Filed 5/30/17 P. v. Negrete CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAIME AUGUSTIN NEGRETE et al., Defendants and Appellants.	B265670 (Los Angeles County Super. Ct. No. VA126268)

APPEALS from judgments of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed in part, reversed in part, and remanded with directions.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant Jaime Augustin Negrete.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Alejandro Pineda.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Alejandro Pineda (Pineda) guilty of first degree residential robbery (Pen. Code, § 211; count 2);[1] assault with a firearm (§ 245, subd. (b); count 3); murder (§ 187, subd. (a); count 4); and first degree burglary (§ 459; count 8). A separate jury found defendant and appellant Jaime Augustin Negrete (Negrete) guilty of murder (§ 187, subd. (a); count 5); possession of a firearm by a felon (§ 12021, subd. (a)(1); count 6); and first degree burglary (§ 459; count 8). The juries also found true that Negrete personally used a handgun within the meaning of section 12022.53, subdivisions (b) through (d), that the murder was committed while defendants were engaged in the commission of a burglary, pursuant to section 190.2, subdivision (a)(17), that the crimes were committed to further the activities of a criminal street gang, pursuant to section 190.2, subdivision (a)(22), that the offenses were committed for the benefit of a criminal street gang, pursuant to

---

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

section 186.22, subdivision (b)(1)(C), and that a principal was armed with a firearm within the meaning of sections 12022, subdivision (a)(1), and 12022.53, subdivisions (d) and (e)(1).

Probation was denied for both defendants. Pineda was sentenced to life in state prison without the possibility of parole, plus 25 years to life. As is relevant to the issues raised in this appeal, the trial court ordered that his sentence on count 3 be served concurrently with the sentence imposed on count 4, the base count. The trial court further ordered him to pay various assessments and fines. Negrete was also sentenced to life in state prison without the possibility of parole, plus 25 years to life. The trial court also ordered him to pay various assessments and fines, including a $400 parole revocation fine pursuant to section 1202.4, subdivision (b).

Defendants appeal. Negrete argues: (1) The evidence is insufficient to show a burglary because (a) the garage where the incident took place was a long-time hangout location for Bratz gang members, and (b) the prosecution did not present any evidence of his entry into the structure; (2) The trial court erred in failing to instruct the jury that Negrete was not guilty of burglary if he was invited into the property by the owner who knew about and endorsed his felonious intent; (3) The trial court erred by failing to instruct the jury on second degree murder and voluntary manslaughter as lesser included offenses of felony murder with malice aforethought; and (4) The section 1202.45 restitution fine must be stricken. Negrete further argues cumulative error warrants reversal.

Pineda argues: (1) The evidence was insufficient to support Pineda's conviction for burglary, felony murder premised on burglary, and the true finding on the felony-murder special

circumstance because he had the right to be inside the garage at the time the crimes were committed and the occupant of the garage knew Pineda intended to use the property to commit a crime; (2) The trial court erred when it failed to instruct the jury that Pineda was not guilty of burglary if he was invited into the garage by the occupant who knew of and endorsed the felonious intent; (3) The trial court erred when it failed to instruct the jury on the intent required for an aider and abettor charged with felony-murder and special circumstance; (4) The evidence was insufficient to support the gang enhancements on counts 2 and 3; (5) The true findings on the section 12022.53 enhancements attached to counts 3 and 8 must be reversed because the enhancements do not apply to convictions for assault with a semiautomatic firearm or first degree burglary; and (6) The sentence on count 3 should have been stayed pursuant to section 654 since the assault with the firearm was the force used to complete the robbery charged in count 2 and was part of an indivisible course of conduct with a single intent and objective. Pineda further argues cumulative error compels reversal.

We agree with Pineda and the People that the jury's true findings on the section 12022.53 enhancements attached to counts 3 and 8 must be reversed. We also agree with Pineda and the People that Pineda's sentence on count 3 should have been stayed pursuant to section 654; we therefore remand the matter to the trial court with directions to stay the sentence on count 3. We further agree with Negrete and the People that the $400 parole revocation fine imposed against Negrete should be stricken; we therefore remand the matter to the trial court with directions to strike this fine pursuant to section 1202.45.

In all other respects, we affirm.

FACTUAL BACKGROUND

I. *Prosecution Evidence*

A. The Wilkinson Incident

On August 20, 2011, Marc Wilkinson (Wilkinson) went to Los Angeles to buy a "significant" amount of marijuana from Pineda. After initially meeting in the parking lot of a Wal-Mart in Pico Rivera, the two men went in Wilkinson's car to pick up the drugs. Wilkinson was not familiar with the area and let Pineda drive his car. Eventually, the two men arrived at a house on Suva Street in Bell Gardens.

As soon as Wilkinson approached a detached garage[2] at the residence, he was "shoved" by Pineda. Suddenly, two Hispanic men approached Wilkinson with baseball bats, demanding money from him. One of the men hit Wilkinson in the leg. Wilkinson attempted to defend himself and began struggling with the men. As this was happening, a third man approached with a gun. Pineda stood by the door.

Wilkinson pleaded with the men to take anything he had, but to spare him his life. The men took Wilkinson's money, phones, wallet, and knife. After threatening to kill him if he said anything, the men eventually walked Wilkinson to his car and let him drive away.

B. The Ortiz Shooting

On December 17, 2011, Jaime Martinez (Martinez) agreed to go with Hugo Ortiz (Ortiz) and Adam Rosales (Rosales) to meet up with Pineda at a Winchell's doughnut store in Bell Gardens. The purpose of the meeting was for Ortiz and Martinez to deliver

---

[2] A man named Gary Woodard (Woodard) resided in the garage. A "white woman" owned the house and sold it after the Ortiz shooting.

some methamphetamine to Pineda, who was acting as a "middle man" in a drug transaction. Martinez knew Pineda as "Enrique."

After a five-minute conversation at the doughnut shop, the group followed Pineda to a house on Suva Street in Bell Gardens. Once at the location, Pineda told Ortiz to leave his gun behind in the car, and the men followed Pineda to a detached garage.

As soon as the group entered the garage, they were "ambushed." A Hispanic man pulled out a gun and pointed it at Ortiz, and someone hit Martinez with a wooden baseball bat. Another man then jumped on Martinez and started wrestling him. At some point, Pineda struck Martinez with the bat. As this was occurring, Martinez heard Ortiz get shot. After Ortiz was shot, everyone except Martinez and Ortiz ran away. Martinez was able to carry Ortiz outside and call 911.

At trial, Rosales could not remember any details regarding the drug transaction or shooting. However, in a January 2012 interview with Los Angeles County Sheriff's Department Detective Philip Guzman, Rosales had stated that Ortiz had negotiated to sell methamphetamine to "Enrique." According to Rosales, on the day of the shooting, as soon as Ortiz walked into the detached garage, he was pushed to the ground by "Enrique." Rosales saw Ortiz struggling with someone and heard "Enrique" demanding money from Ortiz. Rosales then heard a gunshot and ran away.

According to the medical examiner, Ortiz died as a result of a gunshot wound to the chest.

C. Recorded Jailhouse Conversations

In a recorded jailhouse conversation with paid informants, Pineda stated that he was in custody for two cases, one with a "body" and one for attempted murder. Pineda stated that both

incidents occurred in the same place. Pineda admitted that he was concerned because there were witnesses to both crimes.

Pineda told the informants that he took Ortiz and his friends to the house on Suva Street to do "business." Pineda stated that he told the men to leave their guns in the car. According to Pineda, inside the garage, one of the witnesses began stabbing "Chato." "Chato" asked for help and Pineda "got a fucking stick."

Pineda saw "Jaime" shoot Ortiz with a ".357 or something like that." "Jaime" was a Bratz gang member. Pineda told the informants that Jaime shot Ortiz because he "started to get very crazy."

During the conversation, Pineda and the informants discussed the possibility of putting "pressure" on the witnesses and their families.

In a separate recorded conversation with paid informants, Negrete admitted that he knew "everything what happened" because "[he] was there and it was [him] that, you know." Negrete told the informants that his brother used a bat during the crime and left fingerprints, but that he had fled to Mexico. Negrete opined that the police connected him to the crime because he lived two houses down from the house on Suva Street. He told the informants that he was brought into the drug deal at the last minute to do the "payroll."

Negrete admitted that he was the shooter and had used a .357, but nobody saw his face, so he believed that there was no way "that they [could] put [him] on that." Negrete stated that after the shooting, he burned everything he was wearing and destroyed the gun he used. According to Negrete, the garage

where the shooting occurred was "tagged" with Bratz gang graffiti.

D. Gang Evidence

Bell Gardens Police Detective Dano Neslen testified as a gang expert familiar with the Bratz gang in Bell Gardens. According to Detective Neslen, the primary criminal activities of the Bratz gang included vandalism, narcotics possession and sales, weapon possession and sales, shootings, attempted murder, and murder. Detective Neslen knew the house on Suva Street to be a "long standing Bratz location."

Detective Neslen knew Negrete to be a member of the Bratz gang with the letters "TBZ" tattooed on one of his arms. He was not familiar with Pineda and did not believe that he was a member of the gang. When asked hypothetical questions containing the facts of this case, Detective Neslen opined that the crimes were committed in association with or for the benefit of the Bratz gang.

II. *Defense Evidence*

Defendants presented no evidence on their behalf.

DISCUSSION

I. *Substantial evidence supports defendants' convictions for burglary, felony murder premised on burglary, and the felony murder special circumstance*

Defendants contend that the evidence was insufficient[3] to support their convictions for burglary, felony murder premised on burglary, and the felony murder special circumstance because they had the right to be inside Woodard's dwelling at the time the

---

[3] The parties agree that we review this issue for substantial evidence.

crimes were committed and Woodard knew that defendants intended to use the property to commit a crime.

A burglary is committed when a person enters a building with the intent to commit a felony or theft. (§ 459.) However, a defense to the charge of burglary is available "when the owner *actively* invites the accused to enter, *knowing* the illegal, felonious intention in the mind of the invitee. [Citation.] . . . But the invitation by the owner to enter must be express and clear; merely standing by or passively permitting entry will not do. [Citation.] . . . And . . . the owner-possessor must know the felonious intention of the invitee. There must be evidence 'of informed consent to enter *coupled* with the "visitor's" knowledge the occupant is aware of the felonious purpose and does not challenge it.' [Citation.]" (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1398.)

"The consent defense . . . goes to the heart of a defendant's guilt or innocence of the crime of burglary. Accordingly, a defendant has the burden of proof to establish a reasonable doubt as to the facts underlying the defense." (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1309.)

Thus, in this case, defendants had the burden of showing whether Woodard or the garage owner (1) actively invited them to enter the detached garage and (2) knew defendants' felonious intention to rob Ortiz. Defendants did not meet their burden here. There is no evidence that Woodard or the owner of the property knew that defendants intended to commit a robbery there.

The fact that "[n]either the owner nor the occupant of the Suva Street garage dwelling testified at trial to deny that they authorized the use of their space for the commission of criminal

acts" is irrelevant. Lack of consent to enter the building at issue is not an element of burglary. (*People v. Felix*, *supra*, 23 Cal.App.4th at p. 1397 [lack of consent to enter a building is not an element of the offense of burglary].) Rather, defendants had the burden to prove knowing consent and they did not do so.

Even though numerous crimes had been investigated at the Suva Street property, that evidence does not establish that the owner and/or occupant of the property allowed defendants to use the property to commit crimes.

In urging reversal, defendants point to Pineda's recorded jailhouse conversation, wherein he told the informants that the "Gringos" knew that he "was going in that day," must have known what happened because they lived there, and were given money. He claims that this evidence proves that Woodard and/or the property owner knew that he was going to commit a robbery. We disagree. Pineda's statement is ambiguous at best. And, it does not prove that either Woodard or the property owner knew that he was going to commit a robbery that day. (*People v. Hinton* (2006) 37 Cal.4th 839, 886.) It is arguably more likely, or just as likely, that if they knew anything, it was only of a drug sale and/or they allowed Bratz gang members to hang out at the property because they were fearful of the gang. (*People v. Brock* (2006) 143 Cal.App.4th 1266, 1275–1276.)

Negrete additionally argues that the evidence is insufficient to support the burglary conviction, as well as the felony murder conviction and special circumstance, because "the prosecution did not present any evidence of [his] 'entry' into the structure." Absent evidence of his entry "or of his intent, at whatever time he may have arrived in the garage on the day of

the shooting," Negrete contends that his conviction must be reversed.

There is ample evidence from which the jury could have inferred that Negrete entered the garage with the requisite intent to commit a burglary. (*People v. Holt* (1997) 15 Cal.4th 619, 669.) Martinez testified that as soon as he and his companions entered the garaged, they were ambushed. Rosales told police that as soon as he entered the garage, someone pushed him to the ground and demanded money. Negrete was wearing gloves and a beanie to conceal his identity at the time of the robbery, items not normally worn during a routine drug sale. Based on this evidence, it was reasonable for the jury to infer that Negrete and his accomplices had no intention of completing a drug transaction with Ortiz and that he had the requisite intent to participate in a robbery when he entered the garage.

II. *The trial court adequately instructed the jury*

Defendants contend that the trial court had a sua sponte duty to instruct the jury that they could not be found guilty of burglary if they were "invited onto the property by the owner or occupant who knew of and endorsed the felonious intent."

"A trial court's duty to instruct, sua sponte, on particular defenses arises '"only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."' [Citations.]" (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

As set forth above, there is no substantial evidence that the owner and/or occupant of the garage invited defendants into the premises with knowledge of their specific criminal purpose. It

follows that the trial court had no duty to sua sponte instruct on this issue.

Even if the trial court had erred in failing to give this instruction (which it did not), any such error would be harmless.[4] At the risk of sounding redundant, there is no indication that the owner or occupant of the garage gave knowing and express consent for defendants to commit a robbery therein.

It follows that defendants' trial counsel was not ineffective for failing to request such an instruction. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 [failure to request a factually and legally unsupported instruction is not ineffective assistance of counsel].)

III. *The trial court did not err by failing to instruct on second degree murder and voluntary manslaughter as lesser included offenses of felony murder with malice aforethought*

Negrete argues that the trial court erred by failing to instruct, sua sponte, on second degree murder and voluntary manslaughter as lesser included offenses of felony murder with malice aforethought. Pineda joins in this argument.

A. Trial Court Proceedings

The information charged defendants with the crime of murder, in violation of section 187, subdivision (a), and alleged that defendants "unlawfully, and with malice aforethought murder[ed]" Ortiz, "a human being." The information further alleged that defendants committed the murder while engaged in the commission of the crime of burglary.

---

[4] We reach this conclusion under either a *Chapman v. California* (1967) 386 U.S. 18 or *People v. Watson* (1956) 46 Cal.2d 818, 836, standard.

At trial, the People proceeded against defendants upon a theory of first degree felony murder only regarding the death of Ortiz. During a discussion of jury instructions, Negrete's counsel noted that because the prosecution was only "pursuing" a theory of felony murder, he was not requesting a jury instruction on manslaughter because it was not "applicable."

B. Analysis

A trial court has a duty to instruct on all lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense are present, but not when there is no evidence that the offense is less than that charged. (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) Where, as in the instant case, the accusatory pleading charges a defendant with murder "with malice aforethought," second degree murder and voluntary manslaughter constitute lesser included offenses of felony murder "as charged" in the information under the accusatory pleading test, and a trial court must instruct on second degree murder or manslaughter as lesser included offenses where the jury could reasonably conclude that these offenses, but not felony murder, were committed. (*People v. Banks* (2014) 59 Cal.4th 1113, 1159–1160, abrogated on another point by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Here, there is no evidence that would support an instruction on second degree murder because there is no evidence that the offense did not occur during the commission of a burglary. As set forth above, Ortiz and his companions were immediately attacked once they entered the garage, thus demonstrating defendants' intent to commit a robbery (and therefore a burglary) inside the garage.

To the extent Negrete suggests that reversal is required because "it is not at all settled that [he] committed a burglary at all," we disagree. A defendant is still guilty of burglary if he enters with the intent to commit one felony, but ultimately commits a different one. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042.) By his own admission to the jailhouse informants, Negrete was at the garage prior to the shooting to engage in a drug deal, a felony. Thus, it is "settled" that the murder of Ortiz was committed during the course of a burglary.

People v. Anderson (2006) 141 Cal.App.4th 430 does not compel a different result. In that case, the Court of Appeal found that the trial court erred when it refused to instruct the jury on second degree murder because substantial evidence supported the conclusion that the defendant "did not decide to take the victim's money until he had been mortally wounded." (*Id.* at p. 447.) In other words, the evidence showed that the defendant's intent to steal may not have arisen until after the acts resulting in the victim's death. (*Ibid.*) In contrast, there is no evidence whatsoever here that defendants did not form the intent to rob Ortiz and his companions only until after the shooting of Ortiz. Rather, Ortiz and the other men were ambushed immediately after entering the garage, and Ortiz was shot after money was demanded. Because the evidence here indisputably points to a homicide committed during the course of a burglary, the trial court properly refrained from instructing the jury on second degree murder. (*Id.* at p. 448.)

Joined by Pineda, Negrete further argues that the trial court had a duty to instruct the jury on voluntary manslaughter based on imperfect self-defense as a lesser included offense to felony murder. "Imperfect self-defense is the killing of another

human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. [Citation.] Such a killing is deemed to be without malice and thus cannot be murder. [Citation.] The doctrine of imperfect self-defense cannot be invoked, however, by a defendant whose own wrongful conduct (for example, a physical assault or commission of a felony) created the circumstances in which the adversary's attack is legally justified. [Citations.]" (*People v. Booker* (2011) 51 Cal.4th 141, 182, fn. omitted.)

Defendants were not entitled to the requested instruction because their wrongful conduct led to the circumstances in which Ortiz was shot. Ortiz and his companions were immediately ambushed upon entering the garage.

Even if the trial court had erred in failing to give this instruction, any error would have been harmless. (*People v. Gonzalez* (2016) 246 Cal.App.4th 1358, 1380–1381, review granted July 13, 2016, S234377; *People v. Breverman* (1998) 19 Cal.4th 142, 165.) In light of the overwhelming evidence of defendants' guilt, it is not reasonably probable that defendants would have obtained a more favorable outcome. (*Id*. at p. 176.)

In urging reversal, Negrete points to two questions raised by the jury and claims that the jury posed these questions because, absent the imperfect self-defense instructions, it was "in an 'all or nothing position.'" Negrete's speculation does not compel reversal. (*People v. Williams* (2015) 61 Cal.4th 1244, 1264 [speculation is insufficient to require the giving of an instruction on a lesser included offense].)

IV. *The trial court did not prejudicially err in its instruction to the jury on the special circumstances allegation*

Pineda argues that the trial court violated his constitutional rights by failing to instruct on the intent required for an aider and abettor charged with felony murder special circumstances. The People concede that an error was made, but contend that the error was not prejudicial. We agree with the People.

The trial court instructed the jury as follows:

"To find that the special circumstance referred to in these instructions as murder in the commission of a burglary is true, it must be proved: [¶] 1. The murder was committed while [Pineda] was engaged in or was an accomplice in the commission or attempted commission of a burglary; [and/or] [¶] 2. The murder was committed in order to carry out or advance the commission of the crime of burglary. In other words, the special circumstance referred to in these instructions is not established if the burglary was merely incidental to the commission of the murder."

By giving only this instruction, the trial erred by failing to instruct the jury that a nonkiller must have the intent to kill or must have been a major participant in the burglary and have acted with reckless indifference to human life. (§ 190.2, subds. (c) & (d); *People v. Mil* (2012) 53 Cal.4th 400, 408–409.) That error, however, does not compel reversal because the omitted elements were uncontested and supported by overwhelming evidence. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 666; *People v. Mil*, *supra*, at p. 417.)

First, Pineda was a major participant in the burglary in the garage. He posed as the "middle man" for the drug transaction to

lure Ortiz and his companions to the garage on Suva Street. He told the one man with a gun to leave it in the car and he actively participated in the "ambush[]."

Second, Pineda acted with reckless indifference to human life. (*People v. Mil*, *supra*, 53 Cal.4th at p. 417 ["reckless indifference to human life" means the defendant knowingly engaged in criminal conduct with subjective awareness the activity involved a grave risk of death].) As set forth above, he actively participated in an armed robbery with known gang members during an alleged drug deal. He purposely disarmed Ortiz and his companions, leaving them helpless during an attack that he knew was going to occur. And, after the shooting, Pineda fled the garage and failed to summon help. (*People v. Smith* (2005) 135 Cal.App.4th 914, 927–928.)

V. *Sufficient evidence supports the gang enhancements on counts 2 and 3*

Pineda argues that insufficient evidence supports the gang enhancement on counts 2 and 3. Negrete joins in this argument.

We conclude that sufficient evidence supports the gang enhancement. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.) First, there was ample evidence to establish that the Bratz gang engaged in a pattern of criminal activity. (§ 186.22, subd. (e) [a "pattern of criminal gang activity" is established by "the commission, attempted commission, or solicitation of . . . two or more" statutorily enumerated offenses "committed on separate occasions, or by two or more persons"].) The prosecutor presented evidence of a murder committed on November 20, 2006, which

resulted in a conviction on July 18, 2008.[5] And, as Pineda concedes, the charged offenses in counts 2 and 3 could have served as one of the predicate offenses. (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10.) The fact that the prosecutor did not elect to expressly rely upon the charged offenses as predicate offenses to establish the pattern of gang activity is irrelevant. Because the jury could have considered this evidence when it was evaluating the gang enhancement allegation, no reversible error occurred.

Citing *People v. Garcia* (2014) 224 Cal.App.4th 519, Pineda claims that his commission of the charged offenses could not have been used by the jury to meet the requirements of a predicate offense because the jury was not instructed that it could consider his charged crimes. Thus, Pineda contends, we cannot rely upon the substantial evidence rule to affirm. We disagree. The jury instruction indicates otherwise. [6]

---

[5] The prosecutor also presented evidence of a guilty plea for felon in possession of a firearm that occurred on December 1, 2011. As Pineda rightly argues, this offense occurred after the Wilkinson incident and thus could not be used as a predicate offense for purposes of section 186.22, subdivision (e). (*People v. Godinez* (1993) 17 Cal.App.4th 1363, 1365, 1368–1370.) We do not rely upon it here.

[6] The jury was instructed that in determining the Bratz gang's primary activities, it "should consider any expert opinion evidence offered, as well as evidence of the past or present conduct by gang members involving the commission of one or more of the identified crimes, including the crimes charged in this proceeding."

Furthermore, we are charged with reviewing "*all of the evidence*" presented at trial. (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1412.)

Moreover, the chief limitation to the consideration of all evidence in a substantial evidence challenge—recognized in *People v. Kunkin* (1973) 9 Cal.3d 245 (*Kunkin*) and *People v. Smith* (1984) 155 Cal.App.3d 1103 (*Smith*)—does not apply here. In *Kunkin* and *Smith*, the People urged the courts to reject substantial evidence challenges to theft convictions on theories of theft (having completely different elements) that were never presented to the jury. The courts refused, reasoning that a court "cannot look to legal theories not before the jury in seeking to reconcile a jury verdict with the substantial evidence rule." (*Kunkin*, *supra*, at pp. 250–251 [jury instructed on theft by larceny; appellate court may not affirm on theory of theft by embezzlement]; *Smith*, *supra*, at p. 1145 [jury instructed on theft by embezzlement; appellate court may not affirm on other theft theories].)

The rule announced in *Kunkin* and *Smith* is not applicable when a jury instruction simply neglects to highlight what evidence the jury can consider as to a single element (or a subelement) of a crime or enhancement. For this reason, *People v. Garcia, supra,* 224 Cal.App.4th at page 525 (applying *Kunkin* and *Smith* to an instruction that unnecessarily narrowed what the jury could consider as evidence to support one element of a gang enhancement) is distinguishable.

Even if the jury instruction were erroneous, which it was not, we still would find no reversible error. When the instructional error pertains to a single element (or subelement) of a crime or enhancement, there is no danger of a directed verdict

of guilt as to all of the elements of a crime, as there was in *Kunkin* and *Smith*. Moreover, extending *Kunkin* and *Smith* to this new context would place them in tension (if not outright conflict) with more recent cases from the United States and California Supreme Courts holding that instructional error involving the omission or misdescription of one or more elements of a crime (as long as it does not extend to "substantially all of the elements") can be harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 10, 17; *People v. Cummings* (1993) 4 Cal.4th 1233, 1315.) These newer cases contemplate that an appellate court may affirm a conviction based on overwhelming evidence presented at trial (which renders the error harmless beyond a reasonable doubt), even where the jury never actually considered whether that evidence established the omitted or misdescribed element. Under this reasoning, an appellate court is also empowered to ignore an impermissibly restrictive jury instruction as to an element and to conduct a substantial evidence review based on all of the evidence, even though the jury did not. If this were not the case, the label we attach to the same error—instructional versus insufficient evidence—could lead to diametrically opposed outcomes (affirmance in the former if the instructional error is harmless beyond a reasonable doubt, but automatic reversal in the latter). Because "[t]he substance, not the form, is what matters" (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 573), we conclude that any erroneous instruction would not limit the scope of our substantial evidence analysis.

Second, there is sufficient evidence, principally Detective Neslen's expert testimony, that the crimes committed in counts 2

and 3 were for the benefit of the Bratz gang. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

VI. *The jury's true findings on the section 12022.53 enhancements on counts 3 and 8 are reversed*

Pineda contends that the jury's true findings on the section 12022.53 enhancements "attached to counts 3 and 8 must be reversed because the enhancement does not apply to convictions for assault with a semiautomatic firearm or first degree burglary." The People agree.

We agree with the parties that the jury's true findings on the section 12022.53 firearm enhancements must be reversed to counts 3 and 8 because the crimes committed in those counts (assault with a firearm and first degree burglary) are not enumerated offenses under section 12022.53, subdivision (a). (*People v. Fialho* (2014) 229 Cal.App.4th 1389, 1394–1395.)

VII. *Pineda's sentence on count 3 must be stayed*

Pineda contends that his sentence on count 3 should have been stayed pursuant to section 654. The People agree.

We agree with the parties that Pineda's sentence on count 3 should have been stayed pursuant to section 654. Section 654 prohibits punishment for multiple crimes arising from a single indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207–1208.) Because the robbery (count 2) and assault (count 3) were part of an indivisible transaction, Pineda's sentence on count 3 must be stayed. On remand, we order that the abstract of judgment be modified to stay Pineda's sentence on count 3.

VIII. *The parole revocation fine imposed against Negrete must be stricken*

Negrete argues that the trial court improperly imposed a $400 parole revocation fine against him pursuant to section 1202.45 because his life sentence does not include the possibility of parole. The People agree.

We agree with the parties. Because Negrete was sentenced to an indeterminate term of life without the possibility of parole, plus an indeterminate sentence enhancement of 25 years to life for the firearm allegation, he was not subject to a section 1202.45 parole revocation fine. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1185; *People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) Upon remand, Negrete's $400 parole revocation fine must be stricken.

DISPOSITION

The true findings on the section 12022.53 enhancements on counts 3 and 8 are reversed. Pineda's sentence on count 3 is stayed pursuant to section 654. The parole revocation fine imposed against Negrete pursuant to section 1202.45 is stricken. The clerk of the trial court is directed to correct the abstracts of judgment to reflect these changes and to forward the amended abstracts to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT