Filed 5/26/16 P. v. McGuffie CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RHODANKER McGUFFIE, Defendant and Appellant.	B252505 (Los Angeles County Super. Ct. No. VA116183)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick T. Meyers, Judge. Vacated and Remanded in part; Affirmed in part.

Joy A. Maulitz, 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, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Rhodanker McGuffie, aka Ronnell Westley Kirks,[1] was charged by an amended information with five counts of second degree robbery. (Pen. Code, § 211.)[2] As to all five counts, the amended information alleged that a principal personally used a firearm[3] (§ 12022.53, subds. (b) and (a)(1)) (enhancement 1); that a principal was armed with a firearm (§ 12022, subd. (a)(1)) (enhancement 2); and that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the intent to promote criminal conduct by gang members (enhancement 3). (§ 186.22, subd. (b)(1)(C).)

The amended information also alleged pursuant to section 1170.12, subdivisions (a) through (d) and section 667, subdivisions (b) through (i) that appellant had suffered two prior serious or violent felony convictions. (Enhancement 4.) It was alleged for the purposes of section 667, subdivision (a)(1) [enhancement of sentence of habitual criminals] that appellant had been previously convicted of two serious felonies. (Enhancement 5.) The amended information alleged that appellant had been previously convicted of the serious felony of robbery, had served a prison term for that offense, and had suffered another felony conviction during the five-year period following the prison term for robbery. (§ 667.5, subd. (a).) (Enhancement 6.) Finally, the information alleged that appellant had served prison terms for two convictions and did not remain free of prison

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[1] Appellant was charged under the name of Ronnell Westley Kirks; his real name is Rhodanker McGuffie.

[2] All statutory references are to the Penal Code.

[3] This was amended after trial to allege personal use of a firearm by appellant.

custody during the five-year period following the term for these two prior convictions. (§ 667.5, subd. (b).) (Enhancement 7.)

The court granted appellant's motion for leave to represent himself.[4] Attorney M. Balmer remained as stand-by counsel.

The jury found appellant guilty of the five counts of second degree robbery. The jury also found enhancements 1, 2 and 3 to be true as to all five counts. In bifurcated proceedings, the court found enhancements 4, 5, 6, and 7 to be true.

In view of appellant's criminal history and the vulnerability of the victims, the court imposed the high term of five consecutive years on the robbery counts. Each count was enhanced by a total of 31 years. The indeterminate term therefore was 180 years to life. The determinate term, composed of enhancements 1, 3, 4 and 7, was for 111 years. The total is 180 years to life and a determinate term of 111 years.

The appeal is from the judgment.

FACTS

I. *Overview*

The charges arose out of a daylight robbery of Highglow Jewelers (Highglow) in Artesia[5] committed by appellant and three confederates. The five victims of the charged robberies were working in and about the Highglow store as the robbery took place. There were two eyewitnesses to the robbery as it got underway, both of whom testified, and who gave chase after the robbery was over.

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[4] *Faretta v. California* (1975) 422 U.S. 806.

[5] Highglow is located at 18644 Pioneer Boulevard, Artesia, at the northeast corner with 187th Street.

Appellant and his confederates, including the driver of the getaway car, fled the scene but were apprehended in the vicinity of the jewelry store while trying to make good their escape.

Appellant's defense was that while Highglow was robbed on the day in question, appellant was not one of the robbers. Two of the robbers and the driver of the getaway car, each of whom had been convicted of the Highglow robberies, testified that the robberies took place but that appellant was not there. Appellant also took the stand and testified that he was in the vicinity but did not participate in the robberies.

The victims of the robberies were Hema Vijay Kumar (Kumar), Mahesh Shastri (Mahesh), Nimisha Shastri (Nimisha), Lata Trivedi (Trivedi) and Prabha Patel (Patel). Appellant's confederates inside the Highglow store were Bobby White and Corey Harper. Jabarri Pangelinan was the driver of the car used in the robbery.

II. *Eyewitnesses*

Kenneth Myers (Myers) and Erika Garcia (Garcia) witnessed the robbery as it got under way.

On July 23, 2010, around 1:40 p.m., Myers, whose car was parked around the corner on 187th Street, was walking on the sidewalk in front of Highglow when he saw two cars parked alongside his car. Each was occupied by four black males who were slumped down in their seats. Myers got into his car. He saw "three of the males that were in the second vehicle getting out of it and running to the jewelry store, pulling masks up, bandanas over their face. [He] believe[d] at least one -- one gun in the hands of one of the individuals." Myers called 911 "dispatch

with the sheriff's department." He made a U-turn to position his car so he could see which way the robbers would go when they came out.

Garcia was driving on Pioneer Boulevard and came upon the intersection with 187th Street. She witnessed the same scene described by Myers. She saw three men get out of a small green car "and they were lifting up the Hoodie, and I saw the gun. That's why I called 911."

III. *The Robberies*

Ms. Kumar, who worked at Highglow as a cashier, left Highglow by the front entrance for lunch at 1:30 p.m. on July 23, 2010. She saw four men in a green car. Three men with masks came out of the green car. The front person had a gun. One of the men said "go, go, go" to Kumar and she went back to the store.

Mahesh was Highglow's vice-president. On the day and time in question, he was working behind a counter in the store when he saw Kumar coming into the store with three persons. One of the men pointed a gun at Mahesh, who raised his right hand in a sign of surrender. The man, clad in dark clothes and with a mask, jumped over the counter. From the skin around his eyes, Mahesh thought the man was black. "And I [Mahesh] was so much taken away with the fear, I was watching the gun point in case he fired -- just gun point. And told me to go down, so I put my face down in the floor. I lie down." Mahesh thought the man had a gun at Mahesh's back.[6]

Ms. Trivedi was working in the front of the store when she saw Kumar who had just left for lunch, coming back. Kumar called out to Trivedi, who thought

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[6] Respondent's brief identifies this man as appellant.

that Kumar had forgotten something, and she buzzed Kumar in.[7] Kumar came in, followed by a man who was "completely covered. So I [Trivedi] got really frightened and I got under my table, and then I didn't see anything."

Returning to Kumar's account of events, she took a seat in the store near where Trivedi was cowering under the table. In Kumar's words: "I was in shock, so after that I was not in good enough remembering what was happening. My heart was beating really fast, and I was in shock, so I was just sitting there -- sitting on the stool." She was afraid but she watched one of the men "taking all the jewelry" and putting it into his backpack.

Nimisha, a Highglow employee for eight or nine years working with the inventory of the store, was seated in the front of the store when around 1:40 p.m. she saw Kumar come in through the front door followed by "two people with Hoodies. . . . I saw a third one coming in through the door with guns in their hands and their faces were covered. I realized something was happening, so I went under the table." She testified she was scared. She identified the men as blacks. She called 911 on the cell phone.

Patel was working inside the store where the vault is located when she heard loud voices. Next, she saw "[Nimisha] lying down." She apparently got a glimpse of one of the robbers: "I did not see the face because the face was covered completely. . . . I just briefly saw because I got really frightened, and then I lowered my eyes, and I walked into the vault." At some point, she did see a gun. When asked how she felt when she was in the vault, she answered: "I was frightened."

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[7] The store had two sets of front doors. The first door fronting the street required a buzzer to open it.

The robbery was recorded by video surveillance that was admitted into evidence as People's exhibit 7.[8]

IV. *Flight, Capture and Identification*

Myer, who had turned his car around, waited for the men to come out of Highglow. He saw the same three men come out of Highglow and run into an alley. They got into the same car in which they had arrived and drove off, west on 187th Street.

Garcia, who also had waited, followed the green car as it left the scene. In maneuvering to follow the green car, Garcia drove into a parking lot. At that moment, the green car passed within a few yards of Garcia. The men's faces were no longer covered and they were not wearing hats or hoods. The driver, Pangelinan, looked in Garcia's direction and made eye contact. Garcia was able to observe the faces of these men for approximately 30 seconds.

Later that evening, Garcia identified all four men as the robbers at a field show-up near Highglow. When appellant was brought out, Garcia said, "Yes, that's him." She said she remembered him running out of Highglow with a gun and a backpack.

Deputy Ryan Vergel De Dios (De Dios) pursued the green car as it attempted to escape. After a chase, the green car was finally stopped in a cul-de-sac when it collided with a parked car. The four men inside the green car ran off but Deputy De Dios was able to see their faces; he identified appellant as one of the men who ran from the green car.

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[8] We take note of respondent's summary of the video which shows three masked men, one of them armed with a large handgun, entering the Highglow store.

A containment area was set up by the sheriffs. A police dog first detected appellant near a backyard wall; a deputy found appellant hiding behind the wall. Appellant was taken into custody.

V. *The Stolen Jewelry is Recovered*

Mahesh and Nimisha identified the jewelry found inside the green car as merchandise stolen from Highglow. The total value of the stolen pieces was $104,000.

VI. *DNA Evidence from Clothing was Found in the Green Car*

Some clothing items recovered from the green car were subjected to DNA testing. Appellant was found to be a major contributor of DNA to a shirt and a cap found in the car.

VII. *Gang Evidence*

Los Angeles Police Officer Francis Coughlin testified as a gang expert.

Coughlin opined that appellant was a gang member. Appellant had numerous PJ Watts Crips gang tattoos. Coughlin explained that if someone who was not a gang member acquired gang tattoos, he would be disciplined by the gang, since it would be unacceptable to the gang for someone not in the gang to have such tattoos.

White and Pangelinan admitted being, respectively, members of the PJ Crips and PJ Watts gangs. Coughlin concluded that Harper also was a gang member. This was based on the severity of the Highglow robbery and the fact that Harper was with three documented gang members.

Based on a hypothetical that contained the facts of this case, Coughlin testified that the crime was committed in association with the PJ Watts criminal street gang and to benefit that gang. The officer explained that the crime was clearly done with the association of the gang because three documented gang members committed a violent crime with weapons and stole property of significant value. Committing the crime with other gang members gave them "strength in numbers" and "makes the crime go by smoother." The association also benefits the gang because the likelihood of getting away increases. Additionally, the gang benefited on several levels. The atmosphere of fear and intimidation in the gang's neighborhood would increase when people in the community learned of the crime and would allow the gang to operate freely and without fear in the community. Further, the gang would have benefited had the jewelry been liquidated and the money divided among members of the gang. This would have permitted the gang to purchase weapons, and allow gang members not to have to seek employment. The officer observed that when gang members do not have to work, they can congregate together, sell drugs, and carry guns to maintain a stronghold in the community.

Coughlin identified two predicate offenses committed by members of the PJ Watts gang. In one case, Deandre Fountain was arrested and charged with being a felon in possession of a handgun and with selling marijuana. In the second case, Robert Barnes was charged with the illegal possession of a firearm.

VIII. *The Defense Case*

In keeping with the standard of review, we do not summarize the defense evidence in detail. Appellant testified about his activities at the time of the Highglow robberies, denying that he was one of the perpetrators. In explaining his

arrest, appellant testified that he was stopped by the police on the street while walking past. One thing led to another, which included appellant "being smart with the officer." He was taken into police custody and eventually arrested.

DISCUSSION

I. *The Trial Court did not err in Denying Appellant's Request for the Retention of an Eyewitness Identification Expert*

About seven months prior to trial, appellant submitted a request for the assistance of an eyewitness identification expert. The only reason given for the request was that appellant did not fit the description of any of the "suspects."[9]

At an ex parte hearing held on the same day, the trial court asked if appellant had anything additional to add to his written motion. Appellant said he did not. The court denied the request. The court stated that there were no eyewitness identifications of appellant by the victims and the case was "based on circumstantial evidence, video and DNA." Appellant asked whether the court thought this was "not an identification case." The court replied: "My understanding of the evidence is that there is videotape from the robbery, but everyone was masked. There are not victims or witnesses who are identifying you. [¶] Did any victim or witness identify you?" Appellant inaccurately responded, "All the witnesses identified me." The court stated that this was not true. The court also noted that the request was untimely as the case was currently set for trial.

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[9] The request states: "The identification expert is needed by the defendant based upon there being a video with masked men and defendant not fitting the description of any suspects. [T]his expert is needed by the defendant so he can give his expertise at trial."

Appellant contends that the trial court "improperly denied appellant's request for an expert on eyewitness identification." (Boldface and capitalization omitted.) We do not agree.

We begin with the basic proposition that proof of the identity of a person does not require an expert opinion and is properly the subject of lay opinion. (1 Witkin, Cal. Evid. (5th ed. 2012) Opinion Evidence, § 5, p. 612, citing *In re Corey* (1964) 230 Cal.App.2d 813, 826; and 7 Wigmore (Chadbourn Rev.) § 1977.) It follows therefore that to justify the admission of an expert's opinion on the issue of identification something more must be shown than solely that identification is an issue.

When and under what circumstances expert opinion is appropriate was thoroughly explored in *People v. McDonald* (1984) 37 Cal.3d 351 (*McDonald*), overruled on another ground by *People v. Mendoza* (2000) 23 Cal.4th 896. This decision recognized that eyewitness identification may involve problems with perception and memory (37 Cal.3d at p. 361), as well as with the retrieval of information (37 Cal.3d at p. 362), all of which may justify recourse to qualified expert opinion. *McDonald* laid down the rules that guide us in the case at bench:

"We reiterate that the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion; like the court in *Chapple*,[10] 'we do not intend to "open the gates" to a flood of expert evidence on the subject.' (660 P.2d at p. 1224.) We expect that such evidence will not often be needed, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter. Yet deference is not abdication. When an eyewitness identification of

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10 *State v. Chapple* (Ariz. 1983) 660 P.2d 1208, superseded by statute, as noted in *State v. Benson* (Ariz. 2013) 307 P.3d 19.

the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*McDonald, supra,* 37 Cal.3d at p. 377, fn. omitted.)

Appellant's request for an expert on eyewitness identification fails over the "substantial corroboration" rule laid down by *McDonald* (1 Witkin, Cal. Evid. (5th ed. 2012) Opinion Evidence, § 71, pp. 709-713) since in this case, the eyewitness identification of eyewitness Garcia and deputy De Dios is substantially corroborated by DNA evidence. Appellant was found to be a major contributor of DNA to a shirt and a cap found in the getaway car. There was other corroborating evidence, as well. Mahesh described the gunman as wearing dark clothes and a cap. Appellant was arrested wearing dark shorts. The video of the robbery shows the gunman wearing a Toronto Blue Jays cap and such a cap was found in the getaway car. Appellant was a major DNA contributor to the Toronto Blue Jays cap, all of which corroborates the eyewitness identification of appellant as one of the robbers.

Moreover, appellant's request for an expert in eyewitness identification did not show that there was "qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury." (*McDonald, supra,* 37 Cal.3d at p. 377.) Since the request was unsupported by any such showing, the trial court acted well within its discretion in denying the request.

Appellant contends that the trial court's ruling was erroneous because it rested on the wrong assumption that identification was not an issue in the case.

However, as respondent correctly points out, we review the trial court's ruling and not its rationale. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

We note that the jury was instructed in terms of CALCRIM No. 315 on the matters to be considered in weighing eyewitness testimony.

As *McDonald* observed, expert testimony on eyewitness identification is not often needed. It was not needed in this case. We conclude that the trial court did not improperly deny the request for an expert in eyewitness identification.

II. *The Trial Court did not deny Appellant the Services of a DNA Expert*

Appellant contends that "the trial court improperly denied appellant's request for a DNA expert." (Boldface and capitalization omitted.) We disagree.

We first summarize the DNA expenses that were approved by the court. We then provide the timing of DNA testimony, both prior to trial and at trial, which shows that appellant had adequate opportunity to prepare himself for the cross-examination of the prosecution's DNA expert. We also note that appellant's cross-examination of the DNA expert was conducted creditably and showed a sound grasp of the subject.

1. *The DNA Expenses Approved by the Trial Court*

In April 2012,[11] the court appointed Blaine Kern of Human Identification Resources as appellant's DNA expert to review the prosecution's DNA analysis and to advise appellant. The court authorized $3,000 to fund this work.

There then followed several months of hearings. The gist of these mostly unproductive sessions was that appellant was seeking another $8,000 for DNA

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[11] Trial commenced on March 7, 2013.

retesting. The court repeatedly denied this request because appellant failed to substantiate it. On October 29, 2012, the trial court noted that appellant had finally filed a declaration that explained why additional funds were needed. Significantly, the court specifically approved the request to retest the shirt and cap that showed appellant as a major donor. On November 1, 2012, the trial court approved a further expenditure of $8,575 for DNA testing, having approved an additional $600 on October 25, 2012 to pay for telephone conferences between appellant and his DNA expert. These sums approved by the court add up to $12,175 for DNA testing. The court apparently approved other sums for conferences with the DNA expert but the record before us does not reflect the amounts that were approved.

2. *The Timing of DNA Testimony*

There were two prosecution witnesses who testified about DNA. The first was criminalist Ashley Platt, who collected the DNA samples. The second was criminalist Leslie Thompson, who was the actual DNA expert who testified at trial.

(a) *Ashley Platt*

On December 14, 2012, the prosecution filed and served a notice that it intended to conduct a conditional examination of Ashley Platt, the criminalist who collected the DNA evidence from the items of clothing because she had a high risk pregnancy and might not be available to testify at trial. Appellant did not object to the conditional examination.

The prosecutor noted that Platt merely took the DNA samples and was not a DNA expert.

As predicted by the prosecution, on December 20, 2012 Platt testified only as to the procedures used in collecting and handling DNA evidence. At this

pretrial hearing, Platt explained the process by which clothing items were screened for DNA. Platt testified as to the steps that are taken to ensure reliable and accurate samples are collected. Platt followed these procedures when processing the evidence in this case.

Appellant cross-examined Platt about, among other things, the procedures she used to photograph the items tested. Appellant further asked Platt to identify and describe the two hats she analyzed. Appellant also questioned Platt about the chain of custody procedures used by the lab and whether Platt followed those procedures.

(b) *Leslie Thompson*

Leslie Thompson was the prosecution's DNA expert. He testified during trial on March 15, 2013. It was Thomson who explained DNA typing, storage, testing and statistical analysis. It was also Thompson who rendered the expert opinion that appellant was a major DNA donor to the shirt and Toronto Blue Jays cap.

3. *Appellant's Contention is Without Merit*

In his opening brief, appellant claims that he was forced to cross-examine Platt and Thompson "without assistance from an expert."

The record does not support this claim. The court approved at least $12,175 for DNA work and it did appoint Blaine Kern to serve as appellant's DNA expert. There was therefore an expert and money to pay the expert. Thus, it is simply untrue that appellant was "without assistance from an expert."

Appellant contends that he had difficulties in coordinating with Kern in time for the pretrial testimony of Ashley Platt. However, nothing in the record supports

that assertion. In any event, Platt was not the prosecution's DNA expert and her testimony had little technical content. Moreover, appellant had no difficulty in cross-examining her.

Thompson, the actual DNA expert, did not testify at trial until March 15, 2013, nearly three months after Platt's pretrial testimony. There is nothing in appellant's opening and reply briefs that explains why appellant could not have prepared himself adequately for Thompson's testimony. In fact, the record reveals that he was well prepared. Appellant's cross-examination of Thompson shows that appellant had been thoroughly briefed on the technical aspects of the DNA. Appellant's questions were informed and showed a grasp of the subject; he knew enough to be able to pursue independent lines of inquiry.

Appellant's complaints about Kern's availability center on Platt's pretrial testimony. However, as noted, Platt's testimony was of marginal importance in that it only described procedures used in handling DNA evidence. It was Thompson's testimony that counted.

In short, several months prior to trial appellant was afforded a DNA expert and over $12,175 to pay that expert. His claim that he was denied the services of a DNA expert is not supported by the record. Indeed, the record demonstrates affirmatively that the DNA expert was able to prepare appellant for trial.

III. *The Trial Court was not Required to Sua Sponte Bifurcate the Gang Enhancement for Trial*

Appellant contends that the trial court "abused its discretion and violated appellant's due process and fair trial rights when it failed to bifurcate the gang evidence." (Boldface and capitalization omitted.)

"Joinder and severance of different criminal counts against the same defendant are governed by section 954, which states that an 'accusatory pleading may charge two or more different offenses connected together in their commission . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.' . . . [¶] Section 954, however, imposes no sua sponte duty of severance on trial courts. That section, as quoted above, requires the defendant to make a showing of 'good cause' in order to obtain severance, and defendant's failure to request a severance waives the matter on appeal. Nor do we find any authority to support defendant's argument that the Fifth, Sixth, Eighth or Fourteenth Amendments of the United States Constitution, or their California counterparts, impose such a duty." (*People v. Hawkins* (1995) 10 Cal.4th 920, 939-940, overruled in part on another ground by *People v. Blakeley* (2010) 23 Cal.4th 82.)

Here, appellant made no motion to sever, and the trial court had no sua sponte duty to sever. (*People v. Maury* (2003) 30 Cal.4th 342, 392; *People v. Rogers* (2006) 39 Cal.4th 826, 850.) Thus, there was no error.

Appellant objected to the testimony of the prosecution's gang expert because it would "prejudice the defendant and mislead the jury based on a biased opinion about the defendant that has no personal knowledge of me." The trial court overruled the objection. Appellant now contends that this should be construed to be a motion to sever.

Section 954 requires a showing of good cause for a severance. An objection is not a showing of good cause. Appellant states the trial judge should have come

to his aid. However, a trial court is not required to act as stand-by counsel for a defendant who has chosen to represent himself.

IV. *The Jury's Verdict on the Gang Enhancement is Supported by Substantial Evidence*

Appellant contends that the evidence is insufficient to support the finding that the robberies were committed for the benefit of, at the direction of, or in association with a criminal street gang.

As respondent correctly notes, appellant's contention challenges the first of two elements of the gang enhancement under subdivision (b)(1) of section 186.22.[12] The second of these elements is that of specific intent.

Appellant's attack on the sufficiency of the evidence presents evidence from which the inference can be drawn that the robberies were not committed for the "benefit of, at the direction of, or in association with a criminal street gang." For example, appellant states that there was no evidence that the proceeds of the robbery were turned over to the gang or that the gang was even aware of the robberies.

It is a fundamental aspect of the substantial evidence standard that reasonable inferences are drawn in support of the judgment. (*Crawford v. Southern Pacific Co.* (1935) 2 Cal.2d 427, 429.) Thus, our review takes into account inferences that favor or support the judgment and, relying on another

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[12] "[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall . . . be punished as follows." (§ 186.22, subd. (b)(1).)

aspect of the substantial evidence standard on appeal, we disregard conflicting inferences or evidence. (*Ibid*.)

We begin therefore with the fact that all four perpetrators of the robbery were gang members. White and Pangelinan admitted to being gang members. It is reasonable to infer from appellant's tattoos that he was a gang member and, according to Officer Coughlin, it is reasonable to infer from Harper's participation in a serious robbery with three gang members that he was also a gang member. According to Coughlin, robbery was one of the principal activities of the PJ Watts Crips gang. In fact, the PJ Watts gang had previously committed jewelry store robberies. Since the three actual robbers acted in close concert and coordination in masking their faces and invading the store, it is evident that the crimes was carefully planned. The robbery netted property valued at over $100,000, which Officer Coughlin explained would be shared with other gang members to save them from having to work. Based on these facts, it is reasonable to infer that these robberies were committed for the benefit of and in association with a criminal street gang.

Appellant states that the crime was not committed on gang territory. There also was no evidence of gang colors being worn during the robberies. These and other indicia listed by appellant might support the inference that this was not a street gang crime, but the jury was entitled to reject that inference.[13]

Appellant's reliance on *People v. Ochoa* (2009) 179 Cal.App.4th 650 and *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*) is misplaced. In *Ochoa*, the defendant, acting alone, carjacked the victim's car. When asked at trial whether he believed the defendant was involved in a gang, the victim answered,

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[13] We note that Coughlin testified that gangs will travel as far as 30 miles from their territory to commit crimes.

"'[a] little.'" (*Ochoa, supra*, 179 Cal.App.4th at p. 653.) The court found no indication that a gang was involved in the crime. (*Ochoa, supra,* at p. 662.) The court also found no evidentiary support that the crime benefited a gang. (*Ochoa, supra*, at pp. 662-663.) Quite unlike *Ochoa*, in this case the robbers were shown to be gang members, two of them having admitted to it, the jewelry store robbery fit the gang's modus operandi and the gang expert responded to a lengthy hypothetical that these crimes were committed to benefit the street gang.

In *Ramon*, the gang expert opined that "the circumstances involved in this case—two gang members driving a recently stolen vehicle in gang territory with an unregistered firearm in the vehicle," benefitted the gang because the two gang members "could commit" crimes such as robbery, burglary, and carjacking while they possessed the truck and the firearm. (*Ramon, supra,* 175 Cal.App.4th at p. 848.) The *Ramon* court held that the expert "simply informed the jury of how he felt the case should be resolved" and that the expert's opinion was "an improper opinion [that] could not provide substantial evidence to support the jury's finding." (*Id*. at p. 851.) The *Ramon* court concluded that "[w]hile it is possible the two were acting for the benefit of the gang, a mere possibility is nothing more than speculation," and "[s]peculation is not substantial evidence." (*Ibid.*) In this case, Coughlin testified that the crime was committed by gang members for the benefit of the gang. There was nothing tentative or speculative about Coughlin's testimony.

We find it wholly reasonable to conclude that a carefully planned robbery of a jewelry store by four members of a gang that appears to specialize in robberies, or even robberies of jewelry stores, is a gang enterprise under subdivision (b)(1) of section 186.22.

V. *The Issue Whether the Trial Court Erred in Permitting the Prosecution to Amend the Information has not been Preserved for Appellate Review*

Both the original information and the first amended information alleged that as to the five counts of robbery "a principal personally used a firearm, a handgun, within the meaning of Penal Code section 12022.53[, subdivisions] (b) and (e)(1)." After the presentation of evidence, the trial court permitted the prosecution to amend this enhancement by deleting "principal" and substituting appellant's name for "principal." Appellant contends that it was prejudicial error to permit this amendment. We do not agree because appellant has forfeited this issue by failing to object to the amendment.

The court and parties discussed jury instructions after all sides had rested. The trial court proposed giving CALCRIM No. 1402, the instruction for the gang-related firearm enhancement.[14] The prosecutor had also requested CALCRIM No. 3146, which is the instruction for personally using a firearm. The court indicated that CALCRIM No. 3146 did not apply here because the information alleged that a principal, as distinct from appellant, personally used a firearm. The prosecutor explained that the surveillance video "clearly shows who the People are claiming is [appellant] holding the Tech 9 .22 caliber handgun." The People's theory, based on the evidence presented, was that appellant personally used a firearm during the

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[14] "(b) Notwithstanding any other provision of law, any person who, in the commission of a [robbery] personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply. [¶] . . . [¶] (e)(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22 [the gang enhancement charged here]. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." (§ 12022.53, subds. (b) and (e)(1).)

robbery. Appellant interjected that Harper and White had been charged with personal use of a firearm. The court agreed, but added that the "People's theory is one of the photographs indicates that you have the gun." Appellant stated: "I agree with the court." The court then granted the People's motion to substitute appellant's name for "principal" in the enhancement. (*Ibid*.)

The trial court later instructed the jury with both CALCRIM Nos. 1402 and 3146. As to each count, the jury returned true findings that appellant "personally used a firearm, to wit, a handgun, within the meaning of Penal Code section 12022.53(b) and (e)(1)."

A court may allow amendment of the accusatory up to and including the close of trial. (*People v. Graff* (2009) 170 Cal.App. 4th 345, 362.) The failure to object to an amendment of the information forfeits the issue on appeal. (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 555.)

VI. *There must be an Evidentiary Hearing to Determine Whether Appellant Understood, when Pleading Guilty to a Robbery Charge, that he was Waiving his Right to a Jury Trial*

One of appellant's prior conviction was for two counts of robbery on April 20, 2004 in case No. TA073071.

It is uncontested that, at the time he pleaded guilty in case No. TA073071, he was advised of his rights pursuant to *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*) and *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*). Specifically, he was advised of his right to a *trial*, but he was not advised that he had a right to *jury* trial.

Appellant moved twice to strike this prior conviction, contending that he would not have pleaded guilty if he had known that he had a right to a jury trial. The trial court denied the initial motion on the ground that appellant was "advised of your constitutional rights." The court also denied the second motion, stating:

"You were advised of the right to a trial. [¶] There are only two kinds of trials. Jury trial and a court trial. The fact that you were advised of the right to a trial in general covers any sort of trial. You were advised that you had the right to a trial. You said you understood and gave up the right to a trial." The court again denied the motion.

A defendant may collaterally challenge a prior conviction at the trial on his current offenses by moving to have the prior conviction stricken on the ground that his *Boykin/Tahl* rights were violated. (*People v. Sumstine* (1984) 36 Cal.3d 909, 918-919 (*Sumstine*).)

"[The defendant] must affirmatively allege that at the time of his prior conviction he did not know of, or did not intelligently waive, such rights. And this does not end the matter: once such an allegation is made, the court *must hold an evidentiary hearing* of the type set forth in *People v. Coffey* (1967) 67 Cal.2d 204 to determine the truth of the allegation." (*Sumstine, supra*, 36 Cal.3d at p. 914, italics added.)

At the hearing, the prosecution first bears the burden of making a prima facie showing that the defendant suffered the prior conviction. (*Sumstine, supra*, 36 Cal.3d at p. 923.) Once that showing is made, the burden shifts to the defendant to produce evidence demonstrating a violation of the *Boykin/Tahl* constitutional requirements. (*Ibid*.) If the defendant meets this burden, the prosecution has the right to rebut the defendant's showing. (*Ibid*.) The trial court must then determine whether the defendant's prior plea constituted a knowing and intelligent waiver of his constitutional trial rights. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.)

Both *Boykin* and *Tahl* hold that the right to be waived is the right to a jury trial. (395 U.S. at p. 243; 1 Cal.3d at p. 132.) That a defendant has the right to a jury trial, as distinct from simply a trial, may be significant to a defendant who is

contemplating pleading guilty. The function of the evidentiary hearing mandated by *Sumstine* is to determine that fact, among others. Accordingly, we remand for a hearing on the issue of the validity of the *Boykin/Tahl* waiver in case No. TA073071 and for such further proceedings as may be indicated following that hearing.

VII. *Appellant's Determinate Term must be Decreased to 110 Years*

Appellant contends that under *People v. Jones* (1993) 5 Cal.4th 1142, the six one-year enhancements under subdivision (b) of section 667 of the indeterminate term must be stricken because they are based on the same prior two convictions for which the indeterminate term was enhanced by 10 years (five for each conviction) under subdivision (a)(1) of section 667.

It is true that *People v. Jones* held that a prison sentence may be enhanced only by the greater of the enhancement for the prison term and the enhancement for the prior conviction, but not by both, when the prison term and the conviction are for the same offense. (*People v. Jones, supra,* 5 Cal.4th at p. 1150.)

There is no dispute that under the Three Strikes law, the court was required to calculate the indeterminate sentence under the so-called "option (iii)" of subdivision (e)(2)(A) of section 667.[15] Under option (iii), the minimum

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[15] "(2)(A) . . . if a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of: [¶] (i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious and/or violent felony convictions. [¶] (ii) Imprisonment in the state prison for 25 years. [¶] (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any

indeterminate life term is the term under section 1170, *including any enhancement*. (See fn. 18.) As respondent correctly points out, it has been held that the enhancements under option (iii) "are added to the sentence for the current offense *as a means of calculating the minimum indeterminate life term*. They are not 'an additional term of imprisonment added to the base term.'" (*People v. Dotson* (1997) 16 Cal.4th 547, 559.) Thus, the five one-year enhancements forming a part of the indeterminate term under subdivision (b) of section 667 are used as a means of calculating the minimum indeterminate term and are not terms of imprisonment added to the base term. We therefore reject appellant's contention that the five one-year enhancements of the indeterminate term must be stricken.

The same is not true, however, of the one-year enhancement added to the determinate term. As respondent concedes, this additional one-year term is barred under *People v. Jones*, *supra*, and it must therefore be stricken.

VIII. *The Contentions Advanced in the Supplemental Opening Brief are Without Merit*

Appellant contends in his supplemental opening brief that various federal constitutional rights were violated when the request for an eyewitness identification expert was denied, when, allegedly, he was denied the services of a DNA expert and when the prosecution was permitted to amend the information after trial. We have concluded that each of these claims of error is without substantial merit. Since the trial court acted lawfully in these three instances, there is no violation of federal constitutional principles.

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period prescribed by Section 190 or 3046." (§ 667, subd. (e)(2)(A).) Subdivision (iii) is "option (iii)."

DISPOSITION

The sentence is conditionally vacated and the case is remanded with directions to conduct an evidentiary hearing on whether appellant's plea in case No. TA073071 was valid under *Boykin v. Alabama, supra*, 395 U.S. 238 and *In re Tahl, supra,* 1 Cal.3d 122. If the court determines that appellant's plea was valid, the court shall reinstate the sentence, with the exception that the determinate term shall be for 110 years. If the plea is determined not to have been valid, the court shall formulate and impose a new sentence. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.