony and the charges against him for burglary and forged checks were dismissed.

2. Valenzuela

Luz Valenzuela met Jones in March 2011. She met defendant in 2012 when Jones and defendant "showed up at [Valenzuela's] parents' house" in a white SUV.

On Mother's Day 2012, defendant and Jones invited Valenzuela, who was six months pregnant, to attend services at "some Christian Church in Whittier" with defendant's pregnant girlfriend and her two children. After church, the group went to lunch, stopped at a thrift store, and then went back to defendant's house. Valenzuela watched a movie with defendant's girlfriend and her children in the house while defendant and Jones were in the backyard. After the movie, Valenzuela called her father "[b]ecause it was getting late and he was going to start worrying about [her]." Defendant and Jones then drove Valenzuela home in a white SUV. During the drive, Jones looked nervous. He whispered to Valenzuela to call his brother. Valenzuela exited the SUV at her parents' house and watched defendant and Jones drive away.

A day or two later, Valenzuela called defendant's house looking for Jones. Defendant told Valenzuela that he had seen Jones, but that Jones was not there. Defendant promised to give Jones a message from Valenzuela. Defendant seemed upset that Valenzuela had called his house.

Valenzuela had not seen or heard from Jones since he and defendant dropped her off at her parents' house on Mother's Day. She had tried calling Jones's cell phone, but it "would just ring and ring." The last time Valenzuela had seen her black truck, Jones was driving it, but that was days before.

The next day, Valenzuela called defendant's cell phone several times and was ultimately able to speak with Jones. Jones sounded nervous and scared. Valenzuela knew from a prior conversation with defendant that Jones owed somebody money. Defendant told her that Jones owed "thousands." She also knew that the only people that Jones was associating with were selling drugs. One of those people was Rock, whom Jones had identified as a gang member.

Valenzuela was given directions to defendant's house in Pico Rivera and drove there in her parents' black Honda. When she arrived, she saw her truck there. Two older people invited Valenzuela into defendant's house and, a half hour later, she was allowed to see Jones. He was crying, sweating, and dirty. He tried to speak to Valenzuela, but defendant told him to be quiet. Defendant was "lecturing" Valenzuela and Jones about

Jones "making bad choices and things like that." Defendant said that he had already "stuck his neck out for [Jones]" and that defendant was going to keep Jones there until he paid his debt. Defendant also said that they were going to give Jones until Friday to pay his debt and, if he did not pay it by then, they would kill him. He also told Valenzuela that if she told anyone, "something could happen" to her, her family, and her unborn baby. Valenzuela asked defendant to allow her to take Jones home and offered to pay off Jones's debt, but defendant refused. Valenzuela left defendant's house without Jones.

The next day, Valenzuela tried to reach Jones by telephone. She finally was able to speak to Jones who asked her, "What about the truck?" Valenzuela responded that she could obtain a "title loan" on her truck. She then spoke to defendant and told him that based on a prior loan she obtained in Arizona, she believe she could obtain a $2,000 loan on her truck. Defendant picked up Valenzuela in a white SUV at her parents' house and, instead of taking her to the title loan establishment, he took her straight to his house.

At defendant's house, Valenzuela waited for "a little while" in the driveway by her truck while defendant went into the garage. At some point, Jones came out of the garage looking sick, skinny, and dirty. Defendant came out of the garage, said he had something to do, and told Valenzuela and Jones to wait inside the garage. Inside the garage, Valenzuela saw a "Hispanic-Asian looking" female and a Hispanic male with tattoos. The male locked the garage door from the inside. Valenzuela noticed that the male had a gun tucked in his pants. Jones was crying so Valenzuela was not able to speak with him. The female was quiet and did not talk. The male instructed Jones not to speak with Valenzuela. At one point, Jones "pulled out a contraption. [It was] called a [meth] bong." He was trying to smoke methamphetamine. The male told Jones to put the bong away, and Valenzuela and Jones argued because she was pregnant.

When defendant returned, the Hispanic male and Jones spoke with him outside the garage. When the men returned to the room, defendant and the Hispanic male made Jones sit in a chair in the middle of the garage. There was another female named Chacha present in the garage, along with the armed Hispanic male. After Valenzuela saw defendant slap Jones across the face, she became scared and thought her baby was "going

to fall out of [her] stomach." Defendant then told Valenzuela he did not trust her, and he started looking through her purse. But Valenzuela had taken the title to her truck out of her purse and put it in her bra. Defendant called Valenzuela a liar and asked her where the title was. When Valenzuela told him it was in her bra, he told her to take it out and she complied because she was scared. She gave the truck title to defendant and he asked her to sign it. Defendant, Jones, and the armed Hispanic male went outside to discuss something, and Valenzuela asked Chacha what she should do. Chacha replied, "'Do what he says. Just sign it.'" Valenzuela signed the title, not because she wanted to, but because she was afraid of what defendant would do to her, her baby, and Jones.

After Valenzuela signed over title to her truck to defendant, she went into defendant's house. The next morning, Valenzuela saw Jones leaning on her truck "nodding out . . . ." She saw a bloody cut on his ear. She tried to hug him, but he groaned. Valenzuela lifted Jones' shirt and saw a burn mark. When Jones told Valenzuela that defendant had burned him, she became even more scared. The armed Hispanic male was "standing in their perimeter" watching them. At some point, Valenzuela and Jones were again locked in the garage with the armed Hispanic male and the "Asian girl."

Later in the afternoon, defendant returned, looking tired. The "Asian looking girl" and the armed Hispanic male left. Defendant then locked the garage from the inside and fell asleep with Valenzuela and Jones still in the garage. Hours later, Valenzuela woke defendant and told him she was hungry.

That evening, defendant drove Valenzuela home at about 7:00 p.m., after she had spent two nights and three days at defendant's house. When defendant dropped her off, he told her that Jones's "time was going to be up and that his debt wasn't paid. So that he probably wasn't going to make it." Defendant spoke loud enough for Jones, who was in the SUV, to hear. Defendant said "they were going to go to another place to try and cash a check, to some other check cashing places."

When Valenzuela arrived home, her father was upset and asked her where she had been. She "was scared to tell [her] dad what was going on." She did not call the police, but she called Jones's older brother.

Sometime past midnight, Jones called Valenzuela from the police station. The next morning, the police came to Valenzuela's home. Later that morning, Valenzuela went to the police station and saw Jones, who showed her his injuries, each of which was "fresh."

3. Morales

Arlene Morales was a nonfunctioning methamphetamine addict. She met defendant at his house because he had promised to find her work. She ended up staying at his house in the garage, but was not allowed to leave. While Morales stayed at defendant's house, he gave her methamphetamine and sold drugs to others. Defendant took Morales' cell phone, purportedly for security reasons. He appointed two people to "watch over" her when he was away from his house. On at least two occasions, Morales was locked in the garage alone. Morales could not drive away in her car because defendant's close female friend put diesel fuel in it, making it inoperable. According to Morales, "it was starting to feel like a hostage situation. [She] couldn't leave. [She] couldn't eat. [She] couldn't shower. [She] couldn't tend to [her] own family, go back to [her] girls . . . ." On at least one occasion, defendant "made [Morales] strip all [her] clothes" off, tied her hands, made her sit down, and tied her to a chair.

Morales believed defendant was a gang member. Morales was intimidated by gang members, but defendant was not. Defendant was comfortable around gang members and, on more than one occasion, she saw him give orders to gang members. But she never saw gang members "order [defendant] around." She believed defendant was a "big homie" because "everyone did what he said . . . ."

Morales met Jones in defendant's garage. Morales believed Jones was "trying to retrieve his car. But he was told what to do [by defendant]." Jones tried to keep Morales calm and tried to keep her fed and clean.

One night, defendant and another gang member assaulted Jones. "[T]hey started to burn [Jones]. At the time [Morales] thought they were cutting him because [she] saw blood." Morales saw defendant heating a sharp object. Defendant appeared to be the one in charge.

On the Monday following the Friday assault on Jones, Morales escaped from defendant's garage. Morales had been alone with defendant in the garage. She was "half naked." When defendant fell asleep, Morales took the key from him, opened the garage door, and ran. She "jumped the gate," but defendant "came running after [her]." Defendant, who was "a really large man," was "able to break, run, right through [the gate]." Defendant caught up to Morales near a tree. Morales grabbed on to the tree as defendant pulled her by the waist and called her a "stupid bitch." Morales screamed for help, and she heard someone next door say to defendant, "[A]re you okay over there?" According to Morales, "it was just the most terrifying . . . time of [her] life . . . [she] had been in the garage for three days."

4. Police Testimony

Los Angeles County Sheriff's Deputy Oscar Calderon was a gang investigator assigned to the Pico Rivera gang unit. On May 23, 2012, after speaking to Jones and Valenzuela, Detective Calderon went to defendant's residence in Pico Rivera. When the detective arrived, defendant was on the other side of the locked gate. Defendant was with Francisco Barraza, who was nicknamed Ray or Little Man. Despite orders from deputies to open the gate, defendant did not comply. The detective and fellow deputies detained all the occupants of the house after breaking the locked front gate to the yard.

Detective Calderon searched defendant's white Chevy Tahoe and found the pink slip to Valenzuela's truck on the dashboard. Next to the pink slip, the detective found a business card from the tire store where Jones had passed the counterfeit checks.

Inside the garage, Detective Calderon found gang writing on the wall, including "R-13" and a painted-over gang "roll call." He also found a brown-handled knife and a black folding knife on the floor. The blade of the brown-handled knife appeared dull and

"burned." Outside the garage, Detective Calderon found a metal container containing "ashes and burnt items." Duct tape was "partially sticking out" of the container. Next to the driver's side of the Tahoe, Detective Calderon found a semiautomatic handgun on the ground near a tree. There was a round in the chamber.

When Detective Calderon interviewed Jones in jail, he observed "fresh" injuries to Jones's head, ear, and stomach. During trial, Detective Calderon identified photographs of Alfonso Acuna, aka Rascal; Javier Francis, aka Rock; and Monique Garcia, aka Chacha.

Los Angeles County Sheriff's Detective Stephen Valenzuela was a gang investigator for the Pico Rivera station who testified about the Rivera 13 gang. He had training and experience concerning the criminal street gangs in the Pico Rivera area. In that area, there were 12 gangs with over a thousand members. Detective Valenzuela was familiar with the Rivera 13 street gang, which had 139 documented members, 30 of them active, i.e., committing crimes for the benefit of the gang.

Defendant's house was in the territory of Pico Rivera claimed by Rivera 13. The primary activities of Rivera 13 were murders, attempted murders, weapons violations, narcotics sales, credit card thefts, identity thefts, and burglaries. The gang used a common sign or symbol, R-V, and had many rival gangs in Pico Rivera, including one called Pico Nuevo.

Gang members were generally unemployed, so their primary source of revenue was the commission of financial crimes, such as identity theft, narcotics sales, robberies, and burglaries. The gang used such revenue to buy more narcotics and guns, and to pay taxes to the Mexican Mafia. "Higher-ups" in the gang also collected taxes from anyone committing crimes in their territory. A person could not "do business" in a gang's territory without the permission of a veteran gang member or "shot caller."

The R-13 on the wall of defendant's garage was the symbol for the Rivera 13 gang. The symbol on defendant's wall indicated that Rivera 13 used that garage. If someone put up such a symbol without permission, he or she would be retaliated against.

At a minimum, the symbol in defendant's garage indicated that he was associated with Rivera 13.

The roll call on the wall of defendant's garage had the monikers of several Rivera 13 members and indicated that those members congregated at that location. The moniker Rock on the roll call belonged to Javier Francis. The moniker Shotgun belonged to Robert Salazar, the main shot caller for the Rivera 13 gang.

The concept of respect was very important in gang culture. If a gang member was disrespected and did not retaliate, he would look weak and his status within the gang would diminish. Not paying taxes to a gang member would be a sign of disrespect that would require retaliation. Intimidation was "a huge thing" for gang members and it allowed them to control their territory by instilling fear in the community and other gang members.

Two Rivera 13 gang members, Gregory Leyva and Christopher Johnson, had been convicted of vandalism and possession of an illegal firearm, respectively. In Detective Valenzuela's opinion, defendant was also a member of Rivera 13. Based on hypothetical questions that mirrored the facts of this case, Detective Valenzuela opined that the crimes described were committed for the benefit of a criminal street gang.

Los Angeles County Sheriff's Detective Raymond Hwang[3] was assigned to the narcotics bureau at the Pico Rivera station. On April 2, 2012, he executed a search warrant at defendant's residence with a large team of deputies. The search of the house did not locate any narcotics or guns. In the garage, the special weapons team located defendant and two females named Evelyn and Arlene. They were laying under blankets, and the deputies recovered a loaded, semiautomatic pistol near defendant. Detective Hwang also recovered a loaded Derringer pistol from a toolbox in the garage. Defendant was conscious and did not appear to have any injuries.

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3 Detective Hwang was called as part of the prosecution's case in chief, but testified out of order, after defendant had testified. Therefore, certain portions of his testimony served as a rebuttal to defendant's version of events.

On the top of a table in the garage, Detective Hwang saw rock cocaine in plain view. It was weighed and packaged in a manner that was typical for street sales. Next to the rock cocaine on the table was a hand-held digital scale. There was also extra packaging near the narcotics. The six grams of rock cocaine recovered had a street value of between $300 and $600. In Detective Hwang's opinion, the rock cocaine was possessed for the purpose of sale.

Detective Hwang questioned defendant on the front lawn and again at the station. When the detective told defendant he was facing serious charges, defendant said he could help the detective in other narcotics investigations. Defendant claimed he had information about a Rivera 13 gang member named Shotgun. The detective knew that Shotgun Salazar was one of the main methamphetamine distributors in Pico Rivera. According to defendant, he worked closely with Shotgun, and he and his associates were always at defendant's garage conducting narcotics and gang business. Defendant did not say that gang members had robbed him or that he was afraid of them. Defendant explained that he transported quantities of methamphetamine for Salazar.

Detective Hwang believed defendant might be able to help him build a case against Salazar, so the detective signed defendant up as a "defendant" informant, not a citizen informant. In return for his release, defendant was to inform the detective when shipments of narcotics were being moved and if gang members were coming to his garage with firearms.

Defendant told Detective Hwang that one of the gang members that met in his garage had an assault rifle and body armor and all of the gang members carried handguns. But defendant did not tell the detective that the guns and gang members made him fear for his life or that he was threatened by them.

Defendant was released from custody with charges pending and was expected to stay in contact with Detective Hwang. Although defendant called the detective approximately 10 times after his release, he did not provide any useful information about Salazar. In his phone calls with the detective, defendant never said he was being threatened or extorted by the Rivera 13 gang or that he had been duct taped and beaten by

gang members in his own garage. He never claimed that gang members poured a cleaning agent in his eyes and burned them. Defendant did not tell the detective that there were violent crimes occurring at his house and the detective did not ask defendant if anyone was dead. Nor did he ask defendant to "hang in there and stick it out" to help build a case against Salazar. The detective did not threaten to take defendant's kids away or tell him that his house could be seized.

B. Defense Case

1. Defense Investigator and Defense Gang Expert

Elizabeth Archer was a private investigator appointed to act as defendant's investigator. She spoke to Valenzuela eight or nine times, twice in person and the rest by phone. She was called to provide testimony about certain admissions that Valenzuela made to her that contradicted portions of Valenzuela's version of the events.

Martin Flores was defendant's gang expert. Based on the materials he reviewed and the persons he interviewed, including defendant and his family, Flores opined that defendant was not a gang member or a gang associate.

2. Defendant's Father

John Morikis was defendant's father. In addition to his regular work, defendant was "moonlighting," i.e., fixing cars on his property, and his father helped him. Between May 13 and May 17, 2012, defendant's father was at defendant's house fixing cars. On one occasion during that period, he met Morales, who told him that defendant loved her and that they were going to be married. Defendant's father thought that her comment was "kind of odd" because defendant's fiancée was nearby.

At one point between May 13 and May 17, 2012, defendant came to his father's house very late at night. Defendant looked "horrified." Defendant's father and sister spoke with him on the front porch for about a half hour. Defendant's voice was "very

shaky" during the conversation. Defendant's eyes looked as if someone had thrown splinters into them, "[t]hey just had red spots, a lot of red spots in his eyes."

Based on the conversation between and among defendant, his father, and his sister, defendant's parents gave him the money they had in the house and then defendant's father and sister went to an ATM and withdrew more money to give to defendant. In total, they gave him approximately $1600.

3. Defendant

In 2012, defendant was working out of his home as an auto mechanic. Defendant had several cars parked on the property.

In January or February 2012, defendant met Rock, whom he knew as Javier, when Rock came to defendant's house to have his car repaired. They developed "a mutual friendship."

On May 12, 2012, defendant met Jones when Rock brought him to defendant's house with a car that needed repairs. Rock told defendant that Jones had just been kicked out of his house and that Jones was interested in renting defendant's garage. Defendant agreed to rent his garage to Jones, but initially he did not charge Jones rent because "all of [defendant's] belongings were there." Jones came to defendant's house in a black truck with all his belongings. Jones had access to defendant's house, including keys.

Defendant met Valenzuela on Mother's Day in 2012. He was preparing to take his family to church and he invited Jones to go with them. Jones said "he would love to go" and asked if he could bring Valenzuela. Defendant agreed that Valenzuela could accompany the group and they picked her up in his white Chevy Tahoe. After church, the group went to breakfast and then shopping at a Goodwill store. After returning to defendant's house, Valenzuela went inside to watch movies with defendant's family while defendant and Jones smoked cigarettes in the back yard. While the two men were conversing, Jones showed defendant a wound he had on his stomach. The wound had "scabbed up" and appeared to be letters. Jones told defendant that he had tried to burn

"La Eme" (in reference to the Mexican Mafia) on his stomach to gain the respect of gang members.

About 10 minutes later, Rascal and Rock's son, neither of whom defendant knew, walked into defendant's backyard unannounced. Jones and the two men acted as if they knew each other. Jones had a "concerned" look on his face, "like he was . . . a little scared." Rascal and Rock's son had "determined look[s] on their face[s]." The three men went into the garage while defendant waited outside. About two or three minutes later, Rock arrived. Defendant told Rock it was not a good time to visit because his new tenant "was having problems." Defendant considered calling the police because of the men's demeanor and because one of the men had a tattoo on his face. After defendant told Rock about the problem, Rock acknowledged that he "knew what was going on" and that was the reason he was there. Rock went into the garage while defendant smoked outside.

Defendant heard a "loud commotion" in the garage, like a fight. He ran inside the garage, but tripped and fell. He saw Rock and his son punching and kicking Jones, who was "balled up" on the floor. Defendant attempted to break up the assault, and threatened to call the police, but the men turned on him and started "beating [him] up." They then bound him with tape and poured cleaning fluid in his eyes while threatening him. Defendant was terrified for his family.

The three assailants began arguing with Jones. They then went outside, leaving defendant and Jones alone in the garage. Jones, who had a cut on his head, apologized profusely.

At some point, the three assailants came back into the garage and "exchanged words with [Jones]." Then they began kicking defendant and berating him for threatening to call the police. Rascal pulled out a knife, heated it with a torch, and burned defendant's hand. Then he pressed a heated piece of broken glass into the skin on defendant's leg.

Rock and his son went outside to look in Jones's truck. Eventually, Jones left in his truck with Rock, and Rascal and Rock's son left through the gate.

Defendant took a knife from his tool cart and cut the tape that was binding his arms and legs. Then he ran outside the garage to a faucet and flushed his eyes with water.

The next day, defendant called Detective Hwang because, a month earlier, the detective had asked him to be a citizen informant against the Rivera 13 gang. Detective Hwang knew defendant had been robbed in the past by members of the Rivera 13 gang. Defendant told the detective what had happened the prior evening and the detective stated, "'Just keep doing what you're doing. Is anyone dead?'" Defendant replied that no one had been killed.

The following Wednesday night, Jones called defendant and asked to be picked up. When defendant asked Jones why he did not drive his truck, Jones told defendant that "'[t]hey took it from [him].'" Defendant agreed to pick Jones up on the condition that he pack his bags and leave. When defendant picked up Jones at Rock's house, Rock told them to "figure out" how to pay him $6000. After picking up Jones, defendant took him to pick up Valenzuela so she could help him pack. Valenzuela and Jones ended up staying at defendant's house Wednesday and Thursday night; Valenzuela slept on the living room couch in the house and Jones stayed in the garage.

Jones and Valenzuela left defendant's house Thursday, but they left behind some of their belongings. On Friday, Valenzuela borrowed her parents' car and "came back and forth" to defendant's house "a couple of times" to pick up belongings. When Valenzuela's father wanted his car back, defendant picked Valenzuela up in his SUV and brought her to his house. But he told her "you guys got to go."

Defendant denied burning or cutting Jones. He also denied giving Rivera 13 gang members orders. And he denied using or selling methamphetamine.

Defendant agreed to help Jones obtain money to pay Rock because defendant was "terrified" of Rock's gang. Defendant borrowed $1500 from his parents and he had some money of his own. On Friday, he gave Rock $3500 and, after he paid Rock, defendant drove Valenzuela home and he dropped Jones off in the City of Montebello.

Defendant first saw the gang graffiti in his garage after his arrest in April 2012. He denied writing any graffiti. He also denied being a gang member or associate.

Defendant admitted that he allowed Jones to use his computer to make the forged checks, but denied ever getting any money from "illegal transactions." Defendant also saw Jones unloading tires at defendant's house, but denied making any money from the sale of tires.

PROCEDURAL BACKGROUND

The jury found defendant guilty on counts 1 and 2 of the extortion of Jones and Valenzuela in violation of section 518; on count 4 of the torture of Jones in violation of section 206; on count 5 of felony false imprisonment in violation of section 236, as a lesser included offense of kidnapping for extortion; on count 6 of possession of cocaine base for sale in violation of Health and Safety Code section11351.5; and on counts 8 and 9 of possession of a firearm by a felon in violation of section 29800, subdivision (a)(1). The jury found defendant not guilty on count 3, aggravated mayhem in violation of section 205.

As to counts 1, 2, 4, and 5, the jury found true the gang enhancement allegations brought under section 186.22, subdivision (b)(4). As to counts 6, 8, and 9, the jury found true the gang enhancement allegations within the meaning of section 186.22, subdivision (b)(1). As to count 6, the jury also found true the allegation that defendant was personally armed with a firearm within the meaning of section 12022, subdivision (c). As to counts 4 and 5, the jury found not true the allegations that a principal used a firearm within the meaning of section 12022.53, subdivisions (b) and (e). As to counts 6, 8, and 9, the trial court struck the gang enhancements. Defendant admitted that he had suffered five prior convictions for which a prison term had been served within the meaning of section 667.5, subdivision (b).

The trial court sentenced defendant to an aggregate term of 40 years and 4 months to life. The sentence was comprised of the following terms: on the two extortion

convictions, counts 1and 2, consecutive terms of seven years to life; on the torture conviction, count 4, a consecutive term of 15 years to life; on the possession of cocaine base for sale, count 6, a consecutive principal term of four years, plus an additional five-year term for the firearm enhancement; on the false imprisonment conviction, the lesser included offense to count 5, a consecutive one-third the middle term of eight months, plus a one-year term for the gang enhancement; on one of the felon with a firearm convictions, a consecutive one-third the middle term of eight months; and on the second felon with a firearm, a concurrent term of two years. The trial court did not impose or strike the prior prison term enhancements.

DISCUSSION

A. Sufficiency of Evidence in Support of Extortion Convictions

Defendant contends that the prosecutor "elected" to base count 1, the extortion count involving Jones, exclusively on the tires that Jones obtained by fraud and relinquished to defendant. According to defendant, the fraudulently procured tires were not "property" as that term is used in section 518, the statute that defines extortion.

Defendant also contends that there was insufficient evidence to support his convictions on both the count 1 extortion of Jones and the count 2 extortion of Valenzuela. According to defendant, the evidence showed that defendant harbored a unitary intent to collect by fear or force one debt of $6000. Therefore, defendant argues, he should only have been convicted of one count of extortion.

1. Standard of Review

"When a defendant challenges the sufficiency of the evidence, '"[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citations.] . . . 'Substantial evidence includes

circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]' [Citation.] We '"'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" [Citation.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.)

2. Legal Principles

Section 518 defines extortion as follows: "Extortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear, or under color of official right." "The term 'property' as used in the Penal Code includes personal property such as money, goods, chattels, things in action and evidences of debt. (§ 7, subds. 10, 12; see *People v. Baker* (1978) 88 Cal.App.3d 115, 119 [151 Cal.Rptr. 362].) By its terms, subdivision 12 of section 7 does not create an exclusive list of personal property limited to those specifically named. (See *People v. Leyvas* (1946) 73 Cal.App.2d 863, 865 [167 P.2d 770].)" (*People v. Kozlowski* (2002) 96 Cal.App.4th 853, 865 (*Kozlowski*).)

"Witkin advises . . . that the term 'property' as used in the California's extortion statute should be *broadly* interpreted. (See 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 104, p. 137; see generally Annot., What Constitutes 'Property' Obtained Within Extortion Statute (1975) 67 A.L.R.3d 1021.) Another commentator has also rejected a narrow interpretation of the term 'property' for purposes of extortion, suggesting that the nature of the crime of extortion - - one in which the property is obtained by consent - - requires that the term be used 'in an unrestricted sense.' (See Note (1934) 22 Cal. L.Rev. 225, 226.) '[T]here is not the same need in extortion for a narrow definition of "property" as in robbery, as the acts sought to be punished by the crime of extortion often result in the obtaining of things of value which would not be subject to robbery from the person.' (*Id*. at p. 227, fn. omitted.) We conclude on the basis of these authorities that a broad interpretation is appropriate when construing the term 'property' for purposes of extortion." (*Kozlowski*, *supra*, 96 Cal.App.4th at p. 865-866.)

"[A]ll terms set out in our Penal Code must be construed in context. (§ 7, subd. 16.) When construing the statutory definition of property for purposes of extortion, we may consider robbery cases and cases involving other larceny offenses as well as those specifically related to the crime of extortion. We find this to be appropriate because the crime of extortion is related to the offense of robbery; indeed, courts have sometimes found it difficult to distinguish these two offenses. (*People v. Torres* (1995) 33 Cal.App.4th 37, 50 [39 Cal.Rptr.2d 103]; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 790 [213 Cal.Rptr. 465].) The statutory definitions of robbery and extortion are structurally similar. (*People v. Hesslink, supra*, 167 Cal.App.3d at p. 790.) Both offenses have their roots in common law larceny and both share a common element - - acquisition by means of force or fear. (*People v. Torres, supra*, 33 Cal.App.4th at p. 50.) The two crimes are distinguishable - - in an extortion, the property is taken with the victim's consent, while in a robbery, the property is taken against the victim's will. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 63 [43 Cal.Rptr.2d 434].)" (*Kozlowski, supra,* 96 Cal.App.4th at p. 866.)

"Cases and statutes define the term 'property' in the context of theft-based offenses as the exclusive right to use or possess a thing or the exclusive ownership of a thing. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1250-1251 [75 Cal.Rptr.2d 40] (*Kwok*) [taking of lock to make unauthorized copy of key was theft]; *People v. Sadowski* (1984) 155 Cal.App.3d 332, 335 [202 Cal.Rptr. 201, 55 A.L.R.4th 1075] [cat as property for purposes of theft]; see Civ. Code, § 654.) The term is all-embracing, including every intangible benefit and prerogative susceptible of possession or disposition. (*Kwok, supra*, 63 Cal.App.4th at p. 1251.) The right to own property implies the right to possess or use a thing to the exclusion of others. (*State of California v. Superior Court* (2000) 78 Cal.App.4th 1019, 1027 [93 Cal.Rptr.2d 276].)" (*Kozlowski, supra,* 96 Cal.App.4th at p. 866.)

In support of his contention that the evidence did not support more the one extortion conviction, defendant relies primarily on *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*).) In *People v. Whitmer* (2014) 59 Cal.4th 733 (*Whitmer*), the Supreme Court

explained the holding in *Bailey*. "In *Bailey*, the defendant committed a single misrepresentation and then received a series of welfare payments due to that misrepresentation. Other than *omitting* to correct the misrepresentation and accepting the payments, the defendant committed no separate and distinct fraudulent acts. As the *Bailey* court explained, the trial court had instructed the jury it could aggregate into a single count of grand theft a series of petty thefts done pursuant to an 'initial design' to obtain property exceeding the threshold amount that makes the crime grand theft. (*Bailey*, *supra*, 55 Cal.2d at p. 518.) The evidence supported a jury finding that the defendant did have an initial design to keep receiving the welfare payments until they exceeded that threshold amount. Accordingly, the court concluded that defendant had not committed 'separate and distinct' offenses. (*Id*. at p. 519.) But in this case, and, generally, in the earlier cases the *Bailey* court distinguished, the defendant committed separate and distinct fraudulent acts." (*Id*. at p. 740.)

According to the court in *Whitmer, supra*, 59 Cal.4th 733, "[w]hen the *Bailey* court said that the earlier cases upholding multiple convictions of grand theft would not have done so 'had the evidence established that there was only one intention, one general impulse, and one plan' (*Bailey*, *supra*, 55 Cal.2d at p. 519), it must have had this distinction in mind. *Bailey* concerned a single fraudulent act followed by a series of payments. The cases *Bailey* distinguished generally involved separate and distinct, although often similar, fraudulent acts. Accordingly, those cases involved 'separate and distinct' (*ibid*.) offenses warranting separate grand theft convictions." (*Id.* at p. 740.)

The court in *Whitmer, supra*, 59 Cal.4th 733, concluded that "a serial thief should not receive a '"felony discount"' if the thefts are separate and distinct even if they are similar. Accordingly, we conclude that a defendant may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme." (*Id.* at pp.740-741.)

3. Analysis

a. Count 1

Defendant erroneously argues that the prosecutor "elected" to base count 1 exclusively on the evidence concerning Jones's fraudulent acquisition of the tires and subsequent relinquishment of them to defendant. Although the prosecutor expressly referenced the tires when arguing about the evidence in support of count 1, the prosecutor also argued, albeit generally, that defendant continued to coerce Jones to work for him, even after Jones had delivered the second load of tires. For example, Jones testified that after he delivered those tires, defendant slashed Jones's ear with a knife and burned the word "Lame" on Jones's stomach. The next evening, defendant and Jones dropped Valenzuela off at her house and then defendant forced Jones to try to cash more counterfeit checks Jones had made and also forced him to attempt to burglarize the white BMW.

Contrary to defendant's election argument, defendant was charged in count 1 with extorting "money and other property" from Jones, but the type of property was not specified. Similarly, the jury verdict form on count 1 did not specify the type of property extorted, but it did specify that the extortion occurred during the period of May 13 through May 17, 2012. During that period, there was ample evidence that defendant was using force and fear to compel Jones to create and cash counterfeit checks. Thus, there was evidence—independent of the evidence of the fraudulent acquisition of the tires—that defendant extorted labor and services from Jones. Under the broad definition of the property element of the extortion crime, that evidence was sufficient to support defendant's conviction on count 1. (See *People v. Fisher* (2013) 216 Cal.App.4th 212, 218-219 [because defendant's threat to either employ him or be subject to vandalism was a demand for part of the employer's business, that threat was a demand for property sufficient to support defendant's conviction for sending threatening letters with the intent to extort money].)

b. Counts 1 and 2

Defendant's reliance on *Bailey, supra,* 55 Cal.4th 514, to support his contention that the evidence was insufficient to support two extortion convictions is misplaced. In this case, unlike *Bailey,* defendant did not make a single threat followed by a series of payments from the two victims of his extortion. Instead, defendant made multiple and separate threats to both Jones and Valenzuela. When alone with Jones, defendant told Jones that if he did not pay the $6000 debt, Jones, Valenzuela, and their unborn child would be killed. Several days later, after Jones had successfully obtained for defendant two loads of tires, defendant forced Jones to burglarize a white BMW. When Jones refused, defendant said, "You need to do it, dude. Do you want something fucking bad to happen to you or your wife? You need to do this. Let's just get it done, dude, get this over with." On a separate occasion, defendant told Valenzuela that Jones would be "hurt or killed" if he did not pay the debt. And, Valenzuela testified that she transferred to defendant the title to her truck, not because she wanted to, but because she was afraid of what would happen to her, Jones, and her baby.

Therefore, even assuming defendant may have been acting pursuant to a single overarching scheme, i.e., to collect a vindictive gang tax of $6000, the evidence supported a reasonable inference that he did so by committing similar, but separate and distinct, acts of extortion against two different victims at different times. As a consequence, there was sufficient evidence to support the extortion convictions on both counts 1 and 2.

B. Sufficient Evidence of Predicate Crimes to Support Gang Enhancements

Defendant contends that there was insufficient evidence to support the gang enhancements because the prosecution failed to produce evidence that at least two Rivera 13 gang members committed at least two predicate offenses. According to defendant, although the prosecution introduced evidence that Rivera 13 gang member Leyva committed vandalism in violation of section 594, subdivision (b)(1), and gang member

Johnson committed possession of a firearm in a school zone in violation of section 626.9, subdivision (b), the latter offense was not a qualifying predicate offense under section 186.22, subdivision (e). Because the jury was instructed that vandalism and possession of a firearm in a school zone were the two predicate offenses upon which the prosecution was relying to prove that Rivera 13 was a criminal street gang, defendant argues that there was insufficient evidence of the requisite predicate crimes.

The Attorney General concedes that possession of a firearm in a school zone is not a qualifying predicate offense enumerated in section 186.22, subdivision (e), and that the jury was instructed that the two qualifying predicate offenses that must be proved were vandalism and possession of a firearm in a school zone. Nevertheless, the Attorney General argues that under *Musacchio v. United States* (2016) ___ U.S. ___ [136 S.Ct. 709; 193 L.Ed.2d 639] (*Musacchio*), the jury instruction does not control the sufficiency analysis. Instead, according to the Attorney General, the true findings on the gang enhancements must be upheld if there was sufficient evidence of two qualifying predicate offenses, apart from the nonqualifying firearm offense at issue, including evidence of the commission by defendant of one of the qualifying current offenses. We disagree with the Attorney General that *Musacchio* is applicable, but agree with the substance of the Attorney General's argument, as we conclude that the instructional error here was harmless.

1. Standard of Review and Prejudice

Defendant's sufficiency contention is reviewed under the substantial evidence standard discussed above. (*People v. Clark, supra*, 52 Cal.4th at pp. 942-943)

Whether defendant was prejudiced by the claimed instructional error is reviewed under the federal harmless error standard in *Chapman* v. *California* (1967) 386 U.S. 18 (*Chapman*). "Under *Chapman* a federal constitutional error is harmless when the reviewing court determines 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Chapman, supra*, 386 U.S. at p. 24.) When there is '"a reasonable possibility"' that the error might have contributed to the verdict, reversal

is required. (*Ibid.*) . . . If, after examination of the record, the reviewing court concludes beyond a reasonable doubt that the jury must have found the defendant's guilt beyond a reasonable doubt, the error is harmless. If, on the other hand, the reviewing court cannot draw this conclusion, reversal is required. [¶] The reviewing court conducting a harmless error analysis under *Chapman* looks to the 'whole record' to evaluate the error's effect on the jury's verdict. [Citation.] We note in this regard that a *Chapman* harmless error analysis for instructional error typically includes review of the strength of the prosecution's case. [Citation.] Indeed, the harmless error inquiry for the erroneous omission of instruction on one or more elements of a crime focuses *primarily* on the weight of the evidence adduced at trial. Under *Neder* [*v. United States* (1999)], 527 U.S. 1, such an error is deemed harmless when a reviewing court, after conducting a thorough review of the record, 'concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence.' [Citation.]" (*People v. Aranda* (2013) 55 Cal.4th 342, 367-368.)

2. Section 186.22, Subdivision (b)(1) Gang Enhancement

"'Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. (§ 186.22, subd. (f); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 319-320 [109 Cal.Rptr.2d 851, 27 P.3d 739]; *People v. Gardeley* (1996) 14 Cal.4th 605, 616-617 [59 Cal.Rptr.2d 356, 927 P.2d 713]; *People v. Loeun* (1997) 17 Cal.4th 1, 8 [69 Cal.Rptr.2d 776, 947 P.2d 1313].) [¶] 'A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or

conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. (§ 186.22, subd. (e); *People v. Gardeley, supra*, 14 Cal.4th at p. 617.) The predicate offenses must have been committed on separate occasions, or by two or more persons. (§ 186.22, subd. (e); *People v. Loeun*, *supra*, 17 Cal.4th at pp. 9-10.) The charged crime may serve as a predicate offense. (*People v. Gardeley, supra*, at p. 625; *People v. Olguin* [(1994)] 31 Cal.App.4th [1355,] 1383 [37 Cal. Rptr. 2d 596]) . . . .' (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 [119 Cal.Rptr.2d 272].)" (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1399-1400.)

3. Analysis

In *Musacchio, supra*, 136 S.Ct. 709, the United States Supreme Court held that where a jury instruction had added an additional and unnecessary element to a crime, a court reviewing the sufficiency of the evidence determines whether evidence supports conviction on the elements of the properly charged crime, not on the erroneously added element.

Here, unlike in *Musacchio, supra*, 136 S.Ct. 709, the trial court did not instruct on an additional but unnecessary element of the gang enhancement. Instead, it mistakenly instructed the jury that a nonqualifying offense could be used as a predicate offense to prove that Rivera 13 was a criminal street gang. Thus, contrary to the Attorney General's assertion, the holding in *Musacchio* does not apply because the jury was improperly instructed on an essential element of the gang enhancement.

The challenged instructional error in the gang enhancement jury instruction, however, does not warrant reversal based on insufficient evidence. As the Attorney General points out, the instruction also informed the jury that, if it found "defendant guilty of a crime in this case, you may consider that crime in deciding whether . . . a pattern of criminal gang activity has been proved." As defendant concedes, one or more

of defendant's convictions in this case would have qualified as a predicate offense[4] that, when combined with gang member Leyva's prior vandalism conviction, would have been sufficient to prove that Rivera 13 was a criminal street gang.

In *People v. Bragg*, *supra,* 161 Cal.App.4th 1385, as in this case, one of the two predicate offenses on which the jury was instructed was not an enumerated offense under section 186.22, subdivision (b)(1). (*Id*. at p. 1400.) Nevertheless, the court in *Bragg* held that the error was harmless because the jury found the defendant guilty beyond a reasonable doubt of attempted murder and that current qualifying offense could be used to prove the requisite pattern of criminal activity for purposes of section 186.22, subdivision (b)(1). "The first predicate offense . . . was uncontested and there is no question the jury found the commission of that offense true beyond a reasonable doubt. . . . And the jury necessarily found a second predicate offense, the commission of these attempted murders, true beyond a reasonable doubt by virtue of the jury's conviction of defendant for those underlying crimes. We are able to hold therefore that the trial court's instructional error was harmless beyond a reasonable doubt." (*Id.* at p. 1401.)

The prosecution proved that Rivera 13 gang member Leyva committed vandalism, and there is no dispute that vandalism is a qualifying predicate offense. And, the jury in this case found defendant guilty beyond a reasonable doubt of one or more qualifying predicate offenses and was instructed that it could use such convictions in determining whether a pattern of criminal activity had been proved. We therefore conclude that the instructional error about which defendant complains was harmless beyond a reasonable doubt.

Defendant argues that even if one or more of defendant's convictions for the current offenses could qualify as a predicate offense, the prosecution was also required to show that the offense was committed by a gang member and, according to defendant, there was insufficient evidence to show that he was a Rivera 13 gang member.

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4 Section 186.22, subdivision (e) includes in its enumeration of predicate offenses possession for sale of a controlled substance, torture, and extortion. (§ 186.22, subdivision (e)(4), (18), and (19).)

Contrary to defendant's assertion, because there was sufficient evidence from which a reasonable trier of fact could have concluded that defendant was a Rivera 13 gang member, the challenged instructional error was nevertheless harmless. There was ample evidence that defendant associated on a regular basis with known Rivera 13 gang members. Jones, Valenzuela, and Morales saw gang members visiting defendant's property on a regular basis. Defendant appeared comfortable around them and did not appear threatened by them. Morales did not see any of the gang members give defendant orders, but she did see him give other gang members orders. From her perspective, he appeared to be in charge, the "big homie." Moreover, gang members used defendant's garage to do drugs and assault Jones while defendant was present. In addition, defendant's garage had Rivera 13 graffiti on the walls, including the Rivera 13 gang sign or symbol and a roll call of Rivera 13 gang members. And, the prosecution's gang expert concluded that defendant was a Rivera 13 gang member. That evidence was sufficient to support a finding that defendant was a member of the Rivera 13 gang.

C. Instruction on False Imprisonment

Defendant contends that the trial court committed instructional error as to count 5 when it instructed the jury on false imprisonment by violence or menace. According to defendant, because the false imprisonment instruction did not use commas, it allowed the jury to convict defendant if it found he unlawfully confined or detained someone, without also requiring the jury to find that the confinement or detention was accomplished through violence or menace.

1. CALCRIM No. 1240

The trial court instructed the jury on false imprisonment by violence or menace—as a lesser included offense to kidnapping for extortion—as follows: "To prove that the defendant is guilty of *false imprisonment by violence or menace,* the People must prove that: [¶] 1. The defendant intentionally and unlawfully confined or detained someone or caused that person to be confined or detained by violence or menace; AND [¶] 2. The

defendant made the other person stay or go somewhere against that person's will. [¶] Violence means using physical force that is greater than the force reasonably necessary to restrain someone. [¶] Menace means a verbal or physical threat of harm, including use of a deadly weapon. The threat of harm may be express or implied. [¶] An act is done against a person's will if that person does not consent to the act. In order to consent, a person must act freely and voluntarily and know the nature of the act. [¶] False imprisonment does not require that the person restrained be confined in jail or prison." (Italics added.)

2. Legal Principles

The Constitutional principles that guide our review of claimed instructional error are well established. "'[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is "'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" [Citation.] "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" [Citation.] If the charge as a whole is ambiguous, the question is whether there is a "'reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.'" (*Middleton v. McNeil* (2004) 541 U.S. 433, 437.)

3. Analysis

Defendant asserts that the flawed punctuation of the challenged instruction rendered it fatally ambiguous and allowed the jury to find him guilty of false imprisonment by violence or menace without finding an essential element of that crime, i.e., the confinement or detention was accomplished by means of violence or menace. Defendant's assertion, however, is based on an isolated reading of the phrase "unlawfully confined or detained someone or caused that person to be confined or detained by violence or menace." His reading assumes a likelihood that the jury read "by violence or menace" to modify only the latter part of that phrase, such that the jury might have

believed it could find that he "confined or detained someone" without finding that action was "by violence or menace." A fair reading of the entire instruction, however, demonstrates that defendant's claim is without merit.

The first sentence of the instruction informed the jury that the crime under consideration was entitled "false imprisonment by violence or menace." Thus, the jury was instructed from the descriptive name given to the crime that the false imprisonment must be accomplished by one of two means—violence or menace. Moreover, the instruction went on to define both violence and menace, specific definitions that strongly suggested to the jury that one of those two defined means of accomplishing the crime was a required element. Indeed, defendant's reading would require the jurors to disregard completely the name of the crime used at the beginning of the instruction and instead to rename the crime simply as false imprisonment. Thus, there is not a reasonable likelihood that a juror would have interpreted the instruction to mean that the required confinement or detention could be accomplished without either violence or menace when the entire instruction is read in the context of "the overall charge."

D. Duty to Provide Instructions Sua Sponte

Defendant argues that the trial court had the duty to provide three different sua sponte instructions. First, defendant argues that the conviction for false imprisonment should be reversed because the trial court failed to instruct the jury sua sponte on the affirmative defense of a good faith but mistaken belief in consent. According to defendant, the evidence was sufficient to trigger a sua sponte obligation to instruct on the defense because he testified that he locked Jones and Valenzuela in his garage for privacy so they could have sex.

Second, defendant argues the trial court erred when it failed to instruct sua sponte on the lesser included offense of simple possession of cocaine. According to defendant, there was sufficient evidence from which a reasonable juror could have found that he possessed the cocaine found in his garage for use, not sale.

Third, defendant contends that the trial court erred because it failed to instruct sua sponte on the lesser included offense of misdemeanor false imprisonment. According to defendant, the jury likely convicted defendant of false imprisonment based on the incident during which defendant locked Jones and Valenzuela in the garage and, as to that incident, there was no evidence that the confinement was accomplished by force or fear.

1. Legal Principles

a. Affirmative Defense of Consent

"The duty to instruct sua sponte on particular defenses arises only if it appears the defendant is relying on such a defense or if there is substantial evidence to support such a defense, and it is not inconsistent with the defendant's theory of the case. (*People v. Wickersham* (1982) 32 Cal.3d 307, 326 [185 Cal.Rptr. 436, 650 P.2d 311]; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 735-736 [182 Cal.Rptr. 671]; *People v. Hampton* (1981) 118 Cal.App.3d 324, 329.) [¶] The consent defense differs from the reasonable belief in consent defense. (*People v. Romero* (1985) 171 Cal.App.3d 1149, 1155 [215 Cal.Rptr. 634].) 'Where the defendant claims that the victim consented, the jury must weigh the evidence and decide which of the two witnesses is telling the truth.' (*Ibid*.) The defense of a reasonable belief in consent by contrast, 'permits the jury to conclude that both the victim and the accused are telling the truth. The jury will first consider the victim's state of mind and decide whether she consented to the alleged acts. If she did not consent, the jury will view the events from the defendant's perspective to determine whether the manner in which the victim expressed her lack of consent was so equivocal as to cause the accused to assume that she consented where in fact she did not.' (*Id*., at pp. 1155-1156, citing *People v. Mayberry* (1975) 15 Cal.3d 143, 159-160.) The foundation, therefore, for the reasonable belief in consent defense is evidence from which the jury could conclude the defendant acted under a *mistake of fact* that created a reasonable belief the victim consented to the charged acts. [¶] . . . [¶] The reasonable

belief defense derived from *Mayberry* is founded upon evidence showing the defendant acted under a mistake of fact sufficient to harmonize his assertion of consent with the victim's story that consent was lacking. (*People v. Mayberry, supra*, 15 Cal.3d at pp. 156-160; *People v. Romero, supra*, 171 Cal.App.3d at pp. 1156-1157.) Where there is no evidence putting into issue the nature and quality of the defendant's belief in consent, the trial court is under no duty to instruct the jury on its own motion about the mistake of fact defense." (*People v. Rhoades* (1987) 193 Cal.App.3d 1362, 1367-1369.)

b. Simple Possession

"'"[T]he court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.'" [Citation.] The substantial evidence requirement is not satisfied by "'*any* evidence . . . no matter how weak,'" but rather by evidence from which a jury composed of reasonable persons could conclude "that the lesser offense, but not the greater, was committed." [Citation.] "On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense." [Citation.]' (*People v. Avila* (2009) 46 Cal.4th 680, 705 [94 Cal.Rptr.3d 699, 208 P.3d 634] (*Avila II*).)" (*People v. Souza* (2012) 54 Cal.4th 90, 116.) "For purposes of determining a trial court's instructional duties, . . . 'a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' [Citation.]" (*People v. Smith* (2013) 57 Cal.4th 232, 240.)

Possession of cocaine base for sale requires the prosecution to prove that (1) the defendant exercised control over the cocaine; (2) the defendant had knowledge of its presence and nature as a controlled substance; (3) the substance was in an amount sufficient to be used for sale as a controlled substance; and (4) the defendant possessed the controlled substance with the specific intent to sell it. (CALCRIM No. 2302.) Possession of cocaine requires the prosecution to prove only that defendant exercised

control over the substance and had knowledge of its presence and nature as a controlled substance. (CALCRIM No. 2304.)

c. Misdemeanor False Imprisonment

"'False imprisonment is the unlawful violation of the personal liberty of another.' (§ 236.) False imprisonment is a felony if 'effected by violence, menace, fraud, or deceit . . . .' (§ 237, subd. (a); *People v. Fernandez* (1994) 26 Cal.App.4th 710, 717 [31 Cal.Rptr.2d 677].) '"Force is an element of both felony and misdemeanor false imprisonment. Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as 'violence' with the false imprisonment effected by such violence a felony. (*People v. Hendrix* (1992) 8 Cal.App.4th 1458, 1462 [10 Cal.Rptr.2d 922].)' (*People v. Castro* (2006) 138 Cal.App.4th 137, 140 [41 Cal.Rptr.3d 190].) False imprisonment does not require 'confinement in some type of enclosed space.' (*People v. Fernandez, supra*, 26 Cal.App.4th at p. 718." (*People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1356-1357.)

2. Analysis

a. Affirmative Defense of Consent

Defendant's argument concerning a consent defense is based on his interpretation of the jury's verdict, not on the evidence before the trial court at the time it instructed the jury before deliberations. Contrary to defendant's limited focus on his act of locking Jones and Valenzuela in his garage, there were other facts upon which the jury could have found defendant guilty of felony false imprisonment. There was evidence that Jones was taped to a chair and had cleaning fluid poured into the open gash on his head. Later, Jones was forced again to sit in the chair, threatened, hit, cut with a knife, and burned with a knife. As to those two confinements or detentions, defendant did not state or imply that he believed in good faith that Jones consented to the detentions or

confinements. Instead, he denied any involvement in restraining Jones. Thus, there was no "evidence putting into issue the nature and quality of the defendant's belief in consent" (*People v. Rhoades, supra*, 193 Cal.App.3d at p. 1369) and no basis for a sua sponte instruction on good faith but mistaken belief in consent.

b. Simple Possession

Contrary to defendant's assertion, there was no substantial evidence from which a reasonable juror could have found that defendant possessed the cocaine merely for use. Detective Hwang testified that when deputies executed a search warrant for defendant's garage, defendant was lying on the ground in the garage under a blanket near a loaded handgun and there was another handgun located in a tool box. On top of a table, the detective saw six grams of cocaine valued at between $300 and $600. It was weighed and packaged in a manner typical for street sales. A digital scale and additional packaging were also on the table next to the cocaine. In the detective's opinion, the cocaine was possessed for sale. Given that evidence, there was nothing from which a reasonable juror could have inferred that defendant possessed the cocaine only for use. Therefore, the trial court had no sua sponte duty to instruct on the lesser included offense.

c. Misdemeanor False Imprisonment

Defendant's assertion concerning misdemeanor false imprisonment is based on his limited view of the evidence and his speculation about the factual basis for the jury's finding on false imprisonment. But the proper focus is on the evidence before the trial court at the time it instructed on false imprisonment. As explained above, there were at least two forceful and violent detentions of Jones, the one where he was taped to the chair and the other when he was forced to sit in the chair, hit, cut with a knife, and burned with a knife. The incident upon which defendant relies, during which defendant locked Jones and Valenzuela in the garage, occurred after the first violent confinement and after defendant told Jones he would be killed if he did not pay the debt. Given the state of the evidence at the time the trial court instructed on false imprisonment, there was no

evidence from which a reasonable juror could have inferred that the detentions of Jones were not accomplished by violence or menace.[5]

E. Sentences under Section 654

Defendant contends that the trial court violated the prohibition against multiple punishments for the same act in section 654 and his due process rights. According to defendant, the sentence on count 4 for the torture of Jones, after punishing defendant for the extortion of Jones, violated section 654 because the torture of Jones was the means by which defendant extorted Jones.

Defendant also argues that the trial court's sentence on the false imprisonment count, after the trial court punished defendant separately for extortion and torture, violated section 654. As defendant views the evidence, the sole objective of the false imprisonment was to accomplish extortion and torture.

1. Legal Principles

"Section 654, subdivision (a), prohibits multiple punishment for the same act, stating: 'An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than

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5 Defendant contends that the prejudice from the trial court's failure to instruct on the lesser included offenses to felony false imprisonment and possession of cocaine base for sale should be evaluated under the federal harmless error standard in *Chapman v. California* (1967) 386 U.S. 18, notwithstanding the California Supreme Court's holding in *People v. Breverman* (2008) 19 Cal.4th 142, that prejudice from failure to instruct sua sponte on a lesser included offense is evaluated under the state harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). Because we have concluded that the trial court did not err in failing to instruct on the lesser included offenses to felony false imprisonment and possession of cocaine base for sale, we do not need to address defendant's prejudice contention. We note, however, that under principles of stare decisis, we are bound by decisions of the California Supreme Court unless the United State Supreme court has decided the federal constitutional question differently. (*People v. Superior Court* (*Williams*) (1992) 8 Cal.App.4th 688, 702-703.)

one provision. . . .' Section 654 prohibits only multiple punishments, not multiple convictions, for the same act. (*People v. Britt* (2004) 32 Cal.4th 944, 951 [12 Cal.Rptr.3d 66, 87 P.3d 812].) [¶] The California Supreme Court has stated: 'The test for determining whether section 654 prohibits multiple punishment has long been established: "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." ' (*Neal v. State of California* [(1960) 55 Cal.2d 11, 19 [9 Cal.Rptr. 607, 357 P.2d 839]].) A decade ago, we criticized this test but also reaffirmed it as the established law of this state. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1209-1216 [23 Cal.Rptr.2d 144, 858 P.2d 611].) We noted, however, that cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. In those cases, multiple punishment was permitted. [Citation.] . . . [¶] Section 654 turns on the *defendant's* objective in violating both provisions . . . .' (*People v. Britt*, *supra*, 32 Cal.4th at pp. 951-952.)" (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1377-1378.)

"'Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.' (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 [127 Cal.Rptr.2d 319].) '[T]he power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*.' (*Bowers,*

supra, 150 Cal.App.3d at pp. 873-874.)" (*People v. Ortiz*, *supra*, 208 Cal.App.4th at p. 1378.)

2. *Analysis*

a. Extortion and Torture

Defendant's contention that the sentences for extortion and torture violated section 654 is based upon his assertion that the prosecution "elected" to argue that the extortion was accomplished solely by the torture of Jones.[6] The trial court, however, found that the extortion and torture of Jones were separate and distinct offenses for purposes of sentencing, suggesting that it took a much broader view of the evidence. As explained above, the trial court had wide latitude in making that factual determination and its finding will not be disturbed if supported by substantial evidence.

The trial evidence showed that defendant extorted Jones for several days between Mother's Day, May 13, 2012, and May 17, 2012. During that period, defendant threatened to kill Jones, Valenzuela, and their baby. He also admonished Jones not to run away or inform anyone about what was happening to him. On more than one occasion, separated in time, defendant successfully forced Jones to make and attempt to negotiate counterfeit checks. That evidence provided several distinct factual bases sufficient to support the extortion conviction.

During that ongoing extortion, Jones was tortured on two separate occasions. On Mother's Day, defendant watched as Rock and others beat Jones and then taped him to a chair and poured cleaning fluid in the open gash on his head. There was evidence that Rock's motive in torturing Jones was to punish him for losing the $100 Jones owed Rock from a counterfeit check Jones had successfully passed. Before the torture, Rock told Jones he was going to teach Jones a lesson for disrespecting him. That evidence,

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6 In a footnote, defendant supports his "election" argument by a citation to the jury instruction on torture which provided in pertinent part, "the defendant intended to cause cruel or extreme pain and suffering for the purpose of extortion."

involving a motive different from simply coercing Jones to negotiate checks, supported a torture conviction that was separate and distinct from the extortion.

Several days later, after Jones had obtained two loads of tires for defendant, Jones was hit by defendant, forced to sit in a chair, cut behind the ear with a knife, and branded with a hot knife. There was evidence that defendant's motive was to punish Jones for smoking methamphetamine in front of Valenzuela after defendant had admonished Jones not to do so. Defendant told Jones he had "fucked up" when he "hit the meth bong" and "ripped off" Rock. That evidence supported a reasonable inference that the primary motive for the second act of torture was related to punishing Jones for his open use of drugs, separate and distinct from defendant's desire to extort Jones' labor in check-kiting or collecting the money Jones owed Rock.

Given the distinct evidence in support of the extortion and torture counts involving Jones, we conclude that the trial court's finding that those offenses were separate and distinct was supported by substantial evidence. Therefore, the separate punishments on each those counts did not violate section 654. Although defendant also contends that punishments for extortion and torture violated his due process rights, it is well established that, under the United States Constitution, a defendant may be convicted and punished at a single trial under two different statutes for the same act. (*People v. Sloan* (2007) 42 Cal.4th 110, 120-121.)

b. False Imprisonment

The trial court found that the false imprisonment conviction was a separate and distinct offense for purposes of sentencing. Under the legal principles controlling the section 654 analysis discussed above, we conclude there was substantial evidence to support the trial court's finding.

Defendant concedes that the detention or confinement supporting the false imprisonment conviction could be defendant's threats to kill Jones, the two torture incidents, or defendant's conduct in locking Jones in defendant's garage. Because the threats and torture incidents also occurred separately over the course of several days,

defendant's objectives in engaging in each act against Jones could have been similar, but distinct. For example, although defendant's objective in imprisoning Jones by taping him to the chair may have been to accomplish torture, his objective in locking him and Valenzuela in the garage may have been different from his objective to extort and torture Jones, including keeping Valenzuela from telling others about defendant's activities, such as extorting the truck from her or possessing methamphetamine. (*People v. Andra* (2007) 156 Cal.App.4th 638, 640 ["Under section 654, a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment;" this is particularly true when "the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and review his or her intent"].)

Given the evidence in support of the false imprisonment conviction, we conclude that the imposition and execution of sentence on that count did not violate section 654 because the trial court found that the offense was separate and distinct from the other offenses and substantial evidence supported that finding. Moreover, as explained above, a violation of section 654 does not implicate federal constitutional concerns. (*People v. Sloan, supra,* 42 Cal.4th at pp. 120-121.)

F. Correction of Sentencing Errors

The Attorney General raises two sentencing issues not raised by defendant: the trial court's failures to impose or stay the enhancements for the five prison term priors admitted by defendant and the disparity between the orally pronounced 15 years-to-life sentence on count four, torture, and the life sentence reflected in the abstract of judgment.

Defendant admitted that he had suffered five prior convictions for which a prison term was served within the meaning of section 667.5, subdivision (b). The trial court, however, failed to either impose or strike the sentence enhancements for those prior convictions.

On count four, the trial court orally pronounced a term of 15 years to life. But the abstract of judgment reflects that defendant was sentenced to a life term.

We agree with the Attorney General that these sentencing issues must be corrected and therefore remand the matter to the trial court with instructions to address the prior prison term enhancements and to correct the abstract of judgment to reflect that defendant was sentenced to a term of 15 years to life on count four.

DISPOSITION

The matter is remanded to the trial court with instructions to impose or strike the five prior prison term enhancements under section 667.5, subdivision (b) and to amend the abstract of judgment to reflect that defendant's sentence on count 4, torture, is 15 years to life. In all other respects, the judgments of conviction are affirmed.

RAPHAEL, J.*

We concur:

KRIEGLER, ACTING P. J.

BAKER, J.

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* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.