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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARGARITO GONZALEZ et al., Defendants and Appellants.	B267319 (Los Angeles County Super. Ct. No. PA078797)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden Zacky, Judge. Affirmed in part, vacated in part, and remanded.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant Margarito Gonzalez.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant Jesus Antonio Soto.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendants Margarito Gonzalez and Jesus Soto (collectively defendants) guilty of home invasion robbery, first degree residential robbery, first degree residential burglary, and four counts of assault. On appeal, defendants argue: (1) the evidence was insufficient to support the robbery convictions; (2) Penal Code[1] section 1157 requires that the convictions for first degree robbery and first degree burglary be reduced to second degree offenses; and (3) Section 654 required the trial court to stay the sentence on an assault count involving the victim who was also the subject of the robbery. We find no merit in these claims.

Soto additionally contends: (1) the trial court erred in imposing a five-year prior serious felony enhancement as to the indeterminate and determinate portions of his sentence; and (2) the prior conviction findings must be vacated because he did not admit the prior conviction allegations. We disagree with the first contention, but agree with the latter.

Defendants further argue, and the People concede, that (1) the convictions for first degree residential robbery must be vacated because the crime was a lesser included offense of the home invasion robbery charge; and (2) firearm enhancements imposed on the assault counts must be stricken because arming was an element of the underlying crime. We vacate these portions of the defendants' sentences. We also strike the firearm enhancement imposed on the burglary count.

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[1] All further section references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the evidence in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.) On October 20, 2013, Maria Favela, Roberto Villa, and Favela's two adult children, Mayra Olvera and Joaquin Frausto, were at Favela and Villa's apartment. Olvera and Frausto were in the living room; Favela and Villa were in a bedroom. Gonzalez, known as Jojo, Jesus Soto, known as Capone, Gerardo Lopez, known as Lalo, and a fourth man approached the apartment. Gonzalez, Soto, and Lopez were all known to police as members of the Langdon Street gang.[2]

The fourth man had a gun. The group threatened to shoot or break in the door. Olvera and Frausto opened the door. The men were talking about "somebody fucking with Jojo . . . ." Soto punched Olvera in the face and hit the back of her head. The gunman attacked Frausto, punching him. Gonzalez and Lopez stood at the front door. The gunman and Soto then went into the bedroom with the gun. They asked for Carlos Patino. Patino was a friend of Olvera and Frausto; he sometimes stayed at Favela and Villa's apartment.

Favela heard the sound of something being broken in the living room, then a man burst into the bedroom. Villa testified the man said "that was cold-blooded" or "chicken shit" that "we jumped on his homeboy. . . ." The man was yelling and seemed frustrated. He pointed a gun at Villa and Favela. Favela asked the man who he was looking for and what he wanted, but he did

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[2] At trial, the People's theory was that Oscar Murillo was the fourth man and the gunman. However, the jury acquitted Murillo of all charges. Gerardo Lopez was not tried with defendants and Murillo.

not answer. The gunman yelled at Villa, "Go down to the floor, old man, son of a bitch." He grabbed a hearing-aid container out of Villa's hand.[3]

The men outside the bedroom asked the gunman, "what's happening?" He yelled back, "some lady and some frigid old man." The gunman's eyes were searching the bedroom. The other men said "this was not what they were looking for." The gunman told Villa and Favela "this was so that they wouldn't mess around with his homies."[4]

During the incident, Gonzalez and Lopez stood in the doorway. They were "talking to one another and laughing while everything was happening inside the apartment." Frausto perceived Gonzalez and Lopez as instigating or encouraging the violent behavior.[5] Olvera saw Gonzalez in the doorway. She told him to tell his "homeboys" that no one in the apartment "did that

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[3] At trial, Villa testified the gunman opened the hearing aid container, then threw it toward the living room, where Villa found it later that evening. But he admitted that at the preliminary hearing he testified the gunman left with the container. Villa also told police one of the men grabbed a plastic container out of his hand and fled with it. Frausto told police the men took Villa's hearing aid and pushed him; he testified this is what Villa told him.

[4] Favela and Villa testified they did not recognize any of the defendants in court as the men who barged into the bedroom during the incident.

[5] Frausto agreed at trial that at the preliminary hearing he described Gonzalez and Lopez as they stood in the doorway: " 'It was kind of a mutual giggle. Kind of sitting, laughing at the whole situation going on in the house.' "

shit to you, dude, whatever it is." Gonzalez stepped inside the apartment to tell his associates to stop. The group left.

A television in the living room was severely damaged after the men left. Olvera told police: "I guess one of them . . . threw a chair or something and it broke the television." The men also broke two angel figurines. Frausto had a large bruise on his back and a mark in the shape of a tennis shoe. Olvera had a black eye. Frausto was hysterical and crying. Olvera told Favela she had seen the men before on the street but had not spoken to them. The family did not call the police.

In a recorded interview with police, Olvera said "Jojo" and "Lalo" were present during the incident; she had never seen the other two men before. She knew one of them as "Capone." She also identified photographs of two men she said looked like "Lalo" and "Jojo." She selected photographs that resembled the two other men—Capone and another man—but she was unsure. Olvera and Frausto told police the attack occurred because Patino had supposedly "jumped" Gonzalez, and the group was looking for Patino.

Frausto identified defendants, Lopez, and Murillo from photographic lineups. Frausto identified Murillo as the gunman, Soto as the man who attacked Olvera, and Gonzalez and Lopez as the two men who stood in the doorway. The investigating officer wrote in his report that Frausto indicated the gunman said, "I'm going to rob you."[6]

The jury acquitted Murillo of all charges. It found Gonzalez and Soto guilty of home invasion robbery (§ 211; count 1); first degree residential robbery (§ 211; count 2); first degree

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[6] In his preliminary hearing and trial testimony, Frausto denied making this statement to the officer.

residential burglary (§ 459; count 3); and four counts of assault with a firearm (§ 245, subd. (a)(2); counts 4-7).

As to count 1, the jury found true the allegation that the offense was committed in concert with two or more individuals within the meaning of section 213, subdivision (a)(1)(A). As to count 3, the jury found true the allegation that during the commission of the offense, there was a person present other than an accomplice in the inhabited dwelling.

As to all counts, the jury found true gang enhancements under section 186.22, subdivision (b). The jury further found true the allegation that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1) as to counts 1, 2, 3, and that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1) as to counts 4 through 7.

The trial court sentenced Gonzalez to a total prison term of 55 years to life. The court sentenced Soto to a total prison term of 65 years to life. Defendants timely appealed.

DISCUSSION[7]

I. Sufficient Evidence Supported the Robbery Convictions

Defendants contend there was insufficient evidence to support the robbery convictions. We disagree.

A. Standard of Review

" 'To determine whether sufficient evidence supports a jury verdict, a reviewing court reviews the entire record in the light most favorable to the judgment to determine whether it discloses

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[7] Defendants have joined in each other's arguments where applicable.

evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Smith* (2014) 60 Cal.4th 603, 617.) " ' "[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]' [Citation.]" (*People v. White* (2014) 230 Cal.App.4th 305, 315, fn. 13.)

This standard of review applies to claims involving both direct and circumstantial evidence. " 'We "must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" [Citation.] "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]" [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal. [Citation.]' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

B. Discussion

" 'Robbery is the taking of "personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent permanently to deprive

such person of such property." [Citation.]' ([Citation]; see § 211.) 'If the other elements are satisfied, the crime of robbery is complete without regard to the value of the property taken.' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 943.)

This case involved an aiding and abetting theory as to defendants. "An aider and abettor is someone who, with the necessary mental state, 'by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Smith*, *supra,* 60 Cal.4th at p. 616.) " '[W]hile mere presence at the scene of an offense is not sufficient in itself to sustain a conviction, it is a circumstance which will tend to support a finding that an accused was a principal. [Citations.]' [Citation.] ' "[C]ompanionship, and conduct before and after the offense" ' are also relevant to determining whether a defendant aided and abetted a crime. [Citations.]" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 407.)

Here, there was evidence defendants encouraged, instigated, and facilitated the robbery. Soto entered the bedroom with the gunman and was acting with him as the gunman terrorized Favela and Villa, eventually grabbing Villa's hearing aid container out of his hand. The jury could reasonably infer from the evidence that Soto was "back up" for the gunman during the commission of the robbery, facilitating and ensuring its commission.

As to Gonzalez, there was evidence he was "instigating the whole situation" and "encouraging" while "everything was happening in the apartment," which the jury could infer included the robbery in the bedroom. Villa testified that while he was in the bedroom, the gunman was busy talking with people in the

living room, which the jury could interpret as an indication that Gonzalez was aware of and encouraging the robbery, as well as the assaults.

Further, while there was conflict in the evidence about exactly what happened in the apartment, Favela testified at trial that all of the men were standing at the bedroom door when the gunman entered. This evidence indicated Gonzalez was not a distant bystander, but was instead encouraging the gunman, in close proximity to the robbery as it occurred. He was also blocking Favela and Villa from leaving the bedroom, and preventing Frausto or Olvera from entering.

This evidence was sufficient for the jury to reasonably conclude defendants aided and abetted the robbery.

We also reject defendants' argument that there was insufficient evidence for the jury to conclude defendants had the intent to permanently deprive Villa of his hearing aid container. At trial, Villa testified the gunman snatched the container out of his hand and threw it toward the living room. However, there was also evidence Villa told Frausto and an investigating law enforcement officer that the gunman took the container and fled. Villa also testified at the preliminary hearing that the gunman left with the container.

On appeal we do not resolve evidentiary conflicts, but instead " 'review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.' " (*People v. Manibusan, supra,* 58 Cal.4th at p. 87.) Villa's prior statements indicating the gunman took the container and fled supported a finding that there was an intent to

permanently deprive Villa of the container. (*People v. Burney* (2009) 47 Cal.4th 203, 252.)

II. Section 1157 Does Not Mandate a Reduction of the First Degree Robbery and Burglary Convictions to Second Degree Offenses

Under section 1157, "[w]henever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree."

In this case, the verdict forms presented to the jury concerned only first degree robbery and first degree burglary. Defendants therefore contend that under section 1157, the jury was prevented from determining the degree of the crime and the convictions must be reduced to second degree offenses. We disagree. As an initial matter, defendants have forfeited this argument by failing to raise it below. (*People v. Johnson* (2015) 61 Cal.4th 734, 784.) But even if the argument were preserved, we would reject it.

Section 1157's purpose is to protect a defendant from the risk that the degree of the crime might be increased after judgment. (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 756 (*Selivanov*).) The only theory in this case was that of first degree robbery and burglary. In other words, the People's entire theory was that the crimes were committed in an inhabited dwelling. (§ 212.5, subd. (a) [robbery perpetrated in an inhabited dwelling house is first degree robbery]; § 460, subd. (a) [burglary of an

inhabited dwelling house is first degree burglary].) The evidence established that if a robbery or burglary occurred, the crimes took place in an inhabited dwelling. The information and verdict forms permitted a conviction only for first degree robbery and burglary, thus, applying section 1157 would not serve the statute's purpose of avoiding a post-judgment increase of the degree of the crime. (*Selivanov, supra,* 5 Cal.App.5th at p. 756.)

" '[W]here the trial court properly instructs the jury to find a defendant either not guilty or guilty' of [first degree robbery and burglary], 'there is simply no degree determination for the jury to make.' [Citation.] For that reason, requiring application of section 1157 here 'would be both absurd and unreasonable, for it would require courts to deem a conviction to be of a degree that was never at issue and that the jury was neither asked nor permitted to consider.' [Citation.]" (*Selivanov, supra,* 5 Cal.App.5th at p. 756, citing *People v. Mendoza* (2000) 23 Cal.4th 896, 911.)

That the trial court instructed the jury on degrees of robbery and burglary does not change our analysis, in light of the evidence and the theory argued in this case. (*People v. Prince* (2007) 40 Cal.4th 1179, 1270 [section 1157 did not require jury to make determination of degree of murder when substantial evidence did not exist that would warrant the jury to consider the homicide to be anything less than first degree murder].)

III. The Trial Court Did Not Err in Failing to Stay the Sentence on Count 6 Under Section 654

Defendants argue the trial court should have stayed the sentence on count 6 under section 654 because the assault on

Villa was incidental to the accomplishment of the robbery charged in count 1. We find no error.

" ' "In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." ' " ' [Citations.] [But] '[s]ection 654 bars separate punishment for multiple offenses arising out of a single, indivisible course of action.' [Citation.] Its purpose is 'to ensure that a defendant's punishment will be commensurate with his culpability.' [Citation.]" (*People v. Deegan* (2016) 247 Cal.App.4th 532, 541.)

" ' " 'Section 654 has been applied not only where there was but one "act" in the ordinary sense . . . but also where a course of conduct violated more than one statute . . . within the meaning of section 654.' [Citation.] [¶] Whether a *course of criminal conduct* is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." [Citations.]' [Citations.] [¶] But even if a course of conduct is 'directed to one objective,' it may 'give rise to multiple violations and punishment' if it is 'divisible in time.' [Citations.]" (*People v. Deegan, supra,* 247 Cal.App.4th at pp. 541-542, original italics.)

"Whether section 654 applies is a question of fact for the trial court, and its finding will be upheld if there is substantial evidence to support the finding." (*People v. Buchanan* (2016) 248 Cal.App.4th 603, 611.)

In this case, there was substantial evidence supporting the trial court's finding that the robbery and assault on Villa were the result of different criminal objectives. There was evidence that, with the assistance and encouragement of defendants, the gunman first assaulted Villa. The gunman pointed a gun at Villa, yelled about the previous attack on Gonzalez, and demanded that Villa get down on the floor. Then, only after realizing Patino was not in the apartment, the gunman snatched the hearing aid container out of Villa's hand and left. In the victims' accounts of the incident, the assault with the gun preceded the separate grabbing of the hearing aid container.

The evidence supported a conclusion that the initial assault was not for the purpose of carrying out the robbery. Instead, the assault with the gun was part of defendants' efforts to seek revenge on Patino; the robbery was a separate crime that occurred only after they realized Patino was not there. There was sufficient evidence of divisible intents in the commission of the two crimes. The trial court did not err in imposing punishment for both crimes.

IV. The Trial Court Did Not Err in Imposing the Five-Year Prior Serious Felony Enhancement as to Soto's Indeterminate and Determinate Sentences

At Soto's sentencing, on count 1, the home invasion robbery charge, the trial court imposed a sentence of 15 years to life pursuant to the section 186.22, subdivision (b)(4) gang enhancement; the sentence was doubled pursuant to section 667,

subdivision (e)(1); and the court imposed an additional five-year term under section 667, subdivision (a)(1).[8]

As to counts 4 through 7, the assault charges, the trial court imposed an aggregate term of 30 years, and further imposed an additional five-year term under section 667, subdivision (a)(1).

On appeal, Soto contends the trial court could not properly impose the section 667, subdivision (a)(1) enhancement on both the indeterminate and determinate terms. We disagree.[9]

In *People v. Misa* (2006) 140 Cal.App.4th 837 (*Misa*), the court rejected the argument Soto makes here. In *Misa*, the defendant, like Soto, was a second-strike defendant. He was sentenced to an indeterminate term on a charge of torture, and a determinate term on an assault count. Both terms were enhanced under section 667, subdivision (a). On appeal, the

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[8] Under section 667, subdivision (a)(1), "any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

[9] Although we conclude below that the prior conviction findings in Soto's case must be vacated due to the absence of an admission or trial court finding following a bench trial, we remand so that Soto may admit the prior conviction or be tried on the allegations. We therefore consider his argument regarding the section 667, subdivision (a)(1) five-year enhancement.

defendant argued the court improperly imposed the serious felony prior enhancement twice. (*Misa,* at pp. 840, 846.)

The appellate court disagreed. The court followed *People v. Williams* (2004) 34 Cal.4th 397 (*Williams*), in which the California Supreme Court concluded a section 667, subdivision (a) enhancement was properly imposed as to multiple indeterminate sentences. The *Williams* court explained that section 667, subdivision (e) indicated the section 667, subdivision (a) enhancement "was required to be imposed as to each qualifying felony of which the defendant (in that case, a third striker) was currently convicted." (*Misa, supra,* 140 Cal.App.4th at p. 846.) The *Williams* court also reasoned "the section 667, subdivision (a) enhancement was enacted as part of a statutory and constitutional scheme intended to increase sentences for recidivist offenders." (*Misa, supra,* 140 Cal.App.4th at p. 846, citing *Williams*, at pp. 404-405.)

The *Misa* court accordingly concluded the statutory language in section 667, subdivision (e) discussed in *Williams* similarly applied to second strike sentences "and thus supports the conclusion that a logical application of the *Williams* analysis in this context would require the imposition of the prior conviction enhancement on Misa's second strike offense . . . notwithstanding that the enhancement was also imposed as a status enhancement relating to the determinate term on the assault count." (*Misa, supra,* 140 Cal.App.4th at p. 846.) Moreover, the *Misa* court reasoned the *Williams* analysis regarding the Three Strikes law also applied. The court concluded the Three Strikes law's intent to use the fact of recidivism to separately increase the sentence imposed for each new offense applied equally to Misa as a second-strike defendant.

We find the *Misa* court's reasoning persuasive and follow it here. Soto's reliance on *People v. Sasser* (2015) 61 Cal.4th 1 (*Sasser*), for a contrary result, is misplaced. In *Sasser*, the California Supreme Court concluded that as to a second-strike offender, a prior serious felony enhancement could be applied only once to the determinate portion of his sentence. As in *People v. Tassel* (1984) 36 Cal.3d 77, overruled on another ground in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401, the court concluded section 1170.1 governed the determinate portion of the sentence, and the prior conviction enhancement could be added only once as the final step in computing the total determinate sentence. (*Sasser*, at pp. 15, 17.)

Sasser is inapposite here because it did not concern indeterminate sentences. As the *Sasser* court put it, "the only question before us is whether the trial court erred in adding a five-year prior serious felony enhancement to each of Sasser's *determinate* counts." (*Sasser, supra,* 61 Cal.4th at p. 12, italics added; *People v. Knoller* (2007) 41 Cal.4th 139, 155 [an opinion is not authority for propositions not considered].) We thus reject Soto's argument that *Sasser* has invalidated the reasoning in *Misa*, which is directly on point with the facts of this case.

V. The Finding that Soto Suffered a Prior Strike Must Be Vacated

Soto contends the prior strike finding was improper because he did not admit the prior strike conviction. We agree, vacate the prior strike finding, and remand.

In the information, the People alleged Soto suffered a prior "strike" – a serious or violent felony within the meaning of section 667, subdivision (d) and section 1170.12, subdivision (b)—a 2006

conviction for assault with a deadly weapon (§ 245, subd. (a)(1)). The same conviction formed the basis of the section 667, subdivision (a)(1) prior serious felony allegation.

Soto waived his right to a jury trial on the prior conviction allegations. At the time, Soto's counsel stated, with respect to the strike prior: "It'll probably be admitted." At the beginning of his sentencing hearing, the court stated: "First thing I'd like to do is I have been informed that Mr. Soto will be admitting his prior conviction. Is that correct?" Defense counsel responded: "That's correct, your Honor. But before we go forward, Mr. Soto would like to go pro per on his sentencing." At that point, the court and Soto discussed self-representation, and the court determined Soto was in fact asking to replace his counsel. The court accordingly conducted a *Marsden* hearing and subsequently denied Soto's *Marsden* request. After the conclusion of the *Marsden* hearing, the trial court sentenced Soto. The transcript does not include any indication that the trial court first gave advisements regarding the waiver of the right to trial on the prior strike allegations, or that the court actually elicited the expected admission.

On appeal, the People contend the record shows Soto admitted the prior conviction. A minute order from the proceedings notes Soto admitted the prior conviction, and the court, in a subsequent brief proceeding, stated Soto admitted his prior convictions pursuant to the "the Three Strikes section and the five-year prior section." Yet, the reporter's transcript of the proceedings reveals no such admission.

"As a general rule, a record that is in conflict will be harmonized if possible. [Citation.] If it cannot be harmonized, whether one portion of the record should prevail as against

contrary statements in another portion of the record will depend on the circumstances of each particular case. (*Ibid.*)" (*People v. Harrison* (2005) 35 Cal.4th 208, 226; *People v. Thompson* (2009) 180 Cal.App.4th 974, 978.)

Here, there is no indication that proceedings occurred during the sentencing hearing that were not recorded or that the reporter's transcript is otherwise inaccurate. Thus, although the People contend defendant has failed to provide an adequate record for review, we cannot agree where it appears all of the proceedings were recorded accurately and all transcripts were supplied to this court. (*People v. Carter* (2003) 30 Cal.4th 1166, 1199 [rejecting People's argument that defendant failed to meet burden to develop the record; nothing suggested a " 'lacuna' in need of 'reconstruction'. . ."].)

Soto waived his right to a jury trial on the prior strike allegations, but we cannot conclude he also waived his right to a bench trial and admitted the prior. We therefore vacate the prior strike finding and remand. Soto may be retried on the prior conviction allegations.

VI. The Conviction on Count 2 Must Be Vacated

Defendants argue, and the People concede, that first degree robbery (count 2) was a lesser included offense of home invasion robbery while acting in concert (count 1), thus defendants could not validly be convicted of both counts.

We agree. As the People concede, count 1 charged defendants with robbery, committed in an inhabited dwelling house, while acting in concert with others. Count 2 charged defendants with first degree residential robbery—robbery committed in an inhabited dwelling house. Count 1 included all

of the elements of count 2. " '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

The conviction on count 2 must be vacated.

VII. The Section 12022, Subdivision (a) Firearm Enhancements on Counts 4 through 7 Must Be Stricken

Defendants argue, and the People agree, that the section 12022, subdivision (a) enhancements imposed as to counts 4 through 7 must be stricken because use of a firearm was an element of the offenses charged in those counts. We agree.

Under section 12022, subdivision (a)(1), "a person who is armed with a firearm in the commission of a felony . . . shall be punished by an additional and consecutive term of imprisonment pursuant to subdivision (h) of Section 1170 for one year, unless the arming is an element of that offense." Under section 245, subdivision (a)(2)—the offense charged in counts 4 through 7 — "[a]ny person who commits an assault upon the person of another with a firearm shall by punished by imprisonment in the state prison . . . ." Being armed is an element of section 245, subdivision (a)(2). As a result, a section 12022, subdivision (a)(1) enhancement was not properly imposed.

We strike the section 12022, subdivision (a)(1) enhancements imposed on counts 4 through 7.

VIII. The Section 12022.53, subdivisions (b) and (e)(1) enhancement Imposed on Count 3 Must be Stricken

Finally, we strike the section 12022.53, subdivisions (b) and (e)(1) enhancement imposed on count 3.[10]

As to both defendants, on count 3 (first degree burglary; § 459), the jury found true the allegation that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1).

Section 12022.53 sets forth sentence enhancements for persons convicted of enumerated felonies who use a firearm in the commission of the crime. The statute applies to crimes listed in section 12022.53, subdivision (a). The list does not include section 459. Further, count 3 did not charge a felony punishable by death or life imprisonment. (§ 12022.53, subd. (a)(17).) A section 12022.53 enhancement could not properly be imposed on count 3. (*People v. Yang* (2010) 189 Cal.App.4th 148 [section 12022.53 enhancement can only be applied to convictions of enumerated crimes].)

We therefore strike the section 12022.53, subdivisions (b) and (e)(1) enhancement imposed on count 3.

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[10] On appeal, defendants argued they failed to receive fair notice of the section 12022.53, subdivisions (b) and (e)(1) enhancement eventually imposed on count 3. We invited the parties to submit supplemental briefing discussing whether a section 12022.53, subdivision (b) and (e)(1) enhancement could properly be applied to a section 459 count. Defendants then argued the enhancement could not be imposed. The People agree and so do we. Because we conclude the enhancement could not be imposed as to count 3, we need not address defendants' arguments regarding notice.

DISPOSITION

The conviction on count 2 is vacated as to both defendants. We vacate defendants' sentences and remand for new sentencing hearings. As to Gonzalez, we strike the section 12022, subdivision (a)(1) firearm enhancements imposed on counts 4 through 7 and the section 12022.53, subdivisions (b) and (e)(1) firearm enhancement imposed on count 3. As to defendant Soto, we strike the section 12022, subdivision (a)(1) firearm enhancements imposed on counts 4 through 7 and the section 12022.53, subdivisions (b) and (e)(1) firearm enhancement imposed on count 3. We further vacate the prior conviction findings and remand for trial or admission of the prior conviction allegations and resentencing. In all other respects, the judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

SORTINO, J.*

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