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Opinion following rehearing

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY A. IZAGUIRRE, Defendant and Appellant.	B169352 (Los Angeles County Super. Ct. No. BA232697)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob S. Bowers, Jr., Judge. Modified and affirmed, with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Johnny A. Izaguirre was convicted by jury of first degree murder in which he personally discharged a firearm, causing death, with the special circumstance that the murder was intentional and was perpetrated by the discharge of a firearm from a motor vehicle. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d), 190.2, subd. (a)(21).)[1] He was also convicted of three counts of willful, deliberate and premeditated attempted murder, in one count of which it was found that he personally discharged a firearm, causing great bodily injury, and in the remaining counts of which it was found that he personally discharged a firearm. (§§ 187, subd. (a)/664, 12022.53, subds. (d), (c).)[2] He was sentenced to life in prison without the possibility of parole with a firearm enhancement of 25 years to life on the murder count, and to concurrent life terms, one with a 25-year-to-life firearm enhancement and two with 20-year firearm enhancements, for the attempted murders.

Izaguirre appeals, contending that (1) the drive-by shooting special circumstance violates the Eighth and Fourteenth Amendments to the United States Constitution because it requires nothing more than proving a drive-by shooting first degree murder; (2) the imposition of the section 12022.53, subdivision (d) enhancement on the murder count violates principles of merger and section 654; (3) the 12022.53, subdivision (d) enhancement must be stricken because it is subsumed within the life without parole sentence; (4) the rule precluding multiple convictions for included offenses requires the striking of various additional enhancements found true by the jury; and (5) the abstract of judgment must be corrected to reflect the trial court's award of actual presentence custody credits. We granted rehearing to consider the effect of *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*) and its interpretation of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) on the issues raised by appellant.

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

2 As to each count, the jury found true additional allegations, which are set forth in the Discussion section, *post*.

FACTS

Appellant does not challenge the sufficiency of the evidence underlying his convictions, and the facts may be briefly stated. In the early hours of June 1, 2002, as four unarmed young men were leaving an after-prom party in East Los Angeles, three vehicles approached them. Words were exchanged, and some of the occupants of the cars threw gang signs. Appellant, who was seated in the front passenger seat of one of the vehicles, urged the young men to come closer, and then fired several shots. Jose Bernal died as the result of a gunshot wound to the chest. Lionell Rivera sustained gunshot wounds to the arm and upper torso. Jose Chavez was hit in the arm, and a bullet grazed his mouth. Eric Garcia was not hit. Appellant was identified as the shooter by eyewitnesses, including two of the surviving victims and individuals who had been in the cars.

DISCUSSION

I. The drive-by special circumstance is not constitutionally infirm.

The jury was instructed that appellant could be convicted of first degree murder either on the theory that the killing was deliberate and premeditated, or on the theory that it was a drive-by murder. (§ 189 [murder is of the first degree if, *inter alia*, it is a willful, deliberate and premeditated killing or if it is "perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death"].) After finding appellant guilty of first degree murder,[3] the jury found true the special circumstance that the murder was "intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death." (§ 190.2, subd. (a)(21).)

Appellant contends that the drive-by special circumstance set forth in section 190.2, subdivision (a)(21) violates the Eighth and Fourteenth Amendments because it fails to provide a meaningful basis for distinguishing between individuals who

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3 There is no requirement that the jury unanimously agree on the theory underlying a conviction of first degree murder. (*People v. Majors* (1998) 18 Cal.4th 385, 408.)

deserve special circumstance punishment and those who do not, since proof of the drive-by special circumstance requires nothing more than proof of a drive-by first degree murder. This contention must fail.

We need not address whether, as a person sentenced to life without the possibility of parole and not to a sentence of death, appellant has standing to raise this Eighth Amendment challenge. As appellant acknowledges, his contention was rejected on the merits by this court in *People v. Rodriguez* (1998) 66 Cal.App.4th 157 (*Rodriguez*). In *Rodriguez*, we relied on the United States Supreme Court's decision in *Lowenfield v. Phelps* (1988) 484 U.S. 231, as well as the California Supreme Court's decision in *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, footnote 12, to hold that the drive-by murder special circumstance is not constitutionally infirm on the ground that it duplicates the elements of drive-by first degree murder. (*Rodriguez, supra*, at p. 164; see also *People v. Marshall* (1990) 50 Cal.3d 907, 945-946.) Appellant challenges our reliance upon *Lowenfield v. Phelps* to support our conclusion in *Rodriguez*. We believe that *Rodriguez* was correctly decided and decline to revisit the issue.

II. Imposition of the section 12022.53, subdivision (d) enhancement on the murder count does not violate section 12022.53, subdivision (j).

Appellant was sentenced to life without parole for the special circumstance murder of Bernal in count 1, and the trial court imposed a 25-year-to-life firearm enhancement pursuant to section 12022.53, subdivision (d) on that count. Appellant contends that the imposition of this enhancement on the murder count was erroneous because subdivision (j) of section 12022.53 provides that "the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment." He argues that section 190.2, subdivision (a)(21), which mandated his sentence of life without parole, constitutes such a provision providing for a longer term.

We agree with the determination in *People v. Chiu* (2003) 113 Cal.App.4th 1260, where the court rejected this argument and held that the section 12022.53 subdivision (d)

enhancement is properly imposed on a life without parole sentence. The court pointed out that the argument set forth by appellant "equates offenses and enhancements for punishment purposes" and determined that the term "'another provision of law'" in subdivision (j) of section 12022.53 refers to other provisions governing enhancements for use of a firearm. (*Chiu*, *supra*, at pp. 1264-1265.)[4] Accordingly, this claim must fail.

III. The section 12022.53, subdivision (d) enhancement was properly imposed and the other enhancements need not be vacated or stricken.

In addition to the first degree murder conviction and the finding pursuant to section 12022.53, subdivision (d) in count 1, appellant was convicted of the attempted murder of Rivera in count 2 with the finding that he personally discharged a firearm causing great bodily injury pursuant to the same enhancement statute. He was convicted in counts 3 and 4, respectively, of the attempted murders of Chavez and Garcia, each with the finding that he personally discharged a firearm within the meaning of section 12022.53, subdivision (c).

In addition to the enhancements indicated above, on which the trial court imposed sentences, the jury found true various additional enhancement allegations as to each count. The jury found that appellant personally used and discharged a firearm in committing the murder of Bernal and the attempted murder of Rivera within the meaning of subdivisions (b) and (c), respectively, of section 12022.53. It also found as to those counts that appellant caused death or inflicted great bodily injury by discharging a firearm from a motor vehicle within the meaning of section 12022.55. As to the attempted murder of Rivera, the jury also found that appellant personally inflicted great

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4 As appellant acknowledges, in another case addressing this issue, where the Court of Appeal agreed with the argument raised here by appellant, the Supreme Court granted the Attorney General's petition for review and transferred the matter to the Court of Appeal with directions to reconsider its opinion in light of *Chiu*. (*People v. Shabazz* (2004) 118 Cal.App.4th 1458, review granted and matter transferred Sept. 15, 2004, S126065.) The *Shabazz* court thereafter indicated that it disagreed with the conclusion and reasoning in *Chiu*. (*People v. Shabazz* (2004) 125 Cal.App.4th 130, 147-150, petitions for review filed Jan. 25, 2005, S131048.)

bodily injury pursuant to section 12022.7, subdivision (a). As to the attempted murders of Chavez and Garcia, the jury found that appellant personally used a firearm within the meaning of subdivision (b) of section 12022.53. The trial court stated, as to each enhancement on which it did not impose a term, that it "elect[ed] not to impose" those enhancements because "to do so would constitute double use, and all of these acts occurred on the same occasion."

Appellant contends that the rule precluding multiple convictions for included offenses applies to each of the enhancement allegations that were found true but on which terms were not imposed on each count. He further contends that as to the murder count, all of the enhancements, including the one imposed under section 12022.53, subdivision (d), must be vacated because they were all included within the charge of first degree murder based on a theory of drive-by shooting and within the drive-by special circumstance. This contention is without merit.

Appellant first asserts that imposition of the section 12022.53, subdivision (d) enhancement on the murder count violates principles of "merger" and section 654 because the facts and elements necessary to establish the drive-by shooting first degree murder conviction and the drive-by special circumstance finding necessarily included his conduct in intentionally discharging a firearm causing death, as required by the enhancement statute.

In *People v. Sanders* (2003) 111 Cal.App.4th 1371, Division Five of this court rejected a similar claim. *Sanders* held that the merger doctrine is inapplicable in this situation and that section 654 does not preclude imposition of the section 12022.53, subdivision (d) firearm use enhancement. (*Id*. at pp. 1374-1375.) We agree with the analysis in *Sanders* and therefore reject appellant's contention. Nothing in *Apprendi, supra*, 530 U.S. 466, where the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (*id*. at p. 490), requires a different result with respect to the section 654 claim.

We granted rehearing to consider whether under *Apprendi*, as interpreted by the recent Supreme Court decision in *Seel*, *supra*, 34 Cal.4th 535, there is any merit to appellant's next claim, that neither the section 12022.53, subdivision (d) enhancement, nor the section 12022.53, subdivision (b) and (c) enhancements, may be imposed on a count of murder under a drive-by shooting theory under the rule precluding conviction of both greater and lesser offenses, or to his claim that the enhancements found true but not imposed on the attempted murder counts must be stricken on the same theory.[5]

Under section 954, a defendant may be convicted of any number of charged offenses arising from a single act or course of conduct. Section 654 precludes multiple punishment for an act or omission that is punishable by different provisions of law. Thus, in general, when counts arise from a single act or course of conduct, multiple convictions are permitted, although multiple punishment is not. (*People v. Ortega* (1998) 19 Cal.4th 686, 692 (*Ortega*).) However, there is an exception to the rule permitting multiple convictions. "'Although the reason for the rule is unclear, [the Supreme Court] has long held that multiple convictions may *not* be based on necessarily included offenses. [Citations.]' [Citation.]" (*Ibid.*)[6]

Appellant argues that under *Apprendi*, conduct enhancements are treated similarly to offenses for purposes of fundamental due process, including the right to jury trial and

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[5] We did not consider this issue at length in our original opinion. Appellant raised the issue under the heading "The Appropriate Remedy" to the claimed section 654 violation, reiterating it in his challenge to the additional enhancements. We found no error in the failure to grant relief under section 654 and otherwise rejected his argument.

[6] Justice Chin provided an explanation for this rule in his concurring and dissenting opinion in *Ortega*, *supra*, at page 705: "We have never clearly stated the reason for the rule prohibiting conviction of both a greater offense and a necessarily included offense. However, the rule is logical. If a defendant cannot commit the greater offense without committing the lesser, conviction of the greater is *also* conviction of the lesser. To permit conviction of both the greater and the lesser offense '"'would be to convict twice of the lesser.'"' [Citation.] There is no reason to permit two convictions for the lesser offense."

the requirement of proof beyond a reasonable doubt. He asserts, based on *Seel*'s statement that "'*Apprendi* treated the crime together with its sentence enhancement as the "functional equivalent" of a single "greater" crime'" (*Seel*, *supra*, 34 Cal.4th at p. 539, fn. 2), that such enhancements must be treated like criminal offenses for purposes of sections 954 and 654. He therefore claims that, under the accusatory pleading test for determining whether one offense is a lesser included offense of another, the section 12022.53 firearm enhancements are necessarily included within the offense of drive-by shooting first degree murder.

In effect, appellant asks us to hold, pursuant to *Apprendi*, that when a defendant is convicted of first degree murder on a theory of drive-by shooting, a firearm discharge enhancement or firearm use enhancement can never be imposed, although found true by a jury beyond a reasonable doubt. Even assuming that the accusatory pleading test applies to the determination of whether one offense is a lesser included offense of another for purposes of multiple conviction, an issue the Supreme Court has not decided,[7] we decline to so hold.[8]

Appellant acknowledges that in *People v. Wolcott* (1983) 34 Cal.3d 92 (*Wolcott*), the majority held that "a 'use' enhancement is not part of the accusatory pleading for the purpose of defining lesser included offenses." (*Id*. at p. 96.) The majority opinion stated, "In the first place, California courts have consistently stated that 'section 12022.5 does not prescribe a new offense but merely additional punishment for an offense in which a firearm is used.' [Citations.]" (*Wolcott*, *supra*, at p. 100.) The court rejected the argument that the accusatory pleading test should apply to make one offense a lesser

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[7] In *People v. Montoya* (2004) 33 Cal.4th 1031, the Supreme Court stated that the accusatory pleading test is generally used to determine whether to *instruct* on an uncharged lesser offense. Although the court observed that some Courts of Appeal have held that the accusatory pleading test is inapplicable to the issue of *multiple convictions*, it found it unnecessary to decide that issue. (*Id*. at pp. 1035-1036.)

[8] In view of appellant's life without parole sentence, of course, this claim is effectively moot.

included offense of another because of an enhancement allegation, when it is not a necessarily included offense as a matter of law. The court pointed out that the accusatory pleading test rests on principles of due process, that the accused must have notice of the charges against him, and that "[t]he application of those principles to an enhancement allegation . . . is unclear since that allegation becomes relevant only if the defendant is convicted of the substantive crime." (*Id*. at p. 101.)

The *Wolcott* majority further stated that "even if California could constitutionally consider enhancement allegations as part of the accusatory pleading for the purpose of defining lesser included offenses, we see no reason to adopt that course. Not only is the weight of authority against it, but the result would be to confuse the criminal trial. Present procedure contemplates that the trier of fact first determines whether the defendant is guilty of the charged offense or a lesser included offense, and only then decides the truth of any enhancements." (*Wolcott*, *supra*, 34 Cal.3d at p. 101.)

Appellant urges, however, that in light of *Apprendi*, particularly as that case has been interpreted in *Seel*, the majority decision in *Wolcott* cannot stand and that we must give effect to the dissenting opinion, where Chief Justice Bird expressed the view that enhancement allegations should be treated as part of the accusatory pleading in determining whether one offense is a lesser included offense of another. The *Wolcott* dissent challenged the majority's statement that the firearm use allegation becomes relevant only if the defendant is convicted of the substantive offense by arguing that the truth of the firearm use allegation is decided at the same proceeding at which the evidence of the underlying crime is presented, and the firearm evidence must be refuted by the defendant at the same time as the evidence on the substantive offense. (*Wolcott*, *supra*, 34 Cal.4th at pp. 111-112 (dissenting opn. of Bird, C. J.).) The dissent challenged the majority's statement that the firearm enhancement provision does not prescribe a new offense by arguing that this rationale conflicted with a then-recent Supreme Court pronouncement that enhancement allegations were to be treated the same as substantive offenses for purposes of section 995 challenges. (*Wolcott*, *supra*, at p. 112 (dissenting opn. of Bird, C. J.).)

Appellant argues that, after *Apprendi*, the *Wolcott* dissent must govern and enhancement allegations must be considered in the determination of lesser included offenses under the accusatory pleading test. We conclude that nothing in *Apprendi* undermines the decision of the majority in *Wolcott.*

The rule of *Apprendi*, that any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, rests on the reasoning that "[t]he federal Constitution requires the elements of a crime to be proved beyond a reasonable doubt *because they expose the defendant to punishment*; likewise, the elements of a sentence enhancement must be proved beyond a reasonable doubt if there is exposure to *increased* punishment. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326.)

In *Seel*, our Supreme Court disapproved an earlier decision that held that the allegation under section 664, subdivision (a), that an attempted murder was willful, deliberate and premeditated, was a penalty provision and did not evoke double jeopardy protection. The *Seel* court observed that in *Apprendi*, the United States Supreme Court stated, "'[W]hen the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.' ([*Apprendi*, *supra*, 530 U.S.] at p. 494 fn. 19.)" (*Seel*, *supra*, 34 Cal.4th at pp. 546-547.) The *Seel* court concluded that, under the mandate of *Apprendi*, the section 664, subdivision (a) penalty provision constitutes an element of the offense because it exposes a defendant to a greater punishment than that authorized by the jury's verdict and "'goes precisely to what happened in the "commission of the offense."'" (*Seel*, *supra*, at pp. 548-549.) It therefore held that the federal double jeopardy clause applies to bar retrial on the premeditation allegation. (*Id.* at p. 541.)

Appellant argues, in effect, that because an enhancement may be the functional equivalent of an element of a greater offense, it is also the equivalent of a new substantive offense for purposes of the multiple conviction rule. Such a determination would be an unwarranted extension of the *Apprendi* doctrine.

As indicated, the *Apprendi* rule rests on the rationale that the elements of a sentence enhancement, as well as the elements of a crime, must be proved beyond a reasonable doubt because they expose the defendant to increased punishment. (*People v. Sengpadychith, supra*, 26 Cal.4th at pp. 325-326.) Nothing in *Apprendi* or *Seel* undercuts the reasoning behind the Supreme Court's determination in *Wolcott* that enhancement allegations are not to be considered in determining lesser included offenses, and nothing in *Apprendi* or *Seel* lends greater weight to the *Wolcott* dissent. The rationale of *Apprendi* that led to the conclusion in *Seel* that a penalty provision allegation such as that under section 664, subdivision (a) constitutes an element of a greater offense meriting double jeopardy protection does not alter the reasoning by the majority in *Wolcott*, over Chief Justice Bird's dissent, that a firearm use enhancement "'does not prescribe a new offense but merely additional punishment . . . .'" (*Wolcott, supra*, 34 Cal.3d at p. 100.) It also remains true, as stated by the majority in *Wolcott*, over Chief Justice Bird's dissent, that "present procedure contemplates that the trier of fact first determines whether the defendant is guilty of the charged offense or a lesser included offense, and only then decides the truth of any enhancements." (*Id*. at p. 101.)

The rule precluding multiple conviction when one substantive offense is a lesser included offense of another substantive offense, and the reason for that rule as expressed by Justice Chin in his concurring and dissenting opinion in *Ortega, supra*, 19 Cal.4th at page 705, would not be served by a pronouncement that a conduct enhancement that contains the same elements as a substantive offense, or, as appellant states, is "subsumed within" an offense, cannot stand when a defendant is convicted of the offense. Enhancements are not substantive offenses and an enhancement is not a lesser included offense of a substantive offense for purposes of instruction. (*People v. Dennis* (1998) 17 Cal.4th 468, 500-503.) We conclude that the same principle applies for purposes of multiple conviction. The rationale relied upon by the Supreme Court in *Wolcott* remains sound, even in light of *Apprendi*, and we reject appellant's contention that, under *Apprendi*, we must vacate or strike the firearm enhancements that were found true by the jury beyond a reasonable doubt.

IV. Section 12022.53, subdivision (f) requires the striking of certain enhancement allegations found true under that section and the imposition and staying of others.

Although we have rejected appellant's contention that the rule precluding multiple convictions on included offenses applies to the enhancements found true by the jury, appellant's challenge to the enhancements on which sentences were not imposed requires additional discussion.

Section 12022.53, subdivision (f) provides, "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)."[9]

In *People v. Bracamonte* (2003) 106 Cal.App.4th 704, the court held as a matter of statutory interpretation that the appropriate procedure where multiple firearm use and discharge enhancement allegations under section 12022.53 have been found true is to "stay the execution of all such enhancements except for the one which provides the longest imprisonment term." (*Bracamonte, supra*, at p. 713.) The *Bracamonte* court determined that the language of subdivision (f) requires that enhancement allegations under sections 12022.7 and 12022.55 be stricken. (*Bracamonte, supra*, at p. 712, fn. 5.) We so order.[10]

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[9] *People v. Woods*, formerly (2004) 119 Cal.App.4th 1117, on which appellant relies as to this issue, has been ordered not to be published and may not be cited.

[10] Although the trial court did not impose any enhancements under section 12022.53, subdivisions (b) or (c), there is no discretion to be exercised as to the terms for those enhancements, and remand would be an idle act. (Cf. *Bracamonte, supra*, at p. 714.)

V. The abstract of judgment must be corrected.

The trial court awarded appellant 549 days of actual presentence custody credit. The abstract of judgment, however, does not reflect this award of credit. Appellant contends, and respondent concedes, that the abstract of judgment must be corrected to reflect this credit. (*People v. Mitchell* (2001) 26 Cal.4th 181, 188.)

DISPOSITION

The judgment is modified to impose and stay the 10-year enhancements under section 12022.53, subdivision (b) on counts 1 through 4, to impose and stay the 20-year enhancements under section 12022.53, subdivision (c) on counts 1 and 2, to strike the enhancement allegations under section 12022.55 on counts 1 and 2, and to strike the enhancement allegation under section 12022.7 on count 2. In all other respects, the judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect the award of 549 days of presentence custody credit.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST