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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G041195
v.	(Super. Ct. No. 07WF0962)
ROBERTO DUARTE, JR.,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed as modified.

Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Christine Levingston Bergman and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

Roberto Duarte, Jr., was convicted of discharging a firearm with gross negligence (count 1-Pen. Code, § 246.3, subd. (a)),[1] being a felon in possession of a

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part I.

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

firearm (count 2-§ 12021, subd. (a)(1)), street terrorism (count 3-§ 186.22, subd. (a)), and misdemeanor brandishing a firearm (count 4-§ 417, subd. (a)(2)(A)). It was also found true he committed two of the felonies for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and he had previously suffered a strike and a serious felony prior (§§ 667, subds. (a), (d) & (e)(1), 1170.12, subds. (b) & (c)(1)). After the trial court denied Duarte's new trial motion, the court sentenced him to a total term of 15 years, four months in state prison.

On appeal, Duarte argues the trial court erred in refusing to allow him to introduce evidence the gang expert who testified at trial had destroyed traffic tickets in order to prevent prosecution. He also claims the court erred by failing to stay the sentence on his street terrorism conviction (count 3), and the court should not have imposed punishment for the street terrorism conviction and enhancement. After oral argument, we requested the parties submit supplemental briefing on the effect of *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*), on this case. We agree the court should have stayed sentencing on count 3 pursuant to section 654. His other claim has no merit, and we affirm the judgment as modified.

FACTS

Brothers Victor Velasquez and Martin Velasquez[2] lived on Amberleaf Circle in Huntington Beach. Victor and Martin were both members of "Amberleaf" (AML) gang. The members of AML considered the group to be a gang, but law enforcement did not consider the group to be a criminal street gang because it did not meet the statutory definition. AML's rival was "South Side Huntington Beach" (SSHB), a criminal street gang.

One early afternoon, after Victor returned home from school, both brothers went to a park at the end of Amberleaf Circle. While at the park, the brothers observed a

[2] For purposes of clarity, we refer to the brothers by their first names.

dark-colored car speed up the street and stop in front of the park. The driver got out of the car and someone yelled, "He's got a gun." The brothers ran and hid in some nearby bushes. From the bushes the brothers heard three gun shots and the shooter yell, "South Side" or "South Side Huntington Beach." The man drove away in the car.

Neither Victor nor Martin immediately reported the incident to the police. It was not until two weeks later, after being arrested for a probation violation, that Martin provided law enforcement with information regarding the shooting. Martin was unable to pick Duarte's picture from a photographic lineup. Victor also provided information regarding the incident at a later date when he got into some trouble with the police over graffiti.

Shortly after the incident, police officers responded to Amberleaf Circle to investigate the shooting. Officers were looking for a midnight blue four-door car with a license plate that partially read: "5DYZ[]18." Although witnesses were fearful and not initially forthcoming, some told officers "Big Time," later identified as Duarte's gang moniker, was on the street with a gun. A witness by the name of Angelita Ramirez declined to speak with officers at the scene, but she agreed to call Officer Juan Munoz later. Later that evening, Ramirez called and spoke with Munoz. Ramirez related she had seen her cousin, Mario Lemus, run in front of her apartment, and she walked out to see why he was running. As she walked out she saw a person who she recognized as "Roberto" pointing a black-colored handgun in her direction. During a later interview, Ramirez was able to identify the gun as a revolver handgun. Ramirez said that when she realized "Roberto" was pointing the gun at her, she walked back into the house and locked the door. "Roberto" was further identified with the last name Duarte, and a physical description. Ramirez indicated Duarte was a male Hispanic, five feet eight to five feet 11 inches tall, about 23 years of age with a shaved head and a tattoo of writing on his neck. Ramirez stated she had known Duarte for approximately five to seven years and had last seen him about a year or a year and a half ago. She would see him often

when he came to her apartment complex to visit someone in an upstairs apartment. When Munoz showed Ramirez a photographic lineup including Duarte's picture, she was unable to identify anyone.

Two days after the shooting, Munoz observed Duarte seated in a vehicle that was parked next to a midnight blue four-door car with a license plate of "5DYZ718." Duarte's head was shaved, and he had "S.S.H.B." tattooed on the side of his head. When Munoz contacted Duarte, Munoz asked him if he had been at the Amberleaf location at the time of the shooting, and if the midnight blue car belonged to him. Initially, Duarte denied being present at the Amberleaf location on the day of the shooting, but admitted the car belonged to him. Later, Duarte disclosed he had been there looking for a group of AML members who had been bothering his younger brother. Duarte explained he had driven the midnight blue four-door Impala to Amberleaf but denied being involved in the shooting. Duarte advised Munoz that at the time the shooting took place he was filling out some job applications.

Ramirez testified at trial but said the only reason she was testifying was because she had been subpoenaed. She recounted that she and others in the neighborhood would not speak with Munoz because people in her neighborhood do not like to talk to police. She testified she was afraid to talk to Munoz and take his business card. Ramirez testified she had seen a bald man in a white T-shirt with writing on his neck holding a black object in his hand. She claimed she could not tell what the black object was, and denied telling Munoz it was a gun. As to the specifics of the description she gave Munoz, Ramirez at times claimed to not remember. Alternatively, she altered the description she provided Munoz rendering it less detailed. Ramirez said she did not recall if she had told Munoz the man she had seen was Duarte, who she had known for six or seven years. Contrary to what she told Munoz about seeing Duarte on numerous occasions prior to the incident, Ramirez claimed to have only seen Duarte one time.

Ramirez also claimed to recall identifying someone in the lineup, who was not Duarte, as looking familiar to her.

Munoz testified he knew Duarte from previous contacts but had never arrested him. He described Duarte as having been heavier in the past but that the shaved head and tattoo on the side of his head were consistent with Munoz's past observations of Duarte. Munoz was aware of only two other SSHB members with similar tattoos and both were in custody at the time of the incident. Munoz also testified as to statements Ramirez made to him the night of the incident that were inconsistent with her testimony at trial.

Huntington Beach Detective Arthur Preece testified as a gang expert. He testified that gang tattoos demonstrate a member's pride in the gang and a member's permanent allegiance to the gang. He opined committing crimes, especially with a gun, garners respect for the offender or his gang and serves to intimidate potential witnesses from cooperating with law enforcement. Throughout his 22-year career with the Huntington Beach Police Department, Preece had interacted with members of the SSHB gang. He testified the gang had been in existence for more than 30 years and was an ongoing organization with about 70 members. He described SSHB's primary activities, pattern of criminal activity, and common names and symbols. He further testified as to the commission of two predicate crimes by the gang to establish SSHB was a criminal street gang as defined in section 186.22, subdivision (f).

With respect to Duarte's involvement in the gang, Preece described Duarte's continued association with known SSHB members dating back to 2001, and opined Duarte was an active member of SSHB on the date of the incident. Preece testified Duarte's moniker was "Big Time," and he had a number of SSHB gang-related tattoos, including "S.S.H.B." on the side of his head. Based on a hypothetical mirroring the facts of the incident, Preece opined the crime was committed for the benefit of SSHB.

Prior to Preece testifying, Duarte sought permission to impeach Preece with information he had destroyed traffic tickets to prevent prosecution. Duarte's defense counsel advised the court he had received information from the prosecutor in an unrelated case that on approximately four or five occasions over a seven-to-eight-year period, Preece kept routine traffic tickets from being put into the system. Counsel cited an affidavit Preece had prepared for an unrelated case. In it, Preece declared there were no copies of the tickets he had destroyed, or any reports relating to the destruction of the tickets. Preece also stated he had no recollection of conversations with other officers regarding his actions with regard to the tickets. Duarte asserted he did not know exactly what keeping routine traffic tickets from being put into the system entailed. He questioned whether this meant Preece directed another officer to pull a ticket before it was filed. Or did Preece go to the file room, or wherever citations are filed at Huntington Beach Police Department, and pull the citation himself? He then hypothesized as to what Preece may have informed other Huntington Beach police officers. He stated this information "opens a Pandora plethora of questions."

Duarte's defense counsel argued preventing the citations from getting into the system was a "criminal violation." He advised the court he intended to "take this information . . . to the United States Attorney's Office, at a minimum[, and] refer it to the Huntington Beach Internal Affairs Department[,] [b]ecause[] there [were] questions . . . of concealment of evidence, destruction of evidence, conspiracy, obstruction of justice, and probably . . . a number of other federal statutes [the conduct] could potentially . . . implicate." Duarte's counsel then advised the court it was "incumbent that the court should appoint counsel and have [Preece] properly advised."

The prosecutor did not dispute Preece had destroyed tickets. But the prosecutor explained members of a family in a neighborhood where Preece worked were witnesses to a gang-related crime. The father in that family had received citations for driving on a suspended license while driving his disabled daughter to the doctor. Preece

told her he destroyed the tickets to help a family involved in the unrelated case. The prosecutor insisted Preece did not lie at any time about what he had done when asked about the tickets. If anything, the detective may have failed to follow the procedures set out by his department for how to handle this type of situation. The prosecutor argued if evidence regarding a possible violation of a department policy or procedure were admitted, it would consume a huge amount of time.

Duarte's counsel insisted this information was proper impeachment because the conduct was relevant on issues of character and honesty. The prosecutor indicated that although counsel repeatedly asserted Preece's conduct amounted to a violation of law, she was unclear on what law it was that Preece allegedly violated. The prosecutor again argued this conduct amounted to a failure to follow department procedure and was not relevant to prove a witness's character for truthfulness. There was no evidence Preece ever lied about what he had done in connection with the tickets, in fact he was quite candid in his statements. The prosecutor objected to evidence regarding the tickets being admitted for the purpose of impeachment.

The trial court found Duarte's offer of proof vague and based, in significant part, on speculation. The court stated the information appeared to be irrelevant, and to the extent it might be relevant, it found the evidence to be remote and minimal at best. There was a danger the evidence would confuse and mislead the jury. Admission of the evidence would constitute an undue consumption of time on a collateral issue. The court noted the evidence was based on some sort of misconduct and not a conviction. Lastly, the court found the probative value of the evidence was outweighed by its prejudicial value. After making these findings, the court excluded the evidence under Evidence Code section 352.

Duarte called two alibi witnesses, Tiffany Pinero and Barbara Koch. Pinero, Duarte's girlfriend, was working at Quality Drug Long-Term Care in Newport

Beach March 2, 2007, the day of the incident. Pinero recalled having lunch with Duarte at her workplace on March 2 and Duarte leaving her workplace at approximately 1:45 p.m. to go to a job interview. Koch, the owner of A-Ok Rentals, confirmed she interviewed Duarte for a job on March 2. Although she could not recall the exact time of the interview, she believed it took place some time between 12:00 p.m. and 4:00 p.m.

Duarte also called an investigator with the Orange County Alternate Public Defender's Office, Rolando Chavez, regarding an interview he had with Ernest Williams, Duarte's parole agent. Williams told Chavez that he had spoken with Munoz the afternoon of the incident and Munoz told him that Duarte had been seen with a gun at a gang member's funeral, but the Amberleaf incident was not discussed.

The prosecutor called Munoz to rebut issues raised by the defense evidence. Munoz testified he had given information to Williams about the gang member's funeral, but it was a separate incident not related to the Amberleaf incident. He believed Williams had confused the two incidents. Munoz testified when he arrested Duarte, Duarte never said he was with Pinero on March 2. Munoz also testified when he asked Duarte if he went anyplace other than A-Ok Rentals the afternoon of March 2, Duarte said he had but would not disclose where he had gone. The prosecutor also called a police officer witness who testified as to the driving times and distances. The officer calculated the driving time and distance between Pinero's workplace and Amberleaf to be about 11 to 12 minutes and about eight miles. The officer calculated the driving time between A-Ok Rentals and Amberleaf at 3:45 p.m. to be about five minutes but believed traffic was usually heavier at 3:45 p.m. than it would be at 1:45 p.m.

Prior to trial, the trial court granted Duarte's motion to bifurcate the trial on the strike and serious felony prior allegations. The jury convicted Duarte on all counts and found all allegations to be true. Duarte waived his right to jury trial on the strike and serious felony allegations. The court found both the strike and the prior allegations to be true.

The trial court sentenced Duarte to four years on the discharging a firearm with gross negligence count (count 1), a five-year consecutive term on the accompanying street terrorism enhancement, four years on the felon in possession of a firearm count, (count 2), and 365 days on the misdemeanor brandishing a firearm count (count 4). Pursuant to section 654, the court stayed the sentences on count 2 and the gang allegation on this count, and stayed the sentence on count 4. The court imposed an additional five years for the serious felony allegation. Duarte filed a timely notice of appeal.

DISCUSSION

I. Prejudicial Exclusion of Evidence?

Duarte claims the trial court prejudicially erred by refusing to allow him to introduce evidence Preece destroyed traffic tickets. Duarte claims the exclusion of this evidence violated his federal and state constitutional rights to present a defense, to confront and cross-examine witnesses, and to due process and a fair trial. Accordingly, Duarte asserts the more restrictive *Chapman*[3] standard of review applies. The Attorney General argues any error in excluding the evidence was harmless but does not address the applicable standard of review. Because we conclude there was no error, we need not weigh in on the applicable standard of review.

Evidence of past misdemeanor conduct involving moral turpitude may be introduced to impeach a witness's character because it is reasonable to infer a person who has committed a crime involving moral turpitude is more likely to be dishonest. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295 (*Wheeler*).) In *Wheeler,* our Supreme Court cautioned that the admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. In order to be admissible for impeachment, past misconduct must be relevant to moral turpitude and have some logical

[3] The error must be found harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.

bearing upon the veracity of a witness. (*Id.* at pp. 295-296.) Accordingly, we must first resolve whether the alleged misconduct, the destruction of traffic tickets, was a crime involving moral turpitude and relevant to the jury's determination of Preece's veracity.

We agree with the trial court that although Duarte ran through a laundry list of conceivable crimes, he was unable to articulate in any detail what specific crime Preece had committed. The record demonstrates Preece, an experienced police officer, admitted that on approximately four or five occasions over a seven-to-eight-year period he prevented the prosecution of routine traffic tickets. Duarte essentially argued based on this admission he believed it was probable if he was allowed to delve into the circumstances surrounding the destruction of the tickets criminal conduct would be revealed.

The prosecutor disputed that Preece's actions amounted to criminal conduct. She argued that at most, Preece's admission might show he did not follow department policy in the way he handled the situation. Misdemeanor misconduct involving moral turpitude is admissible to impeach a witness because it "suggest[s] a willingness to lie." (*Wheeler, supra,* 4 Cal.4th at p. 295.) Here, the trial court found Duarte's offer of proof as to the import of Preece's conduct was vague and based in significant part on speculation. We agree. Whether Preece's actions amounted to conduct suggesting a willingness to lie under oath is unclear without further facts. The trial court properly excluded the evidence.

After finding the information not to be proper impeachment, the trial court reasoned that even if the information was admissible, the probative value of the evidence was outweighed by its prejudicial value. The court stated the evidence would consume an undue amount of time and had the potential of confusing the jury.

A trial court enjoys broad discretion under Evidence Code section 352 in determining whether the probative value of particular evidence is outweighed by concerns of undue prejudice and confusion or consumption of time. The exercise of this

discretion will not be disturbed on appeal except on a showing the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 42.)

We find no abuse of discretion in the trial court's determination the probative value of this evidence would have been outweighed by its prejudicial value. Again we agree with the trial court that internal police policies and procedures are not matters of common knowledge so the jury would need to be educated on these topics. This would consume a considerable amount of time on a collateral issue. Also, without a sophisticated understanding of the permissible actions law enforcement may take to prevent the prosecution of traffic tickets, it is probable the jury would be more confused than enlightened by Preece's actions. We conclude the court properly excluded this evidence under Evidence Code section 352.

II. Penal Code Section 654

Duarte contends the trial court erred by failing to stay the sentence on count 3, street terrorism, pursuant to section 654 because he had the same intent and objective in count 1, discharging a firearm with gross negligence. He also argues section 654 bars punishment for both the substantive street terrorism offense and the street terrorism enhancement. He asserts that where two criminal acts are committed for the benefit of a criminal street gang (the gang enhancement) and the same acts are committed to further, promote, or assist the same criminal street gang (the substantive offense—street terrorism), the punishment for street terrorism must be stayed pursuant to section 654.[4] We will address his contentions below.

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[4] The California Supreme Court has not decided whether section 654 applies to sentence enhancements. (*People v. Palacios* (2007) 41 Cal.4th 720, 728 ["[W]e need not address the People's argument that section 654 generally does not apply to enhancements. We leave that question for another day"].) The courts of appeal are split on the issue. (*People v. Arndt* (1999) 76 Cal.App.4th 387, 394-395, and the cases cited therein.) We will not decide the issue.

In pertinent part, section 654, subdivision (a), 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." Section 654's purpose is to "to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense—the one carrying the highest punishment." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

Section 654 may also apply where the defendant suffers multiple convictions as a result of a single course of conduct pursuant to a single intent or objective. "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." (*Neal v. State* (1960) 55 Cal.2d 11, 19 (*Neal*).) Multiple punishment for more than one offense arising from the same act or from a series of acts constituting an indivisible course of conduct is prohibited. (*People v. Lewis* (2008) 43 Cal.4th 415, 519.) If all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.)

Before addressing the facts before us, we begin with a review of the development of the relevant case law. *Neal, supra*, 55 Cal.2d 11, is a case often cited when courts must decide whether to apply section 654. In *Neal*, defendant threw gasoline in a bedroom where a husband and wife were sleeping and ignited it. Both husband and wife were severely burned. Defendant was tried and convicted on two counts of

attempted murder and one count of arson. The court held because defendant's convictions for arson and two counts of attempted murder rested upon defendant's single act of throwing gasoline into the bedroom and igniting it, section 654 prohibited a separate punishment for the arson. The two attempted murders were found to be proper because they were crimes of violence against separate victims. (*Neal, supra,* 55 Cal.2d at p. 18.) The *Neal* court opined few crimes are the result of a single physical act. It held whether a course of conduct can be divided into segments subject to separate punishment depends on the intent and objective of the actor. (*Id.* at p. 19.)

Subsequent to *Neal* our Supreme Court revisited the applicability of section 654 in *People v. Latimer* (1993) 5 Cal.4th 1203 (*Latimer*). In *Latimer*, defendant kidnapped his victim, drove her into a desert, raped her, and left her behind. The court held that a separate punishment for the kidnapping was not permitted because the sole objective of the kidnapping was to facilitate the rape. On appeal, the Attorney General urged the court to overrule the test stated in *Neal*, and to adopt a new test. (*Latimer, supra,* 5 Cal.4th at p. 1205.) The court acknowledged that although not specifically stated in the statute, section 654 had been judicially interpreted to prohibit multiple punishment for multiple acts committed with a single intent and objective. The court did not overrule *Neal.* It held under the *Neal* "intent and objective" test, a separate sentence for the kidnapping was prohibited and affirmed. (*Latimer, supra,* 5 Cal.4th at p. 1216.)

A little over 10 years ago a different panel of this court first addressed application of section 654 in the context of a street terrorism charge in *People v. Herrera* (1999) 70 Cal.App.4th 1456 (*Herrera*). In *Herrera*, defendant, a gang member, fired three shots at a rival gang member's house from the front passenger seat of a vehicle. One bullet struck an 11-year-old boy and another bullet struck a man in the left shoulder, breaking a bone. The vehicle then made a U-turn and returned for a second pass, and approximately 10 additional shots were fired but no further injuries were inflicted. A jury convicted defendant of a variety of offenses including one count of street terrorism

and two counts of attempted murder. (*Id.* at p. 1462.) In pertinent part, the trial court imposed a separate term for the street terrorism conviction. On appeal, defendant argued section 654 prohibited the imposition of a separate term on the street terrorism conviction.

The *Herrera* court affirmed, citing *Neal* and *Latimer*. The court stated: "Since *Neal* . . . the test under section 654 has been: '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, . . . defendant may be punished for any one of such offenses but not for more than one.' [Citation.] In . . . *Latimer* . . . our Supreme Court reaffirmed the *Neal* approach and noted several cases in which the 'intent and objective' test had been applied to sustain multiple sentences. [Citation.] The *Latimer* court also clarified that section 654 applies to sentencing both for crimes flowing from a single act and for crimes resulting from an indivisible course of conduct which violates more than one statute. [Citations.]" (*Herrera, supra,* 70 Cal.App.4th 1466.) The *Herrera* court also pointed out that in passing the Street Terrorism Enforcement and Prevention Act (the Street Gang Act), the Legislature was responding to the increasing violence of street gang members throughout the state and noted no "existing law made the punishment for crimes by a gang member separate and distinct from that of the underlying crimes. [Citation.]" (*Herrera, supra,* 70 Cal.App.4th 1467.)

The *Herrera* court then applied what it discerned to be the reasoning of *Neal* and *Latimer* to the facts at hand. "The characteristics of attempted murder and street terrorism are distinguishable, even though aspects of one may be similar to those of the other." (*Herrera, supra,* 70 Cal.App.4th 1466.) In concluding section 654 did not apply, the court relied on the distinctions between the requisite intents for the two crimes. The court said the crime of attempted murder required defendant to have the specific intent to kill, whereas the crime of street terrorism required defendant to have the intent

and objective to actively participate in a criminal street gang. The court noted that to be guilty of street terrorism, defendant need not have the intent to personally commit the particular felony. (*Herrera, supra*, 70 Cal.App.4th at p. 1467.) The court also expressed concern that if "section 654 were held applicable here, it would render section 186.22, subdivision (a)[,] a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang." (*Herrera, supra,* 70 Cal.App.4th at p. 1468.)

In *In re Jose P*. (2003) 106 Cal.App.4th 458 (*Jose P*.), the juvenile court found minor had committed home invasion robbery, false imprisonment, first degree burglary, and street terrorism. The court found true the allegation he had committed these crimes for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) The court committed the minor to the youth authority and calculated the maximum period of confinement as nine years for the robbery, 10 years for the gang enhancement, and eight months for the street terrorism offense. (*Jose P., supra,* 106 Cal.App.4th at p. 458.) Minor argued section 654 prohibited the imposition of a separate term of confinement on the street terrorism offense. The court noted the robbery was not the only felonious act upon which the court could have based its finding minor had committed street terrorism because minor had also been found guilty of attempted robbery in a prior proceeding. (*Jose P. supra*, 106 Cal.App.4th at p. 470.) Relying on *Herrera*, the court indicated that even if minor's criminal liability for the street terrorism offense depended upon his participation in the robbery, the record supported a finding he harbored the separate intent and objective to participate in the gang. Accordingly, section 654 did not preclude separate punishment. (*Jose P. supra,* 106 Cal.App.4th at p. 470.)

Herrera was followed by another case from this court, *People v. Ferraez* (2003) 112 Cal.App.4th 925 (*Ferraez*). In *Ferraez*, defendant was convicted of possessing for sale cocaine base (Health & Saf. Code, § 11351.5), and street terrorism

(§ 186.22, subd. (a)). The jury also found true the allegation the first offense was committed to benefit or assist a criminal street gang (§ 186.22, subd. (b)(1)). The trial court sentenced defendant to four years for the drug offense and a concurrent term of two years for street terrorism, and stayed the sentence on the gang enhancement. (*Ferraez, supra,* 112 Cal.App.4th at p. 928.) On appeal, defendant asserted the trial court erred by failing to stay his sentence on the street terrorism conviction pursuant to section 654. He argued that although he committed two offenses, he only possessed one intent and objective when he did so. In rejecting defendant's argument, the court found defendant possessed the drugs with the intent to sell, and committed the drug offense with the intent to promote or assist the gang. The court reasoned, "While he may have pursued both objectives simultaneously, they were nonetheless independent of each other." (*Ferraez, supra,* 112 Cal.App.4th at p. 935.) *Jose P., supra,* 106 Cal.App.4th 458, and *Ferraez, supra,* 112 Cal.App.4th 925, followed *Herrera, supra,* 70 Cal.App.4th 1456, in rejecting application of section 654.

A few years after *Ferraez,* a different panel of this court faced similar facts in *People v. Vu* (2006) 143 Cal.App.4th 1009. In *Vu* the court acknowledged the reasoning in *Herrera* but found section 654 applied. The court concluded the defendant committed separate acts violating more than one statute and harbored more than a single intent. But because the defendant's acts amounted to a single course of conduct and the separate intents were not independent of one another section 654 barred separate punishment for the street terrorism offense.

In *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*), our colleagues in Division Two of the Fourth District disagreed with the *Herrera* court's reasoning. After a thorough and discerning review of *Herrera* and its application in subsequent cases, the *Sanchez* court rejected the reasoning and holding in *Herrera* and held that where a defendant is convicted of both (1) a crime that requires as one of its elements, the intentional commission of an underlying offense, and (2) the underlying

offense itself, section 654 bars multiple punishment. (*Sanchez, supra,* 179 Cal.App.4th at p. 1315.) By way of analogy, the *Sanchez* court noted the prohibition against separate punishment for both felony murder and the underlying felony. (*Ibid.*)

The *Sanchez* court criticized the *Herrera* court's limited focus on defendant's culpability, which prevented it from considering other valid factors. While culpability was a valid consideration, the *Sanchez* court noted it was not determinative, and it disputed the *Herrera* court's holding that every time a defendant was convicted of two crimes carrying different specific intents, section 654 was inapplicable. (*Sanchez, supra,* 179 Cal.App.4th at p. 1313.) Relying on *People v. Harrison* (1989) 48 Cal.3d 321, 335, the *Sanchez* court also disputed the *Herrera* court's conclusion section 654 is inapplicable to a defendant who entertains multiple objectives. Rather, the *Sanchez* court opined multiple criminal objectives alone are not a bar to the application of section 654, explaining that it is only multiple independent objectives that bar application of section 654. (*Sanchez, supra,* 179 Cal.App.4th at p. 1314.)

The *Sanchez* court also questioned the *Herrera* court's statement a defendant convicted of street terrorism "'does not need to have the intent to personally commit the particular felony (e.g., murder, robbery or assault) . . . .'" (*Sanchez, supra,* 179 Cal.App.4th at p. 1314.) The *Sanchez* court reasoned that when the underlying crime "[was] the act that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation[,] . . . [i]t makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies." (*Id.* at p. 1315.) Thus, the court observed, "[*I*]*f* the defendant is also found guilty of the underlying offense, the defendant's intent and objective in committing both offenses must be the same." (*Id.* at p. 1314.)

The *Sanchez* court then focused on an example used in *Herrera.* The *Herrera* court used the example of a murder committed by other gang members where

defendant was not liable for the murder as either a perpetrator or an aider and abettor, but was merely guilty of being an accessory after the fact. (*Herrera, supra,* 70 Cal.App.4th at pp. 1467-1468.) The *Sanchez* court found this example inapt because defendant could only be convicted of accessory after the fact and, therefore, section 654 would not be implicated. (*Sanchez, supra,* 179 Cal.App.4th at p. 1314.)

Relying on the example in *Herrera,* the *Sanchez* court held that in applying section 654, the dispositive question is not whether defendant's intent and objective in committing street terrorism was the same as the intent and objective of the *gang* in committing the murder, but whether it was the same as defendant's intent and objective in committing the crime of being an accessory. (*Sanchez, supra,* 179 Cal.App.4th at p. 1314.)[5]

Suffice it to say, current case law regarding the application of section 654 as it applies to a street terrorism conviction is less than consistent among the various appellate courts within the state.[6] We find the reasoning in *Sanchez* persuasive. *Sanchez,* however, involved two criminal acts—two robberies—while the case before involved one criminal act of firing a weapon.[7]

In determining the applicability of section 654, we turn first to the plain language of the statute. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1009.) Section 654, subdivision (a), provides, "*An act* or omission that is punishable in different ways by

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[5] The California Supreme Court has granted review in a case addressing the issue presented here. (*People v. Mesa,* review granted Oct. 27, 2010, S185688.)

[6] Although we cite only published cases addressing this issue, we note a number of courts have weighed in on this subject in unpublished opinions.

[7] Although Duarte fired three successive gunshots in rapid succession, the prosecution filed only one count for discharging a firearm. We view this as an implicit acknowledgement that Duarte's discharge of the gun should be viewed as one continuous act.

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." (Italics added.) There is no language in the statute that allows in a single act scenario the circumvention of the prohibition against multiple punishments because a defendant had multiple intents or intended multiple impacts. It is only where a defendant engages in multiple acts that the cases require a determination be made as to whether the series of acts amounts to a course of conduct subject to a single or multiple intents and objectives. If multiple acts were merely incidental to, or were the means of accomplishing or facilitating one objective, section 654 prohibits more than one punishment.

Herrera appears to hold the *Neal* "intent and objective" test may be relied upon to impose separate punishments for the street terrorism offense and the underlying felony even if those offenses arise out of *a single act*. (*Herrera, supra,* 70 Cal.App.4th at p. 1468; see also *Sanchez, supra*, 179 Cal.App.4th at p. 1312 [*Herrera* treated defendant's two counts of attempted murder as a single drive-by shooting].) Such a holding creates a new and different application of the *Neal* "intent and objective" test.

Over the years, the *Neal* "intent and objective" test has been applied by countless courts to parse a *course of criminal conduct* into individuals crimes based on independent intents and objectives. But *Herrera* was the first case to use the "intent and objective" test to parse a single act into individual crimes based on independent intents and objectives to justify the imposition of separate punishments. In *Herrera*, the *Neal* test was interpreted to allow multiple punishments for a single act because defendant simultaneously harbored an intent to actively participate in and promote his gang and an intent to kill. (*Herrera, supra,* 70 Cal.App.4th at p. 1468.)

We find the application of the *Neal* "intent and objective" test as applied in *Herrera* inapt where a defendant's conduct is but a single act. The purpose of section 654 is to prevent multiple punishments for a single act. The *Neal* rule is a judicially

created extension of section 654 and prevents multiple punishments where a defendant has engaged in multiple acts, if these acts are a course of conduct subject to a single intent or objective. The *Neal* court recognized few crimes are the result of a single physical act (*Neal, supra,* 55 Cal.2d at p. 18), but it did not provide that when a crime is the result of a single act, that act could be subject to multiple punishments based on multiple intents or objectives. We find no support in *Neal* or *Latimer* for the proposition a single act can be carved up based on intent or objective to avoid section 654's prohibition against multiple punishments for a single act.

We do not disagree with *Herrera's* characterization as to the intent of the Legislature in enacting the Street Gang Act. Clearly, the Legislature intended to create a new crime to address the serious threat to public safety posed by increasing street gang violence. But the legislative intent behind the Street Gang Act does not assist us in interpreting the plain language of section 654 or the *Neal* test.

Lastly, we disagree with *Herrera's* assertion that if section 654 were held applicable, it would render section 186.22, subdivision (a), a nullity. The street gang offense remains a viable charging option for the prosecution. As the *Jose P*. court noted, the prosecution has the option of relying on a felony not charged in the instant case to satisfy the felonious conduct element of the street terrorism offense. (*Jose P. supra,* 106 Cal.App.4th at p. 470.) It is only where the prosecution elects to rely on the same felony conduct to support two felony convictions that section 654 would be implicated. In the event section 654 bars multiple punishments, the court must impose the greater of the two sentences. (*People v. Beamon* (1973) 8 Cal.3d 625, 639-640.) It is also important to note that even if section 654 bars a separate sentence in the instant case, the conviction is not inconsequential to the defendant should he reoffend. A street terrorism conviction could be charged as a serious felony prior within the meaning of section 1192.7, and could result in an additional five-year sentence. For all of these reasons, we cannot conclude

that if section 654 were held applicable, it would render section 186.22, subdivision (a), a nullity.

To the extent our concurring colleague concludes independent intents and objectives may be used to divide a single act into separately punishable segments, we respectfully disagree.

With respect to our facts, the evidence is undisputed Duarte rapidly fired three successive shots. The prosecutor charged Duarte with multiple felony offenses arising out of the *one* act of shooting. The Attorney General accurately notes the jury was instructed it could not convict Duarte of street terrorism unless the prosecution proved he engaged in felonious conduct. The trial court instructed the jury felonious conduct meant committing or attempting to commit either the crime of discharging a firearm with gross negligence (count 1) or possession of a firearm by a felon (count 2). Accordingly, the jury necessarily relied on one of the underlying firearm offenses to establish the requisite felonious conduct on the street terrorism charge. It this circumstance, where the underlying felony is used to satisfy the felonious conduct element of a street terrorism charge, section 654 bars separate punishment.

The Attorney General notes the trial court stayed the punishment on count 2, possession of a firearm by a felon. Relying on this fact, the Attorney General argues count 2 could be relied upon to satisfy the requisite felonious conduct element of street terrorism. Not so. Both crimes formed the basis for the felonious conduct element in the street terrorism charge. Indeed, the trial court instructed the jury that "felonious criminal conduct means committing or attempting to commit any of the following crimes: discharging a firearm with gross negligence and possession of a firearm." The trial court appropriately stayed punishment on count 2 pursuant to section 654 because it imposed punishment on count 1. Under the same reasoning, count 2 could not be used to support separate punishment on count 3. We agree with Duarte's contention section 654 bars

punishment for the firearm offense and a separate punishment for the street terrorism substantive offense for the same conduct.

Duarte also suggests section 654 precludes separate punishment for the substantive street terrorism offense and the street terrorism enhancement. Our finding that section 654 prohibits separate punishment on the street terrorism offense renders this argument moot.

DISPOSITION

We affirm the convictions but modify the judgment as follows: The 16-month term imposed on count 3, street terrorism, is ordered stayed pursuant to section 654. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and forward it to the Department of Corrections and Rehabilitation, Division of Adult Operations.

CERTIFIED FOR PARTIAL PUBLICATION

O'LEARY, J.

WE CONCUR:

ARONSON, J.

I concur in the majority opinion's reasoning and result as to Part I and in the result as to Part II. I write separately because I cannot agree with the majority opinion's analysis and application of Penal Code section 654. (All further statutory references are to this code.) Since this case involves but a single act, I believe the traditional approach announced in *Neal v. State of California* (1966) 55 Cal.2d 11 applies, not the categorical approach announced in *People v. Sanchez* (2009) 179 Cal.App.4th 1297.

Section 654, subdivision (a) declares, "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." Whether section 654 applies is generally a question of fact. (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5.) Thus, except in cases of "the applicability of the statute to conceded facts" (*People v. Harrison* (1989) 48 Cal.3d 321, 335), "the trial court's finding will be upheld on appeal if it is supported by substantial evidence [citations]" (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583; see also *People v. Andra* (2007) 156 Cal.App.4th 638, 640).

In *Neal v. State of California* (1960) 55 Cal.2d 11, the Supreme Court recognized the general rule that "'[i]f only a single act is charged as the basis of . . . multiple convictions,' . . . the defendant can be punished only once. [Citation.]" (*Id*. p. 19.) *Neal* also observed that because "[f]ew if any crimes . . . are the result of a single physical act," "'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 . . . .' [Citation.]" (*Ibid*.) "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." (*Ibid.*)

As *People v. Latimer* (1993) 5 Cal.4th 1203 pointed out, cases subsequent to *Neal* that involved a course of conduct "have limited the rule's applicability in various ways. Some have narrowly interpreted the length of time the defendant had a specific objective, and thereby found similar but *consecutive* objectives permitting multiple punishment. [Citations.] [¶] Other cases have found separate, although sometimes simultaneous, objectives under the facts. [Citations.]" (*Id.* at pp. 1211-1212.) *Neal* also recognized an exception "'where . . . one act has two results each of which is an act of violence against the person of a separate individual[]'" (*Neal v. State of California, supra,* 55 Cal.2d at p. 21) because "[a] defendant who commits an act of violence with the intent to harm more than one person or by a means likely to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person." (*Ibid.*)

Relying on the *Neal* rule and the above principles of appellate review, several courts have considered the question of whether section 654 permitted separate punishment for a defendant convicted of street terrorism as well as one or more other felonies. (E.g., *People v. Vu* (2006) 143 Cal.App.4th 1009, 1032-1034; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935; *In re Jose P.* (2003) 106 Cal.App.4th 458, 468-471; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466-1468.) These decisions reached varying results based on the particular facts of the case.

In *People v. Herrera*, *supra*, 70 Cal.App.4th 1456, "the defendant was charged with a course of criminal conduct involving two gang-related, drive-by shootings in which two people were injured. [Citation.]" (*People v. Vu*, *supra*, 143 Cal.App.4th at p. 1034.) The shootings were committed in retaliation against a rival gang who had shot

at members of the defendant's gang. We held that "under section 186.22, subdivision (a) the defendant must necessarily have the intent and objective to actively participate in a criminal street gang. However, he does not need to have the intent to personally commit the particular felony (e.g., murder, robbery or assault) because the focus of the street terrorism statute is upon the defendant's objective to promote, further or assist the gang in its felonious conduct, irrespective of who actually commits the offense. . . . Hence, section 186.22, subdivision (a) requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess 'two independent, even if simultaneous, objectives[,]' thereby precluding application of section 654. [Citation.]" (*People v. Herrera*, *supra*, 70 Cal.App.4th at pp. 1467-1468, fn. omitted.) Because the evidence showed the defendant had separate intents to murder multiple victims (see *id*. at p. 1467 [the defendant "repeatedly shot a gun on two separate occasions—the interval between the two being brief but distinct—striking cars, occupied apartments, and bystanders"] and to support his "gang's felonious conduct," we held section 654 did not bar punishment for both crimes (*id.* at p. 1468).

In *People v. Ferraez*, *supra*, 112 Cal.App.4th 925, where the defendant was convicted of possessing cocaine base for sale and street terrorism, I authored an opinion following *Herrera*. (*Id*. at p. 935.) The record there contained evidence the defendant possessed the drugs for sale with the separate intent to personally benefit and promote or assist the gang. (*Ibid*.)

Similarly, in *In re Jose P.*, *supra*, 106 Cal.App.4th 458, the Sixth District rejected the minor's contention he could not be punished for both street terrorism and robbery. It noted the street terrorism count could have been based on a previous robbery the minor had committed rather than the currently charged robbery (*id*. at p. 470) and in any event the case was "no different than *Herrera*" because there was evidence

supporting the findings the defendant had the separate objectives of participating in the gang and taking the property from the home (*id.* at p. 471).

In *Vu*, another panel of this court distinguished *Herrera* as involving multiple victims and separate incidents. It held the defendant could not be separately punished for conspiracy to commit murder and street terrorism because although he "committed different acts, violating more than one statute, . . . the acts . . . constituted a criminal course of conduct with a single intent and objective" of conspiring to "avenge" the prior murder of a fellow gang member. (*People v. Vu*, *supra*, 143 Cal.App.4th at p. 1034.) Thus, while "that intent or objective could be parsed further into intent to promote the gang and intent to kill, those intents were not independent," but rather "dependent on, and incident to, the other." (*Ibid.*)

Unlike the above cases, which determined section 654's applicability based on the particular facts, *People v. Sanchez, supra,* 179 Cal.App.4th 1297 announced a "categorical" approach. Stating "the crucial point is that . . . the defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself" (*id.* at p. 1315), *Sanchez* concluded "it makes no sense to say that [the] defendant had a different intent and objective in committing the crime of gang participation than he did in committing the [underlying offense]" (*ibid.*).

I find *Herrera*'*s* approach to be more in line with the *Neal* rule. But in contrast to *Herrera*, a separate and independent intent and objective cannot be inferred from the facts of this case. The evidence demonstrates only that defendant, an active member of a criminal street gang aware of its activities, yelled the gang's name while displaying and firing a handgun at a park located in a rival group's neighborhood. Because the record reflects defendant committed but a single criminal act, I agree the trial

court erred by imposing a separate sentence on defendant for his street terrorism conviction in this case.

RYLAARSDAM, ACTING P. J.