Filed 11/18/13 P. v. Carrillo CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL CARRILLO, Defendant and Appellant.	2d Crim. No. B241023 (Super. Ct. No. VA116025) (Los Angeles County)

Rafael Carrillo appeals his conviction by jury of attempted first degree murder (count 1; Pen. Code, §§ 664/187, subd. (a))[1], assault by means likely to produce great bodily injury (count 3; § 245, subd. (a)(1), felony vandalism (count 4; § 594, subd. (a)), receiving stolen property (count 5; § 496, subd. (b)), grand theft of personal property (count 6; § 487, subd. (a)), and two counts of soliciting or recruiting another to join a criminal street gang (counts 7 - 8; § 186.26. subd. (a)) with special findings that appellant committed the offenses for the benefit of or at the direction of a criminal street gang (§ 186.22, subd. (b)(1)(C)), intentionally and personally discharged a firearm causing great bodily injury to the victim in count 1 (§ 12022.53, subd. (d)), and inflicted great bodily injury on the victim in count 3 (§ 12022.7, subd.

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

(a)). Appellant admitted a prior strike conviction for carjacking (§§ 667, subds. (b) - (i); 1170.12, subds. (a)-(d)) and admitted suffering a prior serious felony conviction (§ 667, subd. (a)(1)). The trial court sentenced appellant to 30 years to life plus a determinate term of 27 years state prison. .

Appellant asserts that his post-arrest statements were obtained in violation of *Miranda*. He also contends that the trial court committed sentencing errors. We reverse the conviction on count 5 for receiving stolen property (§ 496, subd. (b)) because it is subsumed in the conviction for grand theft (count 6; § 487, subd. (a); *People v. Ceja* (2010) 49 Cal.4th 1, 10), and remand with directions to resentence on counts 3, 4, 6, 7, and 8. The judgment of conviction is affirmed.

Facts & Procedural History

On January 9, 2010, members of the South Side Players 13 (Players) street gang attempted to shoot several police officers. South Gate Police Officer Christian Perez obtained a wiretap warrant to monitor the mobile phones of appellant, Mario Ortiz, and Martin Hernandez from March 18, 2010 through July 16, 2010. During the course of the investigation, the police determined that appellant (aka "Thumper" or "Lil Thumper"), a Players gang member, committed the following offenses.

Count 1: Attempted Murder

On the evening of November 30, 2009, Oscar Reyes (Hoodlum Family gang member), Salvado ("Niner") Palacios (Willow Street gang), and Lizette Meza ("Giggles") saw a car pass by as they walked to Walgreens. Appellant was in the front passenger seat, yelled "South Side Players," and flashed the "P" gang sign. Reyes threw a "HF" gang sign back at appellant and Palacios threw a gang sign.

After Reyes left Walgreens, appellant drove by and made a U-turn. Appellant fired three or four shots out the passenger window. The third shot struck Reyes in the back.

Meza and Palacios told the police that appellant was the shooter. Reyes said that he knew the shooter because they attended school together. School records showed that Reyes and appellant attended South Gate Middle School from 2001 to 2004.

Count 3: Assault of Jonathan Nunez

On the evening of April 24, 2010, Jonathan Nunez and Bryan Mendoza attended a party in South Gate. Appellant approached and asked, "Where you from?" and "Are you from Fresh Boys?" Nunez said "no" and turned to leave. Appellant had an object in his hand that appeared to be brass knuckles and hit Nunez, fracturing his jaw. Nunez and Mendoza ran to a Mexican restaurant for help. Appellant followed them into the restaurant and said "we still got business" to settle. Nunez was hospitalized, had his mouth wired shut for seven months, and incurred $14,000 in medical bills.

Nunez's friend, Mendoza, saw appellant's picture on a MySpace posting and identified appellant in a photo lineup. On May 28, 2010, Nunez identified appellant in a photo lineup and wrote, "Yes, this is the guy who had hit me up, asked where I am from, and broke my jaw." Appellant's friend, Gustavo Valdivia, told the police that appellant "just clipped some guy at the party." Later that day, the police recorded a conversation between Valdivia and appellant in which appellant admitted socking someone at the party.

Count 4: Gang Tagging/Graffiti

On May 18, 2010, appellant called a fellow gang member to graffiti the riverbed area where the 105 and 710 Freeways meet. Police confirmed the location based on the GPS signal from appellant's phone and photographed the graffiti. The graffiti included references to the South Side Players, "SGNBK," "L. Thumps," "Thumps," "Lil Thumper," "SGP13," "NBK," and appellant's girlfriend, "Mary Jane." Appellant was previously a member of NBK, a tagging crew associated with the South Side Players.

On May 28, 2010, appellant tagged another area with graffiti that said "Lil' Thumper" and "VSPG13." The graffiti was posted on a MySpace account that had a photo of a person spraying graffiti. Officer Perez opined that it was a photo of appellant based on appellant's physique and clothing. At trial, it was stipulated that the cost of the graffiti removal was $2,047.92.

Counts 5 - 6: Theft of Cadillac Escalade Car Parts

On May 14, 2010, Victor Melchore parked a 2010 maroon Cadillac Escalade at the shopping mall where the 405 and 91 Freeways meet. The car was gone when Melchore returned from a movie.

On May 26, 2010, undercover officers spotted the Escalade behind Mario Ortiz's (aka "Criminal") house in South Gate. and observed appellant enter the residence several times. Minutes later, a Silverado Chevrolet pickup left the house and transported maroon-colored car parts to a body shop. The pickup returned and was loaded again. Officers arrested the driver, Mario Gallindo, and three passengers: appellant, Jose Hernandez Jr. ("Mousy"), and Eduardo Guiterrez ("Crazy"). Escalade parts were in the rear seat and truck bed. The sunroof assembly and navigation system were inside Ortiz's house.

Recorded Phone Calls

At trial, a recording of a March 7, 2010 phone call between appellant and Michael Ruiz (aka "Lil Man") was played to the jury. During the call, appellant said he had a tech-9 and a 44 magnum, and that he had already used it three times. Ruiz asked if appellant shot "that fool from HF" (i.e., Oscar Reyes). Appellant admitted shooting Reyes and said that Salvado Palacios, a gang rival, was present. Appellant said that he used to go to school with Reyes and "didn't give a fuck. Fuck you. Bop! Bop! Bop! Let the nigga have it, fool. I don't give fuck." During the phone call, appellant talked about how Palacios and Reyes pistol-whipped a fellow gang member ("Lil Flaco") on a prior occasion.

Gang Expert Testimony

Officer Perez, a gang expert, testified that appellant was the only person in the Players gang that went by the moniker "Thumper." Officer Perez authenticated recorded phone calls in which appellant discussed the January 9, 2010 police shooting and how he "socked somebody [i.e., Nunez] up" at a party. In a May 26, 2010 phone call, Valdivia told appellant that he had been arrested for the assault on Nunez. Appellant responded, "That fool I socked?" Valdivia called a second time to warn appellant that the police recognized him in a surveillance video taken the night Nunez was assaulted. Valdivia warned appellant not to go home.

The jury heard 18 recorded phone conversations in which appellant talked about dismantling the Escalade and tagging the freeway area. It heard five recorded phone calls in which appellant recruited Oscar Hernandez (aka "Reckless") and Jesus Lopez (aka "Cartoon") into the Players gang.

Detective Derek O'Malley, a gang expert, testified that the South Side Players 13 was an organized street gang that used the letter P and letters VSSP, SSP, SSP13, X3, and SSPLRZ as graffiti and tattoo symbols. O'Malley stated that gang members earn respect by putting in work for the gang and recruiting new members. Gang members steal cars to raise money for gang operations, punch non-gang members at parties, and shoot gang rivals to heighten the gang's reputation.

August 18, 2010 Arrest

On August 18, 2010, Officer Perez executed warrants for the arrest of appellant and other gang members. Appellant was not home. An Immigration and Customs Enforcement (ICE) officer arrested appellant's mother, Ana Gonzalez, and requested the she be transported to the police station to determine whether she had a criminal history and was a deportable felon.

Appellant was arrested at his girlfriend's house a few hours later and transported to the South Gate Police Department. Los Angeles County Deputy District Attorney Phillip Stirling assisted in the arrest and conducted the *Miranda* interview.

During the first 12 minutes of the interview, Stirling and appellant talked about appellant's family, gang ties, and criminal history. Appellant said that he knew his *Miranda* rights by heart and admitted that he shot Reyes, assaulted Nunez, tagged the freeway area, and dismantled the Escalade. The entire interview was recorded and transcribed.

Miranda

Appellant contends that his post-arrest statement violates *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]) because he was not advised of the right to counsel. *Miranda* holds that the suspect must be advised of the right to the presence of an attorney before and during questioning and that if the suspect cannot afford an attorney one will be appointed. (*Miranda*, 384 U.S. at pp. 478-479; see *People v. Wash* (1993) 6 Cal.4th 215, 236.)

Before appellant was advised of his rights, Stirling explained that appellant would be arraigned and "you'll get you a lawyer. Okay. You'll probably start with a public defender, unless there's going to be a conflict of interest with the public defender . . . . You'll get - you get a lawyer - a free lawyer." Stirling discussed the factors that go into a plea negotiation and said that it was important that appellant be truthful otherwise "your value, potentially, as a witness, just drops." Stirling stated "you don't have to talk to us" and asked, "You've been read your Rights before, right?" Appellant acknowledged that he knew his *Miranda* rights "by heart," recited his rights, and confessed.

Before trial, appellant brought a *Miranda* motion to suppress the statement. The prosecution, in opposition to the motion, presented evidence that appellant was arrested 13 times before the *Miranda* interview and had been advised of his *Miranda* rights at least seven times. Denying the motion, the trial court found that appellant knowingly and voluntarily waived his *Miranda* rights.

In reviewing a defendant's claim that his *Miranda* rights were violated, we accept the trial court's resolution of disputed facts and inferences that are supported

by substantial evidence. (*People v. Cruz* (2008) 44 Cal.4th 636, 667.) We also accept the trial court's determination of witness credibility. (*Ibid*.) It is settled that a suspect may impliedly waive his/her *Miranda* rights and an "expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights." (*Ibid*.)

Although Stirling did not specifically say that appellant had the right to the presence of counsel during questioning, the colloquy shows that appellant was aware of his right to counsel and waived it:

"[Stirling] Right now, do you understand that you don't have to talk to us?

"[Appellant]: Yeah. I -- .

"[Stirling]: You understand that? You've been read your Rights before, right? [¶] . . . And you know - you know them by heart probably.

"[Appellant]: Yeah.

"[Stirling]: Okay. What - what are they, real fast? Tell - tell me your Rights, if you don't mind.

"[Appellant] Any - anything - uh, you have the right to remain silent. Anything you say can be - can be used against you in a court of law. You have the right for an attorney. If not, you know, you will be placed [sic] by one. . . .

"[Stirling]: I -- I think that's kind of it. I mean, you have the right to -- the right to remain silent. You have the right to a lawyer.

"[Appellant] Uh-huh. Yeah.

"[Stirling]: If you can't afford a lawyer, --

"[Appellant]: One will be appointed by counsel.

"[Stirling]: -- one will be appointed. One will be appointed for you, uh, free and blah, blah.

"[Appellant]: Yeah. Uh-huh."

In *People v. Nitschmann* (1995) 35 Cal.App.4th 677 we held: "A suspect may not 'out *Mirandize*' the police by reciting his *Miranda* rights and later claim the admonition was defective." (*Id.*, at p. 683.) In *Nitschmann* the officers told defendant he had a right to consult an attorney but did not expressly say the attorney could be consulted before and during questioning. (*Id.*, at pp. 682-683.) We concluded that defendant waived his rights and that *Miranda* did not operate in an overly technical way to exalt form over substance. (*Ibid.*) "Reviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonable 'conve[y] to [a suspect] his rights as required by *Miranda*.' [Citation.]" *Duckworth v. Eagen* (1989) 492 U.S. 195, 203 [106 L.Ed.2d 166, 177].)

Like *Nitschmann*, appellant acknowledged that he had the right to counsel and agreed to talk. (*People v. Nitschmann*, *supra*, 35 Cal.App.4th at p. 683.) Appellant had been advised of his *Miranda* rights "[p]lenty of times" and admitted, at the *Miranda* hearing, that he understood that he had the right to have an attorney present before and during questioning. "[T]hose who know the *Miranda* rules, including 'con-wise' arrestees such as appellant, are entitled to the admonition. But a rule excluding otherwise voluntary statements after the arrestee admonishes himself on the record would do violence to common sense. Here there was direct evidence that appellant was aware of his *Miranda* rights before talking to the police. This is the goal of *Miranda*. Where as here, the reason for the rule is satisfied, the rule should not operate in an overly technical way to exclude relevant evidence." (*Id.*, at p. 683.)

Duress/Coercion

Citing *People v. Honeycutt* (1977) 20 Cal.3d 150, appellant argues that the *Miranda* waiver was involuntary because Stirling "softened" him up with small talk before asking appellant to waive his *Miranda* rights. Unlike *Honeycutt*, there is no evidence that appellant was threatened, tricked, cajoled, or badgered into waiving his rights. (*Id.*, at p. 160.) The trial court found that pre-*Miranda* colloquy was "just

chitchat" and "[t]here's no coercion here . . . ." We concur. The totality of the circumstances surrounding the interrogation, when considered in the context of appellant's prior police contacts, supports the finding that the *Miranda* waiver was free and voluntary.

Appellant argues that Ana Gonzalez's (appellant's mother) arrest was a coercive tactic to induce appellant to waive his *Miranda* rights. When Officer Perez tried to execute the arrest warrant, appellant's mother and sister denied knowing where appellant was. An Immigration and Customs Enforcement officer arrested Gonzalez and requested that Gonzalez be transported to the police department to determine if she was a deportable felon.

Appellant was arrested a few hours later on the warrant. Perez and Stirling drove appellant to the police station and, on the way there said: "We were holding [Gonzalez] for ICE." Appellant arrived at the police station at 7:40 a.m. and was interviewed at 9:10 a.m.

Appellant claims that he confessed to get Gonzalez released.[2] (See *People v. Steger* (1976) 16 Cal.3d 539, 550 [threat to arrest a close relative or express or implied promise that suspect's cooperation will benefit the relative is a form of coercion].) Appellant, however, did not mention Gonzalez during the interview. Any desire of appellant to aid his mother by confessing was entirely self-motivated. (*Ibid*.)

At the *Miranda* hearing, appellant claimed that Stirling was operating the tape recorder and the recording light "came off once or twice" when appellant talked about Gonzalez. In rebuttal, Officer Perez, testified that two recording devices were used and not visible, and that the entire *Miranda* interview was recorded and transcribed. At no time during the interview did appellant mention Gonzalez, her detention, or her release. Nor did anyone say that Gonzalez would be released if

[2] Appellant was advised, prior to or at the start of the *Miranda* interview that Gonzalez no longer had an ICE hold and was going to be released. Before Gonzalez was released at 1:30 p.m., Gonzalez asked to see appellant and hugged him.

appellant cooperated. Substantial evidence supports the finding that Gonzalez's detention by ICE was not used to coerce appellant to confess. "[W]here no express or implied promise or threat is made by the police, a suspect's belief that his cooperation will benefit a relative will not invalidate an admission. [Citations.]" *People v. Steger, supra,* 16 Cal.3d. at p. 550.)

Promise of Leniency

Appellant claims that the *Miranda* waiver was involuntary because Stirling told him that truthful statements were important to a potential plea offer. The advice that it would be better to tell the truth is not a promise of leniency. (*People v. McWhorter* (2009) 47 Cal.4th 318, 357-358.) "The record does not substantiate the claim that [appellant's] admissions/confession and any promise of leniency were ' "causally linked." ' [Citations.]" (*People v. Linton* (2013) 56 Cal.4th 1146, 1177.) Appellant was street-wise in police matters and made a knowing decision to talk to Stirling without a lawyer. (*People v. Nitschmann, supra,* 35 Cal.App.4th at p. 683.) During the interview, appellant said that he understood a person was less likely to get a deal if he was untruthful and more likely to "go straight down to the trial" if he lied. There were no implied threats or promises of leniency.

Harmless Error

The alleged error, if any, in admitting appellant's *Miranda* statement was harmless beyond a reasonable doubt. (*People v. Sims* (1993) 5 Cal.4th 405, 447.) The phone wiretaps and eyewitness testimony was overwhelming and established appellant's guilt. In the recorded phone calls, appellant bragged about shooting Reyes (count 1; attempted murder), assaulting Nunez (count 3), tagging the freeway area (count 4), dismantling the Escalade (counts 5-6), and recruiting new gang members (counts 7-8).

Appellant argues there is insufficient evidence to support the finding that the attempted murder was deliberate and committed with premeditation. (§ 664, subd. (a).) After appellant and Reyes exchanged gang signs, appellant armed himself,

returned to the area, and drove by Reyes. Appellant made a U-turn and fired three or four shots, hitting Reyes in the back as he ran. Multiple shots fired at an unarmed victim at close range is compelling evidence of planning, premeditation, and deliberation. (*People v. Silva* (2001) 25 Cal.4th 345, 369; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1463-1464.) Where the shooting is based on a gang rivalry, premeditation and deliberation may be inferred even though the time between the sighting of the victim and actual shooting is brief. (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.) The admission of appellant's post-arrest statement, even if erroneous under *Miranda,* was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-309 [113 L.Ed.2d 302, 332]; *People v. Sims, supra,* 5 Cal.4th at p. 447.)

Prosecutor As Defense Witness

Appellant asserts that he was denied the due process right to a fair trial because he was not permitted to call Stirling as a witness at the *Miranda* hearing. Appellant argues that Stirling could have testified about what was said about Gonzalez. Appellant does not dispute that the recording and the transcript of the interview accurately sets forth everything said. (See *People v. Kitechel* (1963) 59 Cal.2d 503, 519 "recordings or the written transcript of them are 'more reliable and satisfactory evidence than testimony of conversations from memory by those who overheard them.' "].)

The trial court denied appellant's request to call Stirling because "[i]t's all in the transcript, sir. It is what it is." A trial court has broad discretion under the Sixth Amendment to exclude evidence that is repetitive, would confuse the issues, or is marginally relevant. (Evid. Code, § 352; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [89 L.Ed.2d 674, 683]; *People v. Jennings* (1991) 53 Cal.3d 334, 372.) Appellant made no offer of proof that Stirling's testimony would address new and relevant information that could not be elicited from other witnesses. It is uncontroverted that Officer Perez was with Stirling when the police went to appellant's

house to serve the warrant, when appellant was arrested and transported to the police station, and throughout the interview. Appellant claims there are factual conflicts about the *Miranda* waiver but other witnesses could have been called to testify.[3] Three other detectives where present when appellant waived his *Miranda* rights and confessed.

Stirling as a Trial Witness

Appellant asserts that he was denied the right to present a defense because he was not permitted to call Stirling at trial. Gonzalez, appellant's sister (Maribel Carrillo), and Officer Perez were called as defense witnesses based on theory that it was a false confession and appellant would do anything to protect Gonzalez. Stirling's testimony would have been cumulative and was properly excluded. (Evid. Code, § 352; *People v. Mincey* (1992) 2 Cal.4th 408, 440 [application of ordinary rules of evidence does not infringe on a defendant's right to present a defense]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Appellant argues that the manner in which the confession was obtained casts doubt on its credibility. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 689 [90 L.Ed.2d 636, 644].) But the reliability of a confession is governed by state evidentiary law and presents no due process issue. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 [93 L.Ed.2d 473, 484].) This is not a case where the jury was unaware of the factors affecting the reliability of the confession. (Compare *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1205-1206 [upholding exclusion of expert testimony on false confession where circumstances of confession not withheld from jury].) Appellant defended on the theory that he falsely confessed to protect his mother (Gonzalez).

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[3] Appellant claims that a Child Protective Services (CPS) was called to place his sister's baby in protective custody and that Stirling's testimony could have clarified when CPS arrived at Gonzalez's house. Appellant, however, did not know about the CPS investigation. It is irrelevant to the question of whether appellant's confession was coerced or involuntary.

Defense counsel argued that appellant was so scared that he would have "confess[ed] to shooting the pope."

Appellant makes no showing that the trial court's ruling excluding Stirling's testimony resulted in "the complete exclusion of evidence intended to establish [his] defense . . . ." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) The jury was instructed that it was to "[c]onsider with caution any statement made by the defendant tending to show his guilt" (CALCRIM 358) and that appellant "may not be convicted of any crime based on his out-of-court statements alone." (CALCRIM 359.) On review, it is presumed that the jury understood and followed the instructions. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83.)

Prior Strike

Appellant argues that the trial court erred in sentencing him as a second striker because his 2008 juvenile adjudication for carjacking (§ 215, subd. (a)) does not qualify as a strike. For juvenile offenders, carjacking is not a serious or violent felony unless a dangerous or deadly weapon was used to commit the offense. (See Welf, & Inst. Code, § 707, subd. (b)(25); Pen. Code, § 667, subd. (d)(3); *People v. Garcia* (1999) 21 Cal.4th 1, 6-7, 13.).

Appellant asserts that an unauthorized sentence is jurisdictional error that can be raised for the first time on appeal (*People v. Scott* (1994) 9 Cal.4th 331, 354) and that he was denied effective assistance of trial counsel. Although the 2008 juvenile adjudication is not part of the record of appeal, a 2007 police report filed in opposition to the *Miranda* motion states that a cohort used a handgun to carjack the vehicle with appellant. (See e.g., *In re Travis W.* (2003) 107 Cal.App.4th 368, 372 [juvenile offense of carjacking "while armed with a dangerous or deadly weapon" does not require that the principal be personally armed].)

Trial counsel's decision to forgo implausible arguments or objections concerning the factual basis for the prior strike enhancement does not constitute deficient performance. (*People v. Prieto* (2003) 30 Cal.4th 226, 261; *People v. Ochoa*

(1998) 19 Cal.4th 353, 432.) Appellant's admission of the strike enhancement is valid even if it does not include specific admissions of every factual element required to establish the enhancement. (*People v. Thomas* (1986) 41 Cal.3d 837, 842-845; *People v. French* (2008) 43 Cal.4th 36, 50.) We reject the argument that the trial court erred in sentencing appellant as a two strikes offender, that the prior serious felony enhancement resulted in an excessive sentence, or that appellant did not receive effective assistance of trial counsel.

Count 5 - Receiving Stolen Property

Appellant contends, and the Attorney General agrees, that appellant cannot be convicted of both grand theft of the Escalade car parts (count 6) and receiving stolen property. Section 496, subdivision (a) provides that a principle in the actual theft of property may not be convicted of both theft of the property and receiving stolen property. Where the jury convicts a defendant of both theft and receiving the same stolen property, the reviewing court must reverse the receiving stolen property conviction. (*People v. Ceja, supra,* 49 Cal.4th at p. 10.) One may not be convicted of stealing and of receiving the same property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757.)

Sentencing Errors On Counts 4, 6, 7, and 8

On counts 4, 6, 7, and 8 the trial court sentenced appellant to one-third the midterm and doubled the sentence based on the prior strike.[4] The midterm on each

[4] The trial court sentenced appellant to 30 years to life plus a determinate term of 27 years based on the following sentencing calculation: On count 1 for attempted murder, the trial court sentenced appellant to life without possibility of parole, plus 25 years to life on the firearm enhancement, plus five years on the serious felony enhancement (§ 667, subd. (a(1)). The trial court imposed a determinate term of 27 years, to be served consecutive to count 1, based on the following sentence calculation: On count 3 (assault) it imposed a term of eight years (four year upper term, doubled based on the prior strike), plus three years on the great bodily injury enhancement (§ 12022.7, subd. (a)), plus five years on the gang enhancement for a total term of 16 years. On counts 4, 5, and 7, it imposed consecutive terms of two years, plus one year on the gang

count is two years. The trial court erroneously assumed that one-third the midterm was one year rather than eight months. The Attorney General concedes that appellant should be sentenced to 16 months on each count (one third the midterm of eight months, doubled based on the prior strike) plus one year on the gang enhancement.

Appellant argues that the trial court erred in imposing a one-year gang enhancement on count 7 for recruiting another to participate in a criminal street gang. (§ 186.26, subd. (a).) In *People* v. *Mesa* (2012) 54 Cal.4th 191, 193, our Supreme Court held that section 654 precluded punishment for both street terrorism (§186.22, subd. (a)) and the underlying felony (assault with a firearm) which transformed mere gang membership (a non-crime) to the crime of actively participating in a criminal street gang. The same principle applies where "gang-related conduct" is used to convict for soliciting/recruiting someone to join a gang, and used again to impose a one-year gang enhancement. "[T]he same gang-related conduct cannot be used twice in the same sentencing scheme without violating the concept of double punishment for the same act." [Citations.]" (*Lopez v. Superior Court* (2008) 160 Cal.App.4th 824, 831.) On resentencing, the one-year gang enhancement on counts 7 and 8 must be stayed. (See *People v. Ahmed* (2011) 53 Cal.4th 156, 164 [section 654 "bars multiple punishments for the same aspect of a criminal act"].) Appellant cannot suffer multiple punishments for active gang participation and the underlying felony of recruiting a gang member. (*People v. Mesa, supra,* 54 Cal.4th at p 197-198.)

Conclusion

The conviction on count 5 for receiving stolen property (§ 496, subd. (b)) is reversed on the ground that it is subsumed in the conviction for grand theft

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enhancement. On count 6 for receiving stolen property, it imposed a concurrent term of two years plus a one-year gang enhancement and stayed the sentence pursuant to section 654. On count 8, the court imposed a two-year term but failed to sentence on the one-year gang enhancement. The trial court was required to either strike the gang enhancement or impose it. (*People v. Lopez* (2004) 119 Cal.App.4th 355, 364.)

(count 6; § 487, subd. (a); *People v. Ceja*, *supra*, 49 Cal.4th at p. 10.) This requires a remand and recalculation of the determinate sentence. The sentence on counts 4, 6, 7, and 8 is vacated with directions to (1) recalculate the sentences (one-third the midterm of 8 months, doubled based on the prior strike, plus a one-year gang enhancement), (2) stay the one-year gang enhancement on counts 7 and 8 (§ 654; Cal. Rules of Court. rule 4.447; *People v. Mesa*, *supra*, 54 Cal.4th at p 197-198.), (3) declare whether the sentences on counts 4, 6, 7, and 8 are concurrent or consecutive to the 16 year sentence on count 3 for assault; and (4) order that the aggregate sentence on counts 3, 4, 6, 7, and 8 be served first, followed by the indeterminate term of life plus 30 years to life on count 1 for attempted murder. (See § 669; *People v. Garza* (2003) 107 Cal.App.4th 1081, 1094 (where indeterminate life term and determinate terms run consecutively, the determinate terms are to be served first].)

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Thomas I. McKnew Jr., Judge

Superior Court County of Los Angeles

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Zeb Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.