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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. FELIX SILVA, Defendant and Appellant.	B270812 (Los Angeles County Super. Ct. No. BA361087)

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed as modified.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General and Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

Convicted of a series of felonies, Felix Silva challenges two of his convictions, the calculation of his presentence custody credits, and the amount of his restitution and parole revocation fines. We modify the judgment with respect to the custody credits and fines but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006 and 2007, the Los Angeles Sheriff's Department conducted a wiretap investigation involving the Varrio Locos Trece gang, commonly called "Trece." The investigation resulted in the indictment of multiple members and associates of the gang, including Silva. Silva was tried with gang members Saul Campos and Pasqual Campos.[1]

Silva was charged with two counts of conspiracy to commit murder (Pen. Code,[2] §§ 182, subd. (a)(1), 187) (counts 1 and 11), both with the special allegations that the crime was committed to benefit a criminal street gang (§ 186.22, subd. (b)); three counts of active participation in a criminal street gang (§ 186.22, subd. (a)) (counts 3, 13, and 16); and carrying a loaded firearm (felony) (former § 12031, subds. (a)(1), (a)(2)(C)) (count 12), also with the special allegation that the crime was committed to benefit a criminal street gang. It was further alleged that Silva had a prior felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1).

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[1] Because Saul and Pasqual share the same surname, they will be referred to by first name for clarity.

[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

Silva represented himself throughout his trial and sentencing. The jury found Silva guilty of the three counts of active participation in a criminal street gang; guilty of conspiracy to commit murder (count 11); not guilty of carrying a loaded firearm; and guilty of conspiracy to commit assault with a semiautomatic firearm (§245, subd. (b)) as a lesser included offense of conspiracy to commit murder in count 1. The jury found the gang enhancement allegations and prior conviction allegations to be true.

On count 11, the trial court imposed a term of 25 years to life and doubled this term under the Three Strikes law. As to count 1, the court imposed a midterm of six years, doubled under the Three Strikes law; a three-year gang enhancement; and a five-year enhancement under section 667, subdivision (a)(1), all to run consecutively to the term on count 11. For counts 3, 13, and 16, the court imposed a midterm of two years for each count and stayed the terms under section 654. The court also imposed restitution fine and parole revocation fines of $300 per count.[3] Silva was given 3,567 days of presentence custody credit, which included 3,102 actual days and 465 conduct credit days.

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[3] The abstract of judgment states that the restitution fine is $300 and the parole revocation fee is $300, but the court imposed this amount for each count. Where there is a discrepancy between the court's oral pronouncement and the minute order or abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

DISCUSSION

I. Count 1: Conviction of Conspiracy to Commit Assault with a Semiautomatic Firearm

Silva argues, with respect to count 1, the court should not have instructed the jury on conspiracy to commit assault with a semiautomatic firearm because it is not a lesser included offense of conspiracy to commit murder, and he contends that he was denied his rights to due process and to notice by instructing the jury that it could convict him of this lesser offense.

A trial court in a criminal case has a duty to instruct on those general principles of law applicable to the case that are """closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."""" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) This obligation includes the duty to instruct on a lesser included offense if the evidence raises a question as to whether the elements of the lesser included offense, but not the greater offense, are present. (*Ibid.*; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Birks* (1998) 19 Cal.4th 108, 118 (*Birks*).)

A particular offense is considered a "lesser included offense" if it satisfies one of two tests. The "elements" test is satisfied if the statutory elements of the greater offense include all the elements of the lesser. The "accusatory pleading" test is satisfied if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense. In both cases, the test is met when the greater offense charged cannot be committed without committing the lesser offense. (*People v. Sloan* (2007) 42 Cal.4th 110, 117.)

The parties agree that conspiracy to commit assault with a firearm, applying the elements test, is not a lesser included offense of conspiracy to commit murder. (See, e.g., *People v. Cook* (2001) 91 Cal.App.4th 910, 918-919 (*Cook*).) However, there is a split of authority—echoed by the parties—whether conspiracy to commit assault with a firearm is a lesser included offense to conspiracy to commit murder under the accusatory pleadings test. In *Cook*, the court held that under the latter test assault with a firearm could be a lesser included offense within conspiracy to commit murder when one considers the overt acts alleged as to the murder conspiracy. (*Cook*, at p. 920.) In reaching this conclusion the *Cook* court disagreed with *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, in which the court held it was improper to consider the overt acts allegations when applying the accusatory pleading test; the court concluded conspiracy to commit assault with a deadly weapon could not be included within conspiracy to commit murder. (*Cook*, at pp. 920-921.)

The *Fenenbock* court reasoned that overt act allegations "do not provide notice of lesser included target offenses." (*People v. Fenenbock*, *supra*, 46 Cal.App.4th at p. 1708.) "Because overt acts need not be criminal offenses or even acts committed by the defendant, the description of the overt acts in the accusatory pleading does not provide notice of lesser offenses necessarily committed by the defendant. Moreover, inasmuch as overt acts may be lawful acts, the overt acts do not necessarily reveal the criminal objective of the conspiracy." (*Id.* at p. 1709, fn. omitted.)

However, this per se rule limiting analysis to the specific charging allegations and disregarding the overt acts alleged to have been committed in furtherance of the conspiracy conflicts

with the very purpose of the lesser-included-offense doctrine and its accusatory pleading test, which comes into play only when the elements test is not satisfied. As explained in *Birks*, *supra*, 19 Cal.4th 108, the issue is whether an information or indictment adequately notifies the defendant, for due process purposes, that he or she must be prepared to defend against any lesser offenses necessarily included in the greater offense expressly charged based on "the facts actually alleged in the accusatory pleading." (*Id*. at pp. 117-118.) If the defendant is on notice, the instructional rule ensures that neither the prosecutor nor the defendant may force the jury to confront an all-or-nothing choice. For this salutary purpose—which benefits both the prosecution and the defense (*Birks*, at p. 119)—it can make no difference, for example, whether the facts actually alleged are that the defendants conspired to commit murder by means of assault with a firearm or conspired to commit murder with an overt act allegation that they obtained firearms in furtherance of the conspiracy. Accordingly, we agree with the analysis and conclusion in *Cook*, *supra*, 91 Cal.App.4th 910: The allegations of overt acts in an accusatory pleading charging defendants with conspiracy to commit murder may identify lesser included target offenses with sufficient clarity to trigger the trial court's duty to instruct on them.

Silva argues that "nothing [in the overt acts identified in the second amended indictment] alerted appellant that he could also be convicted of any lesser crime including conspiracy to commit assault with a semiautomatic firearm." In this case, however, as in *Cook*, *supra*, 91 Cal.App.4th 910, the overt acts alleged in count 1 of the second amended indictment gave notice that Silva and his codefendants were charged with conspiracy to

commit murder by means of a firearm. The indictment specifically alleged that Silva and other defendants searched for rival gang members "to shoot and kill," and that Roman shot the victim with a .40 caliber Smith & Wesson handgun. Given these alleged overt acts, we conclude that Silva had notice that conspiracy to commit assault with a firearm was a lesser included offense of the conspiracy to commit murder charged in count 1.

II. Count 11: Sufficiency of the Evidence

Silva asserts that the evidence was insufficient to support his conviction in count 11 for conspiracy to commit murder. "'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

"One who conspires with others to commit a felony is guilty as a principal. (§ 31.) "'Each member of the conspiracy is liable for the acts of any of the others in carrying out the common purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design." [Citations.]' [Citation]." (*In re Hardy* (2007) 41 Cal.4th 977, 1025-1026, italics omitted.) A conspiracy conviction requires proof that the defendant and one or more other persons had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, and proof of the commission of an overt act by one or more of the parties to the agreement in furtherance of the conspiracy. (*People v. Smith*

(2014) 60 Cal.4th 603, 616.) The elements of conspiracy may be proven with circumstantial evidence. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1024.) "Because there rarely is direct evidence of a defendant's intent, '[s]uch intent must usually be derived from all the circumstances of the attempt, including the defendant's actions.' [Citation.]" (*Id.* at p. 1025.)

Silva contends that there was no evidence that there was an agreement between any of the participants to murder anyone, nor was there evidence that he was involved in any murder conspiracy. Silva asserts that the prosecution relied on the mere association of these gang members when there was "no reliable, reasonable evidence about the proposed use of the weapon" that Silva participated in transporting. He argues that inferences may not be based on suspicion and must be grounded in evidence rather than speculation. (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) He observes that mere association and suspicion of criminal conduct is not enough to establish a conspiracy and that there must be some evidence that the association is also a conspiracy. (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1221.) We conclude that the evidence was sufficient to support Silva's conviction on count 1 for conspiracy to commit murder.

On January 19, 2007, at 7:11 p.m., Trece member Antonio Roman, Jr. spoke with Trece member Jose Rodriguez. Roman wanted to know if Rodriguez possessed two unspecified items (described as "that shit"). Rodriguez said he had both of them but that he did not have them at the moment; they were at his house. Roman responded, "Because right now the . . . Lady[b]ugs are here." The Ladybugs were members of a rival gang. Rodriguez

asked several questions about the Ladybugs who were in the neighborhood, and Roman told him to call if he got one of those "things." Rodriguez told Roman that "We will go right now," and that Silva was coming over later.

Ten minutes later, Saul and Roman discussed getting a car and a "thing." Roman said that he thought he could get a thing but that he needed a ride. Saul told Roman that he would "see what's up" when Silva arrived. Saul told Roman to get back in touch with him, and said, "I'm gonna fuck them up . . . ."

At 7:51 p.m. Trece members Anthony Rivera and his brother discussed the need to have an item picked up for an unidentified third person who said that rival gang members were passing through the area. This third person said that "the enemy's been going through" and that he was going to "take them fools." They talked about arrangements to pick up something so that "the little homies" can "[h]andle what they gotta handle."

A flurry of calls followed. Rivera talked to an unknown man at 7:55 p.m. about meeting plans to pick "it" up; Rivera advised the other speaker that the "homie's gonna need that right now." The unidentified speaker asked who would pick it up, and Rivera said that he would have Silva go do it. At 8:32 p.m., another unidentified speaker told Rivera that Trece member Raul Soltero had the item but that it needed shells, meaning casings or bullets. Rivera said that he had advised "them" that they needed to get shells. The unknown man asked, "They gonna burn it up or what?" Rivera responded, "They're gonna do something." Immediately after that call ended, Rivera told Soltero that he would try to reach Silva to send Silva to pick up the item so that Soltero would not have to travel with it.

At 8:35 p.m. Rivera and Silva spoke. Silva confirmed that he was in the neighborhood. Rivera asked if Silva "want[ed] to go pick that thing up," and Silva said that he had been waiting for "you guys to call me." Rivera said, "[I]t's already ready." Silva asked if "he" was there already, and Rivera explained how the item had been transferred from person to person. Silva then asked, "Al[l]right, can I go get it right now?" Rivera said yes, and asked if Silva wanted to drop it off "on Bliss." Silva said, "whatever," and told Rivera to ask where "he" wanted it dropped off. Rivera said that he preferred that Silva not have to travel with it, and Silva said he would "take one of the little homies right now." They made further arrangements, and then Rivera asked if Silva had "some things for it." "Nope. You ain't got nothing?" asked Silva. "Nope," said Rivera. "Damn man. Come on now. None at all?" asked Silva. "None," confirmed Rivera. "Al[l]right," said Silva, "I'm gonna go get it right now."

In an 8:40 p.m. call, Rivera told Soltero "they" were driving an older white truck, and the two stayed on the phone until Soltero confirmed that he saw the truck. Meanwhile, Trece members continued to search for ammunition: Saul asked Roman for shells for a "nino," a nine-millimeter handgun, and Roman said he would attempt to locate some. Rivera asked Soltero for ammunition but Soltero had none.

These wiretapped conversations prompted law enforcement to send officers toward Soltero's street to intercept the white truck and disrupt the plan for Pasqual and Silva to pick up the gun from Soltero. The police spotted Silva driving his white pickup truck with Pasqual in the passenger seat. When the police pulled Silva over, Pasqual jumped out of the truck and fled,

tossing a gun away as he ran. The police pursued Pasqual, took him into custody, and recovered the gun.

At 9:05 p.m., Silva told Rodriguez that the police "just chased the 'Twin' [Pasqual] right now" and probably were looking for him (Silva) too. Silva told Rodriguez not to "mention my name to nobody." Silva believed that the police had caught Pasqual. Silva expected that the police would conduct a raid and told Rodriguez to tell everyone to leave the neighborhood.

Silva then talked with Rivera, asking Rivera if he had "heard." Rivera said, "No, why what happened?" "I lost the strap,"[4] Silva confessed. Silva explained to Rivera that they had picked up the gun as planned but then encountered the police, and Pasqual ran. Rivera asked if the police found "the heat."[5] Silva believed they were still searching for it.

Silva explained that he "punched it" on his truck once Pasqual ran, but that his muffler fell off his truck and so he had to leave it behind. Silva reported that his sister picked him up and that he had then gone to another gang member's house. Rivera said, "Man[,] I should have had that fool take it over there." Silva stated that he took the clips home with him. The call ended with Silva asking Rivera to call to let him know if "they found that shit."

The following morning, January 20, 2007, Pasqual spoke to several other Trece members about how the plan had gone awry. In one call, Pasqual said that he had been "about to go plug," meaning about to commit a shooting, and that he and Silva were going to "go get some shells" before the police intervened.

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[4] "Strap" is a slang term for a gun.

[5] "Heat" is another slang term for a gun.

Rodriguez told Pasqual that when he asked Silva what had happened, Silva said, "I don't know. I don't." "He would act stupid," Rodriguez said, after mimicking Silva. Pasqual complained about Silva and said he would not "roll" with him anymore. Pasqual explained that although they had intended to get ammunition, Silva became paranoid and panicked when the police appeared. Pasqual said Silva made him jump from the vehicle, and Rodriguez responded that it was because Pasqual had the gun. Pasqual told Rodriguez that he did not think that the police had found the gun he had tossed away.

Later that morning, Silva spoke with Pasqual and Rodriguez (who were together) about the events of the night before. Silva wanted to know if the police had found the gun. Pasqual said that he knew where the gun was and that the police had not found it. Pasqual said he would go look for the gun, and Silva responded, "You can't go right now, I will pick you up and take you right now fool, will just pull up where it's at and have [Rodriguez] get off and look for it." Pasqual cautioned Silva to stay away and to hide his truck. Silva said the police did not take down his license plate number, but Pasqual thought they might have, and Silva opined that if the police did not find the gun they would have no case against him. Pasqual reported that he told the police that Silva had nothing to do with the crime; Silva wanted to know if the police said they were looking for his truck. Silva and Pasqual discussed the police pursuit; Silva said that "as long as they didn't find it, that's what I said. They didn't find it, fuck it you are cool and shit," and then laughed.

Pasqual said that Silva had taken off when the police showed up; Silva said it was Pasqual who jumped out and ran. "What[,] you wanted me for wait for you[?] No!" Pasqual said

that he had taken the blame to protect Silva: "At least somebody got away . . . . And shit they would of gave your ass more time and shit you know. I was like fuck it, let this nigga get away[,] let me get caught, that's why I was like fuck it."

Silva told Pasqual that he would take Pasqual to look for the gun if he wanted, and cautioned him to be careful. Pasqual, in turn, warned Silva to stay away from the area and to stop using his truck.

The evidence was sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that Silva conspired to commit murder. On January 19, 2007, Saul, Roman, Anthony and Rene Rivera, Soltero, and Silva extensively discussed acquiring guns, ammunition, and a car to shoot members of a rival gang. Silva was a participant and waited to hear from the others when he should go pick up the weapon. Silva picked up the gun, actively sought bullets for it, and was about to go with Pasqual to get ammunition when the police intervened. A jury could reasonably conclude from this evidence that Silva participated in a conspiracy to commit murder.

III. Presentence Custody Credit

As noted by both Silva and the Attorney General, Silva was awarded 3,102 days of actual credit, although the records indicate that he was in custody for 3,103 days prior to sentencing. We modify the judgment to reflect one additional day of actual presentence custody credit. This additional day of actual credit does not alter the calculation of Silva's conduct credits. (§ 2933.1; *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.)

IV. Restitution and Parole Revocation Fines

At sentencing, the trial court imposed a restitution fine in the amount of $300 per count pursuant to section 1202.4, subdivision (b), and a corresponding parole revocation fine of the same amount per count under section 1202.45.[6] Silva argues that these fines are unconstitutional ex post facto punishments because the trial court meant to impose the statutory minimum fine, which at the time of the crimes in 2006 and 2007 was $200, but instead imposed the statutory minimum fine at the time of sentencing in 2016, which was $300. The People contend that Silva waived this argument by failing to object in the trial court.

Challenges to the imposition of restitution and parole revocation fines may be forfeited by failing to object in the trial court. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 881; *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218.) Where the trial court exercises discretion in making a sentencing decision, imposing a sentence that was "otherwise permitted by law but was imposed in a manner that was factually or procedurally flawed" (*People v. Scott* (1994) 9 Cal.4th 331, 354), the defendant must object in the trial court to preserve the issue for appeal. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303; see *People v. Smith* (2001) 24 Cal.4th 849, 852-853 (*Smith*); see also *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153.) In contrast, unauthorized sentences or sentences entered in excess of jurisdiction are not waived by the failure to object in the trial court. (*Smith*, at p. 852.) The California Supreme Court has explained, "[O]bvious legal errors

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[6] The trial court is required to impose a parole revocation fine equal to the restitution fine whenever the sentence includes a period of parole. (§ 1202.45.)

at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*Smith*, at p. 853; see *Talibdeen*, at p. 1153.)

At the sentencing hearing, the court told Silva, "You will pay a restitution fine as to each count in the amount of—I think it's now $300." The court clerk confirmed, "Yes." The court said, "Three hundred dollars as to each count," and imposed a parole revocation fine of $300 as to each count as well. While the People are correct that this sentence was not legally unauthorized, as the court could have exercised its discretion to impose fines in this amount under the applicable law, it does not appear from this record that the trial court actually exercised its discretion to impose restitution fines $100 above the statutory minimum of $200 that was in effect at the time of the offenses. To the contrary, it is obvious that the trial court exercised its sentencing discretion to select the minimum statutory restitution fine for these offenses but mistakenly believed that the statutory minimum fine was $300, a belief erroneously confirmed to the court by the clerk. This is pure legal error, "obvious and correctable without reference to any factual issues in the record . . . ." (*Smith*, *supra*, 24 Cal.4th at p. 853.) Therefore, we conclude that Silva did not forfeit his objections to the restitution and parole revocation fines.

On the merits, the $300 fines cannot stand. The record reveals that the trial court meant to impose the minimum fine but, uncertain about the statutory minimum amount, consulted the clerk and accepted erroneous advice regarding the amount of the applicable statutory minimum fine. We reduce the restitution and parole revocation fines from $300 to $200 per count.

DISPOSITION

The judgment is modified to: (1) reflect 3,103 days of actual custody credits in addition to presentence custody credits in the amount of 465 days, for a total of 3,568 days of presentence custody credits; and (2) to reduce the restitution and parole revocation fines from $300 each per count to $200 each per count. The clerk of the superior court is ordered to prepare an amended abstract of judgment as set forth in this opinion and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

SMALL, 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.