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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ANDY BRIAN ACOSTA, Defendant and Appellant.	B287760 (Los Angeles County Super. Ct. No. BA451969)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed in part; reversed in part and remanded for resentencing.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Andy Brian Acosta appeals from a judgment of conviction entered after a jury trial of first degree murder, attempted murder, assault with a firearm, unlawful possession of a firearm, and shooting at an occupied motor vehicle. On appeal Acosta contends the trial court erred by failing to stay his sentence for shooting at an occupied motor vehicle under Penal Code section 654[1] because substantial evidence does not support the trial court's application of the multiple victim exception. We agree and reverse the sentence.

Acosta also contends, the People concede, and we agree the trial court erred by imposing both the gang and firearm enhancements on count 3 for assault with a deadly weapon. On remand, the court should exercise its discretion whether to impose the firearm enhancement under section 12022.53, subdivision (c), or the gang enhancement under section 186.22, subdivision (b)(1)(C), but it may not impose both.

Acosta also requests we review the sealed record of the trial court's in camera hearing to determine whether the court disclosed all relevant complaints in response to his *Pitchess*[2] motion seeking discovery of the personnel records of two police officers who generated a field investigation (FI) card identifying Acosta as a gang member. We have reviewed the record and conclude the trial court did not abuse its discretion in ordering disclosure of one responsive complaint.

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

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536-538 (*Pitchess*).

We reverse the sentence and remand for resentencing. In all other respects we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

Acosta was charged in an information with the first degree murder of Danny Chea (§ 187, subd. (a); count 1), attempted premeditated murder of Amber Campos (§§ 187, subd. (a), 664; count 2), assault with a firearm of Abel R. (§ 245, subd. (a)(2); count 3), unlawful possession of a firearm (§ 29800, subd. (a)(1); count 4), and shooting at an occupied motor vehicle (§ 246; count 5). As to all counts, the information alleged Acosta committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(C) [counts 1, 2, & 3]; *id*., subd. (b)(1)(A) [count 4]; *id*., subd. (b)(4) [count 5].) The information also specially alleged as to counts 1 and 5 Acosta personally and intentionally discharged a firearm causing great bodily injury and death. (§ 12022.53, subd. (d).) As to count 2 the information specially alleged Acosta personally and intentionally discharged a firearm.[3] (§ 12022.53, subd. (c).) As to count 3 the information alleged Acosta personally used a firearm. (§ 12022.5,

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[3] The information contains additional allegations Acosta personally used a firearm (§ 12022.53, subd. (b)) and personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), but the information does not make clear as to which counts these additional allegations apply. The jury found these allegations true as to count 1 and found the allegation Acosta personally used a firearm true as to count 2.

subd. (a).)[4] The information also alleged Acosta suffered a prior felony conviction for which he served a prison term within the meaning of section 667.5, subdivision (b).

Acosta pleaded not guilty and denied the special allegations.

B. *Evidence at Trial*

1. *The People's case*

(a) The shooting

In October 2016 Chea and Campos were in a long-term romantic relationship. Chea was a member of the Lincoln Heights criminal street gang. On October 24 Chea drove Campos to pick up Campos's son Abel from elementary school. Campos exited the vehicle and went inside the school to wait for Abel. Inside the school, Campos saw Jason Avalos, who was a member of the Eastlake criminal street gang. Avalos gave Campos an "ugly look[]," then made a telephone call. When Campos returned to the car with Abel, she told Chea she had seen Avalos. Campos sat in the front passenger seat, and Abel sat in the seat behind Chea, who was driving. The three left for Campos's home.

While the three were stopped at an intersection, a car pulled up on the passenger side. Campos's window was partially rolled down; the windows were down in the adjacent car. Chea told Campos that "Rana from Eastlake" was in the car next to them. Chea said to Acosta, who was driving the adjacent car, "What's up, G?" Campos looked into the adjacent car and saw Acosta holding an automatic weapon. Campos did not see anyone else in the car.

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[4] On the first day of trial, the People orally amended the information to allege as to count 3 the offense of assault with a firearm and the special allegation Acosta personally used a firearm pursuant to section 12022.5, subdivision (a).

Acosta fired two or three shots into Chea's car, shattering the passenger window and hitting Chea. Chea fell back, and "there was blood everywhere." The car crashed into a fast food restaurant. Campos exited the car and checked on Abel, who was not hurt. Chea was dead. Campos later identified Acosta in a six-pack photographic lineup as the shooter.

Enrique Saldana testified he was working as a security guard at the fast food restaurant on the day of the shooting. Saldana was on duty inside the restaurant when he heard three gunshots. He looked out the window and saw the car crash into the restaurant. Saldana did not provide any other details of the crash.

An autopsy showed Chea had been shot twice: once in the back of the head and once in the abdomen. The wound to Chea's head was fatal.

(b) Gang evidence

Los Angeles Police Officer Manuel Bojorquez came into contact with Acosta in July 2015. Acosta told Officer Bojorquez he belonged to the Sick Dogs clique of the Eastlake street gang and was known by the name "Rana." Officer Bojorquez documented the interaction in an FI card. In October 2016 Los Angeles Police Officer Dennis Goynes generated an FI card based on his interaction with Acosta. Acosta told Officer Goynes he was a member of the Eastlake street gang, and he went by the name "Rana."

Los Angeles Police Sergeant Michael Yoro testified as the People's gang expert. Sergeant Yoro did not know Acosta personally but opined Acosta was an Eastlake gang member

"based on the arrest report, the prior stops, the [FI] cards at the time of his arrest or contacts with present and past officers."

The People introduced phone calls made by Acosta from jail following the shooting. In some of the calls, Acosta referred to himself as "Rana." Sergeant Yoro testified "Rana" is Spanish for frog, and Acosta's use of the nickname on the calls and in interactions with the police supported Sergeant Yoro's belief Acosta was a gang member.

The Lincoln Heights street gang is the principal rival of the Eastlake gang. Acosta's killing of Chea would have elevated his status with the Eastlake gang because the murder of a rival gang member in broad daylight on a public street "enhances the reputation of the Eastlake gang as being callous, being unafraid to do whatever's necessary to serve payback and revenge." Sergeant Yoro testified the murder, attempted murder, and assault with a firearm were committed to benefit the Eastlake street gang.

2. *The defense case*

Campos's mother, Angelica Castaneda, testified she visited the hospital where Chea was taken after the shooting. There she saw Campos speaking with members of the Lincoln Heights street gang. Castaneda overheard Campos on the phone saying Rana from Eastlake shot Chea.

C. *The Verdict and Sentence*

The jury convicted Acosta on all counts. The jury also found true on count 1 Acosta personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury or death; on count 2 Acosta personally used a firearm and personally

and intentionally discharged a firearm; and on count 3 Acosta personally used a firearm. Acosta admitted the allegation he suffered a prior felony conviction for which he served a prison term. (§ 667.5, subd. (b).)

The trial court sentenced Acosta on count 1 for the first degree murder of Chea to 25 years to life, plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). The court did not impose the 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5), finding it was superseded by the 25-year-to-life sentence set by statute for first degree murder.[5] On count 2 for the attempted premeditated murder of Campos, the court sentenced Acosta to a life term with 15-year minimum parole eligibility date, plus 20 years for the firearm enhancement under section 12022.53, subdivision (c).[6] The trial court selected count 3,

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[5] As the Supreme Court observed in *People v. Lopez* (2005) 34 Cal.4th 1002, 1009, the 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5), may have a practical effect on defendants convicted of first degree murder who face a 25-year life term by affecting the defendant's release date. The *Lopez* court explained, "The true finding under section 186.22(b)(5), which provides for a lower minimum term, 'is a factor that may be considered by the Board of Prison Terms when determining a defendant's release date, even if it does not extend the minimum parole date per se.'" (*Lopez*, at p. 1009.) Accordingly, on remand the trial court should impose the 15-year minimum parole eligibility term on count 1 or strike the enhancement allegation (§ 1385, subd. (a)) or the punishment for the enhancement (§ 186.22, subd. (g)).

[6] As to count 1, the court also imposed, but stayed, a 10-year firearm enhancement under section 12022.53, subdivision (b), and a 20-year firearm enhancement under section 12022.53,

for assault with a firearm of Abel, as the base determinate term and imposed the upper term of four years, plus the upper term of 10 years for the firearm enhancement under section 12022.5, subdivision (a), plus 10 years for the gang enhancement under section 186.22, subdivision (b)(1)(C). The court acknowledged it had discretion to strike the firearm enhancements, but it declined to do so given the "cold-blooded nature of the crime." As to count 4, the court imposed a consecutive sentence of eight months (one-third the middle term of two years) and dismissed the gang enhancement in the interest of justice (§ 1385, subd. (a)).

On count 5 for shooting at an occupied motor vehicle, the court sentenced Acosta to a life term with a 15-year minimum parole eligibility date under section 186.22, subdivision (b)(4)(B). The court declined to stay the sentence on count 5 under section 654, reasoning that "[c]onsecutive sentencing is warranted by the fact that we have a separate innocent victim. Shooting of an occupied vehicle with multiple victims which increased the danger. This is amply demonstrated by the fact that the victim's car crashed into an occupied public restaurant, thereby endangering the lives of all the people after the defendant killed the driver." The court struck the prison prior enhancement. (§ 667.5, subd. (b).)

The trial court sentenced Acosta to an aggregate state prison sentence of 94 years eight months to life plus two life terms, each with a 15-year minimum parole eligibility date. Acosta timely appealed.

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subdivision (c). As to count 2, the court imposed, but stayed, a 10-year firearm enhancement under section 12022.53, subdivision (b).

DISCUSSION

A. *Substantial Evidence Does Not Support the Trial Court's Application of the Multiple Victim Exception to Section 654 on Count 5 for Shooting at an Occupied Motor Vehicle*

Acosta contends the trial court should have stayed his sentence under section 654 on count 5 for shooting at an occupied motor vehicle because his conduct underlying the first degree murder, attempted premeditated murder, and assault with a firearm offense was an indivisible course of conduct directed against, at most, three persons, namely Chea, Campos, and Abel. Acosta is correct.

Section 654 provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) "[T]he purpose of section 654 is to ensure that a defendant's punishment will be commensurate with his culpability." (*People v. Correa* (2012) 54 Cal.4th 331, 341; accord, *People v. Cardenas* (2015) 239 Cal.App.4th 220, 229 (*Cardenas*).) To this end, "[s]ection 654 precludes multiple punishments for a single act or omission or for an indivisible course of conduct." (*Cardenas*, at p. 229; accord, *People v. Kopp* (2019) 38 Cal.App.5th 47, 90.)

However, "section 654 does not prohibit multiple punishments where the defendant's single objective during an indivisible course of conduct results in crimes of violence against multiple victims." (*Cardenas, supra*, 239 Cal.App.4th at p. 230; accord, *People v. Williams* (2017) 7 Cal.App.5th 644, 695 ["Section 654 does not bar multiple punishments for an act of violence

against multiple victims . . . ."].) "To preclude application of section 654, however, each of the crimes must have involved at least one different victim." (*Cardenas*, at p. 230; accord, *People v. Oates* (2004) 32 Cal.4th 1048, 1063 ["'Section 654 is not ". . . applicable where . . . one act has two results each of which is an act of violence against the person of a separate individual."'"]; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1784 ["The multiple victim exception, simply stated, permits one unstayed sentence per victim of all the violent crimes the defendant commits incidental to a single criminal intent."].)

"'Ordinarily, in determining whether Penal Code section 654 applies, the trial court is entitled to make any necessary factual findings not already made by the jury.'" (*People v. Deegan* (2016) 247 Cal.App.4th 532, 545; accord, *People v. Kopp, supra*, 38 Cal.App.5th at p. 91 ["The question of whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination."].) We will not disturb the trial court's findings if they are supported by substantial evidence. (*Kopp*, at p. 91; *Cardenas, supra*, 239 Cal.App.4th at p. 229.) "This requires us to view the evidence in the light most favorable to the sentencing order and presume the existence of facts a trier of fact could reasonably deduce from the evidence." (*Kopp*, at p. 91; accord, *People v. Phung* (2018) 25 Cal.App.5th 741, 761 [in its review of whether § 654 applies, "[a]n appellate court views the evidence in a light most favorable to the respondent and presumes in support of the sentencing order the existence of every fact the trier could reasonably deduce from the evidence"].)

The People contend the trial court properly imposed punishment on count 5 under the multiple victim exception

because, as a result of the killing of Chea, the car "crash[ed] into a restaurant at a time when it was open to customers and staffed with employees." Thus, according to the People, the additional victims are the customers and staff present in the restaurant. The People rely on *People v. Dydouangphan* (2012) 211 Cal.App.4th 772 (*Dydouangphan*) and *People v. Felix* (2009) 172 Cal.App.4th 1618 (*Felix*) to support their argument, but both are distinguishable.[7]

In *Dydouangphan*, the defendant was convicted of voluntary manslaughter, assault with a firearm, and shooting at an occupied motor vehicle after firing a shotgun at a pickup truck with at least seven occupants, killing one. (*Dydouangphan, supra*, 211 Cal.App.4th at pp. 777, 781.) The appellate court affirmed the trial court's application of the multiple victim exception to allow punishment for each of the three convictions, reasoning that "[s]ince there were at least seven individuals in the pickup when [defendant] shot at it, his action was likely to cause harm to several people . . . . The potential for harm to multiple individuals is even more obvious if one remembers that [defendant] shot at the pickup with a shotgun using a shell that contained between nine and 12 pellets." (*Id.* at p. 781.)

Likewise, in *Felix*, the defendant was convicted of attempted murder and shooting at an occupied dwelling. Although the defendant had intended to kill the homeowner, multiple houseguests were also present in the home at the time of the shooting. (*Felix, supra*, 172 Cal.App.4th at p. 1630.) The Court of Appeal concluded the trial court properly imposed punishment on

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[7] The People also rely on *People v. Phung, supra*, 25 Cal.App.5th 741, but that case did not address the multiple victim exception. (*Id.* at p. 761, fn. 11.)

both counts, reasoning the "houseguests were victimized by the shooting into the dwelling but were not named victims in any other count." (*Id.* at pp. 1630-1631.)

Neither *Dydouangphan* nor *Felix* involved imposition of multiple punishment for a single course of conduct based on a victim who was not an occupant of the targeted vehicle or dwelling. In both cases, the additional victims were placed at risk of harm by their presence within the vehicle or dwelling. *Cardenas, supra*, 239 Cal.App.4th 220, relied on by Acosta, is more on point. There, the defendant was convicted of burglary and robbery for his entry into an elderly woman's home and violent attack on her. (*Id.* at p. 229.) The jury found true the great bodily injury allegations as to both offenses with respect to the elderly victim. (*Id.* at p. 223.) The People argued imposition of punishment on both counts was proper because the woman's son-in-law who was in the home constituted a second victim for purposes of the multiple victim exception to section 654. The Court of Appeal rejected this argument on the basis "[t]he record show[ed] that defendant fled as [the son-in-law] was unlocking the front door," and therefore he was not a victim of a violent crime for purposes of the exception. (*Id.* at pp. 231-232 & fn. 4.)

Here, as in *Cardenas*, there is no substantial evidence of an additional victim of violent crime in the restaurant who was a victim of the shooting at the vehicle. The only testimony about the restaurant came from Saldana, the security guard, who heard the gunshots, looked out the window, and saw the car crash into the restaurant. The trial court's finding the car crash "endanger[ed] the lives of all the people" within the restaurant is speculative because there is no evidence anyone other than Saldana was inside the restaurant and no evidence Saldana was placed at risk

of harm from the crash. While the trial court could reasonably deduce other employees and possibly patrons were present inside the restaurant, there is no evidence they were placed in harm's way from the crash. Saldana did not describe the windows of the restaurant shattering, the car penetrating the exterior of the building, or any person being injured or narrowly escaping injury from the crash. Thus, substantial evidence does not support the conclusion anyone other than Chea, Campos, and Abel was "victimized by the shooting." (*Felix, supra*, 172 Cal.App.4th at p. 1631.) Because no substantial evidence supports the conclusion counts 1, 2, 3, and 5 involved more than three separate victims, the trial court erred in failing to stay imposition of punishment as to one of the counts pursuant to section 654.[8]

B. *The Trial Court Disclosed All Relevant Materials at the* Pitchess *Hearing*

1. *Acosta's* Pitchess *motion and trial court's in camera review*

On September 28, 2017 Acosta filed a *Pitchess* motion pursuant to Evidence Code section 1043, seeking discovery of personnel records concerning complaints involving Los Angeles Police Officers Gaxiola and Holguin,[9] based on an FI card

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[8] We therefore do not consider the circumstances under which the multiple victim exception applies to a bystander who was placed at an indirect risk of harm as a result of a defendant shooting at an occupied motor vehicle.

[9] Acosta sought disclosure of all complaints of "racial bias, ethnic bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure[,] false arrest, perjury, dishonesty, writing of false

generated by the officers on May 13, 2010, which the People produced in pretrial discovery. The FI card stated that during an encounter with the named officers Acosta admitted, "I'm from Eastlake and we get along with Hazard." In his motion, Acosta "adamantly denie[d] saying what the officers quote him as saying on May 13, 2010." On October 12, 2017 the trial court granted the *Pitchess* motion, but limited its order to disclosure of information concerning fabrication of evidence by either of the named officers. The court conducted an in camera hearing and ordered disclosure of one complaint involving Officer Gaxiola. The trial court did not order any disclosure as to Officer Holguin.

2. *The trial court released all discoverable materials responsive to its order granting the* Pitchess *motion*

"When a defendant shows good cause for the discovery of information in an officer's personnel records, the trial court must examine the records in camera to determine if any information should be disclosed." (*People v. Winbush* (2017) 2 Cal.5th 402, 424; accord, *People v. Anderson* (2018) 5 Cal.5th 372, 391.) "The court may not disclose complaints over five years old, conclusions drawn during an investigation, or facts so remote or irrelevant that their disclosure would be of little benefit." (*Winbush*, at p. 424; see Evid. Code, § 1045, subd. (b).) "'A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion.'" (*People v. Landry* (2016) 2 Cal.5th

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police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude."

52, 73, quoting *People v. Hughes* (2002) 27 Cal.4th 287, 330; accord, *Anderson*, at p. 391.)

Acosta requests we review the sealed portion of the record, which includes the transcript of the in camera hearing. The People do not object to the request. Acosta's request for an independent in camera review is proper. (*People v. Anderson, supra*, 5 Cal.5th at p. 391 ["Defendant properly asks us to review the sealed record of the in camera hearing to determine whether the court erroneously failed to provide discovery that he should have received."]; *People v. Hughes, supra*, 27 Cal.4th at p. 330 [conducting independent examination of materials in camera on appeal].)

We have reviewed the sealed record. The trial court reviewed the records, made a detailed record of what it reviewed, and released all relevant discoverable materials. The court did not abuse its discretion. (See *People v. Anderson, supra*, 5 Cal.5th at p. 391; *People v. Winbush, supra*, 2 Cal.5th at p. 424.)

3. *Acosta has forfeited any argument the trial court erred in failing to conduct a second* Pitchess *review, and any error was harmless*

After completing its in camera review on October 12, 2017, the trial court stated it had "conducted the first part of the in-camera review" and ordered "the city attorney's office [to] review[] the personnel records of the two referenced officers [and] provide any complaints for this court's review" no later than October 20, 2017 "to see if there is additional disclosure that will be ordered." Because the record did not reflect whether any additional records were located or whether the trial court conducted an additional in camera review, we augmented the record on our own motion (Cal.

Rules of Court, rule 8.155(a)(1)(A)) to include the trial court's October 26, 2017 minute order and the reporters' transcripts of the October 16, 19, 26, and 30, 2017 hearings, and we invited the parties to brief whether the trial court conducted a second *Pitchess* review. The parties agree the augmented record and supplemental briefing show no indication the trial court conducted a second review.

Acosta requests in his supplemental brief we remand for the trial court to complete its review. However, in his opening brief, Acosta requested only that we review the sealed transcript of the *Pitchess* hearing held in this case to determine whether the trial court abused its discretion in conducting the hearing. Acosta did not argue it was error for the trial court to fail to complete its review of any additional records, and he therefore forfeited the issue on appeal. (*People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9 ["the claim is omitted from the opening brief and thus waived"]; *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 296, fn. 7 ["Issues not raised in the appellant's opening brief are deemed waived or abandoned."].)

Even if Acosta had not forfeited the argument, any error was harmless. (See *People v. Gaines* (2009) 46 Cal.4th 172, 182 ["To obtain relief, then, a defendant who has established that the trial court erred in denying *Pitchess* discovery must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed."].) At Acosta's trial, Officers Gaxiola and Holguin did not testify, and their 2010 FI card was not introduced as evidence. Although Sergeant Yoro opined Acosta was an Eastlake gang member "based on the arrest report, the prior stops, the [FI] cards at the time of his arrest or contacts with present and past officers," Officers Bojorquez and Goynes testified they generated

FI cards in 2015 and 2016 based on interactions with Acosta in which he admitted he was an Eastlake gang member known as "Rana." This evidence was corroborated by Campos's testimony Chea told her prior to the shooting that "Rana from Eastlake" was in the car next to them, and by the jail phone calls in which Acosta referred to himself as "Rana." Given the substantial evidence of Acosta's gang affiliation, there is no reasonable probability of a different outcome had the trial court conducted a second review and ordered further disclosure of complaints against Officers Gaxiola and Holguin. (*Gaines*, at p. 182.)

C. *The Trial Court Erred in Imposing Both the Gang and Firearm Enhancements on Count 3*

Acosta contends the trial court erred in imposing on count 3 for assault with a firearm the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C), and the 10-year firearm enhancement under section 12022.5, subdivision (a). The People concede, and we agree.

Section 1170.1, subdivision (f), provides, "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." The Supreme Court in *People v. Rodriguez* (2009) 47 Cal.4th 501, 508-509 (*Rodriguez*) applied section 1170.1, subdivision (f), to conclude the trial court erred in imposing on the count for assault with a firearm both a firearm enhancement for personal use of a firearm under section 12022.5, subdivision (a), and a gang enhancement for a violent felony under section 186.22, subdivision (b)(1)(C). The *Rodriguez* court reasoned, the "defendant became eligible for this 10-year

punishment [under section 186.22, subdivision (b)(1)(C),] *only* because he 'use[d] a firearm which use [was] charged and proved as provided in . . . [s]ection 12022.5.'" (*Rodriguez*, at p. 509.)[10] Thus, "[b]ecause the firearm use was punished under two different sentence enhancement provisions, each pertaining to firearm use, section 1170.1's subdivision (f) requires imposition of 'only the greatest of those enhancements' with respect to each offense." (*Ibid.*; accord, *People v. Martinez* (2012) 208 Cal.App.4th 197, 199 [trial court erred in imposing gang enhancement for violent felony under § 186.22, subd. (b)(1)(C), and enhancement for personal use of a firearm under § 12022.5, subd. (a), for crime of assault with a firearm]; see *People v. Le* (2015) 61 Cal.4th 416, 424-425 [trial court erred in imposing gang enhancement for a serious felony under § 186.22, subd. (b)(1)(B), and enhancement for personal use of a firearm under § 12022.5, subd. (a), for crime of assault with a semiautomatic firearm].)

As in *Rodriguez*, we reverse the sentence and remand for the trial court to exercise its discretion whether to impose the firearm enhancement under section 12022.5, subdivision (a), or the gang enhancement under section 186.22, subdivision (b)(1)(C), but it cannot impose both. (*Rodriguez, supra*, 47 Cal.4th at p. 509.)[11]

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[10] The crime of assault with a firearm is a violent felony under section 667.5, subdivision (c)(8), which makes a base crime a violent felony if the defendant "'use[d] a firearm which use [was] charged and proved . . . .'" (*Rodriguez, supra*, 47 Cal.4th at p. 509.)

[11] The People suggest the trial court may on remand exercise its discretion to impose the firearm enhancement and a gang enhancement under section 186.22, subdivision (b)(1)(A), because that gang enhancement does not depend on the use of a firearm. However, as our colleagues in Division Three concluded in *People v. Francis* (2017) 16 Cal.App.5th 876, 883, citing to *Le, supra*,

DISPOSITION

We reverse the sentence and remand for resentencing with directions for the trial court (1) to exercise its discretion on count 3 whether to impose the firearm enhancement under section 12022.5, subdivision (a), or the gang enhancement under section 186.22, subdivision (b)(1)(C); and (2) to stay Acosta's sentence on one of counts 1, 2, 3, or 5 pursuant to section 654. In all other respects we affirm.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.

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61 Cal.4th at page 423, the penalty provisions in section 186.22, subdivision (b)(1), are mandatory. Thus, "[w]hile there is discretion embedded *within* subdivision (b)(1)(A) for felonies falling within that provision, a trial court has no discretion to impose a term under subdivision (b)(1)(A) for a felony that falls under (B) or (C)." (*Francis*, at p. 883.) We follow the persuasive reasoning of our colleagues in *Francis*.