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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JEROLD MOORE, Defendant and Appellant.	B190732 (Los Angeles County Super. Ct. No. BA280698)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed as modified.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters, Kenneth N. Sokoler, Corey J. Robins and Susan Sullivan-Pithey, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Jerold Moore of first degree murder (Pen. Code, § 187, subd. (a))[1] (count 1) and two counts of second degree robbery (§ 211, counts 2 & 3). The jury found true the allegations that the murder was committed while appellant was engaged in committing a robbery (§ 190.2, subd. (a)(17)) and that the crimes were committed for the benefit of a street gang (§ 186.22, subd. (b)(1)). The jury also found true the allegations that a principal personally and intentionally discharged a handgun, causing great bodily injury and death to the victim (§ 12022.53, subds. (d) & (e)(1)); that a principal personally discharged a handgun (§ 12022.53, subds. (c) & (e)(1)), and that a principal personally used a handgun (§ 12022.53, subds. (b) & (e)(1)).

The trial court sentenced appellant to state prison for an aggregate term of 96 years to life. The sentence consisted of 25 years to life for the murder in count 1 and a consecutive 25 years to life for the firearm-use enhancement. In count 2, the court imposed the upper term of five years for the robbery, a consecutive 10 years for the firearm-use enhancement, and a consecutive 10 years for the gang enhancement. In count 3, the court sentenced appellant to one-third the midterm (or one year) for the robbery, 10 consecutive years for the firearm-use enhancement, and 10 consecutive years for the gang enhancement. The court stayed the remaining firearm-use enhancements.

Appellant appeals on the grounds that: (1) the trial court erred and deprived appellant of his Fifth and Fourteenth Amendment rights by admitting his coerced statement; (2) the trial court deprived appellant of his constitutional right to have the jury determine all issues by refusing to instruct on the lesser included offense of grand theft of a person (§ 487, subd. (c)); (3) there is insufficient evidence to sustain appellant's conviction in count 2; (4) the trial court committed several sentencing errors under section 654 and failed to properly impose sentences for several of the enhancements; (5) imposing a life sentence for an offense committed when appellant was 15 years old violates the federal and state proscriptions against cruel and unusual punishment; and (6)

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[1] All further references to statutes are to the Penal Code unless otherwise stated.

appellant's upper term sentence in count 2 is a violation of his rights under the Sixth and Fourteenth Amendments, as stated in *Cunningham v. California* (2007) 549 U.S. _____ [127 S.Ct. 856] (*Cunningham*).

FACTS

I. Prosecution Evidence

On August 17, 2001, Tamikka Ivory (Ivory) and her boyfriend, Anthony Henrickson (Henrickson), planned to spend the night at the Baldwin Hills Motor Inn. They arrived there at approximately midnight and Henrickson paid for their room. Afterwards, they parked in the parking lot near their room. Ivory and Henrickson got out of the car, and Henrickson began to collect their belongings from the trunk of the car.

Ivory was startled by the approach of two men, one Hispanic and the other Black. The two men walked past Ivory and Henrickson but then returned. Ivory remembered the Hispanic as approximately five feet eight inches tall, approximately 150 to 160 pounds in weight, and 17 to 19 years old. He was clean shaven and had a medium-toned complexion. He wore a light blue baseball cap with "North Carolina" printed on it, and a black, white and gray Pendleton with dark jeans. The Black male (later identified as appellant) had a dark complexion, was approximately five feet five or six inches in height, and weighed approximately 140 pounds. He was thin and clean-shaven and appeared to be 15 or 16 years old. He wore a black do-rag, heavy black jacket, and dark pants.

The two men pulled guns on Ivory and Henrickson. Both guns were dark and large, and Ivory thought they were automatics. The Hispanic said, "Where you from, Cuz?" Ivory and Henrickson said they were "grown" and "not from nowhere." The Hispanic said "Fuck that, give me all your jewelry and your money. Give me everything." Ivory began to hand over her jewelry, and appellant snatched her chains from her hand.

Ivory remembered Henrickson saying, "This what you want? You can have this. Who are ya'll anyway, approaching me, asking me where I'm from." He said he was a "grown man." The Hispanic told appellant to "dome" Ivory if she moved. Appellant

said, "Fuck that, dome that nigger." Ivory got closer to Henrickson and asked the men not to shoot Henrickson. Appellant said, "Fuck that, he gotta get domed." The Hispanic then shot Henrickson in the face. Ivory fell to the ground with Henrickson and heard three more shots. One of the men said, "We gotta get up out of here, cuz" and the two ran away. Henrickson suffered five gunshot wounds, including a fatal wound to the head.

Officer Brandea Hill and her partner, Officer Khalfani, responded to the scene of the shooting. As the officers walked up the motel's driveway they saw two males climbing over a fence in the parking lot. One had a shaved head and was wearing a black and white shirt. The other was a male Black wearing a dark do-rag. Another responding officer, Rose Luledzhyan pulled a weeping Ivory away from Henrickson. Ivory described the subjects and said that the Hispanic male shot Henrickson after the Black male ordered him to do so.

Detective Richard Gordon of the Los Angeles Police Department and his partner Detective Peter Rezanskas responded later in the morning to the shooting scene. Police took photographs and recovered cartridge casings, projectiles, bullet fragments, and a cross pendant. The projectiles were medium caliber, and the shell casings were 9 millimeter. Ivory told Detective Gordon that she and Henrickson "had given the suspects chains and their property" according to the robbers' demands.

As of February 2002, Detective Gordon had no physical evidence connecting appellant to the crimes. He later learned that in August 2001 a firearm had been recovered from an Anthony Fidis (Fidis) and that Fidis had been arrested. The recovered firearm was test-fired. At that time, other teams were following up on the leads in the Henrickson case.

Criminalist Stella Chu determined that the three cartridge cases and the two projectiles from the Henrickson crime scene as well as the two bullets found in Henrickson's body were all fired by the Fidis gun. The gun was a 9-millimeter Luger semiautomatic.

Detectives Robert Lait and his partner, Detective Garrido, were assigned to investigate the Henrickson murder. In 2003, they learned there was a hit made on a gun

possessed by Fidis when he was arrested. They decided to interview Fidis, who had been released from prison in October 2003. Their subsequent investigation led to appellant.

The detectives interviewed appellant at a juvenile detention facility where appellant was in custody. Appellant was approximately 17 years old at the time of the interview. The interview was recorded and played for the jury as People's exhibit 20. The detectives employed a technique of revealing a little information that they possessed to try to make appellant think they knew more than they actually did. The detectives identified themselves and advised appellant of his rights. Appellant said that he understood each right. When Detective Lait asked appellant if he wanted to "talk about what happened," appellant replied, "I don't know—what—about what?" Detective Lait said, "Let's get into it a little bit," so that appellant could "try to fill in the blanks for us, or we'll fill in the blanks for you if need be, okay?" Detective Lait explained that he and his partner were from "Homicide" and told appellant that it meant "murder; killing a person." Detective Garrido explained that they were investigating a homicide from 2001 and that appellant was more likely to be a witness to it than to have actually been involved in it.

Appellant acknowledged that he used to be known as "Hershey" and "Stinky Fingers." Appellant said he remembered a Mexican called "Dopey" but denied that person was also called Little Essay. He acknowledged running with the 40's, or the Rolling 40s, and the Dirty Old Men, whom he referred to as D.O.M.'s. He identified a photograph of Dog, whose real name was Anthony Fidis.

When Detective Garrido asked appellant if he remembered the incident at the motel on La Brea, appellant said he did not. The detectives told appellant that Dog remembered it, but appellant still denied any memory of being there. Detective Lait told appellant he would not have another chance to sit down with the detectives and have a clean slate. Detective Lait said that they knew what they were going to talk about and if appellant started "slipping" with them he would not "be able to rehabilitate." Appellant said, "All right." Detective Lait told appellant that the police had witnesses saying that his "involvement was pretty intense." The detective said that he and his partner were not

convinced of that. He told appellant that they knew he was there, and the question was the role he played. Appellant then identified Little Essay, and Detective Garrido said they had spoken to both Little Essay and Dog. Appellant said that Little Essay, who was also called Dopey and whose real name was Jose Amaya, was one of the shooters that night. Appellant initially denied that one of the photographs shown to him was of himself.

Detective Garrido suggested that some things may have happened at the motel that appellant did not know about in advance, and appellant then agreed that he had been there. Appellant said that he and two other men were driving around in Dog's car. When they stopped the car he went in to eat at Popeye's. When he came back out he saw people running back to the car. They were telling him "some shit" about what happened but appellant could not really remember. Appellant at first said he did not know why they stopped at the motel, but later said he guessed they "was probably going to rob somebody or something" because "that's just the type of shit they do." They did not tell him in advance. Appellant then admitted the other two men talked about the robbery before stopping and appellant said he was willing to go with them to rob somebody. However, by the time he got something to eat they had already robbed somebody, he guessed. Appellant said he had no thought about robbing anyone and did not rob anyone.

Appellant denied having a gun that night. He said that Dog had a 9 millimeter and Dopey had a .357-caliber firearm, which was usually a revolver. The detectives had not told appellant that a 9 millimeter was one of the firearms used. Detective Lait told appellant the surviving female had selected his photograph. Detective Garrido told appellant the female pointed out appellant and Dopey as the two who approached her and her boyfriend, but she said Dopey was the shooter. The detectives said that Dog was on tape saying appellant was there. They said that Dog told them he was driving with a man called Black and that Hershey and Dopey "did all that stuff." Detective Lait told appellant that Dog named appellant as having the gun in his hand, and that Dog heard the shots from the parking lot.

The detectives falsely told appellant that Dog had passed a lie detector test. They also told appellant, untruthfully, that Dog had said that appellant admitted shooting the person in the head because he was not moving fast enough. Detective Lait testified that this was said as an interrogation tactic.

Appellant then said he was ready to start over and tell the detectives what happened. He said he and Dopey went into the hotel looking for someone to rob when they saw the victims. Dopey ran up to them and appellant tried to deter him. At one point appellant told the detectives, "She took off her chain and stuff," which validated Ivory's statement. The detectives had not told appellant that a chain was stolen from Ivory. Appellant said Ivory's chain was "a bullshit chain." Appellant said that Dopey counted to 5 and shot the man because he did not want to give up his stuff for some reason. Appellant said he was holding a .380 and he tried shooting the man but his gun jammed. At one point appellant told the detectives that he had tried to shoot at the victim's body and legs but his gun did not fire.

At another point in the interview, appellant said, "I'm looking at him. He didn't respond so he shot him first time. The first time I hear the guns go off I seen like the dude's eyes, like, you know, just a hole in his head." The detectives had not told appellant that the first shot had been to Henrickson's head.

Detective Lait testified that they did not force appellant to say anything, and the recording reflected the way that the detectives handled themselves. The recording also showed how appellant contradicted himself at various times during the interview. Detective Lait wrote down appellant's statements, and appellant initialed all changes. After the interview the detectives identified four suspects.

Detective Jerritt Severns of the Los Angeles Police Department testified as a gang expert. He stated that the Dirty Old Men gang was associated with the Rolling 40's Crips Gang. Members of the Dirty Old Men, of which there were 12 documented members, were not ready to become full-fledged members of the Rolling 40's Crips, of which there were approximately 696 members. The Rolling 40's members wear North Carolina baseball hats and also wear baby blue clothing. The Rolling 40's Crips are part of the

Neighborhood Crips. For that reason they use the North Carolina caps with the initials "NC," and they have adopted the baby blue color of the caps. They also wear the New York Yankee caps, using the initials NY to stand for Neighborhood Youngsters. Detective Severns also described the hand signs used by the Rolling 40's.

Detective Severns testified that the gang had a complex organizational structure. The amount of work that a gang member puts in for the gang, such as crimes committed, helped determine the member's position in the gang. The shot callers of the gangs were in their late 20's or early 30's and the younger members were as young as 12 years old. The gang commits crimes such as extortion of businesses, drive-by shootings, witness intimidation, murder, attempted murder, carjacking, robbery, mayhem, burglary, and sale of narcotics. Detective Severns said the gang was very active and very violent. They had one of the largest territories in Los Angeles. The scene of the motel shooting was approximately one mile outside their territory.

Detective Severns believed that appellant started out as a member of Dirty Old Men. His moniker was "Hershey." He eventually graduated to become a full-fledged member of the Rolling 40's and his moniker became "Tiny Dark." In 2002, appellant admitted being a member of both gangs for two years, and in 2000, appellant was approximately 15 years old. Anthony Fidis was a member of Dirty Old Men and known as "Dog." Jose Amaya was known as "Dopey." He had heard that Amaya was also called "Lil Essay." The term "Cuz" was used solely by the Crips.

Detective Severns explained how a young man joined a gang. He explained how gangs committed crimes to keep citizens in fear and how they equated fear with respect. Robberies were committed to acquire funds to buy narcotics and weapons but also to send a message to the community. Robberies helped promote the cycle of fear and control of the community. Detective Severns testified regarding the crimes committed by two other members of the Dirty Old Men.

When given a hypothetical based on the facts of the instant case by the prosecutor, Detective Severns said that telling a gang member that one was too grown for a gang would not be acceptable. It would be considered disrespectful because it did not display

fear. The response would be violent. The term "to dome" someone meant to shoot that person in the head. Shooting a male victim who was not quick enough to cooperate would benefit the gang because it would send a message that gang members would not tolerate disrespect. Continuing to shoot the victim would send a stronger message and thereby benefit the gang. Detective Severns was of the opinion that the crimes described in the hypotheticals were done in association and in conjunction with Dirty Old Men and the Rolling 40's Crips. Because Dopey and Hershey were young, their actions showed they were putting in work for the gang, especially if they followed orders from older gang members. Dopey and appellant would have been soldiers rather than shot callers of the gang in 2001.

II. Defense Evidence

Appellant offered no evidence in his defense.

DISCUSSION

I. Admission of Appellant's Statement

A. Argument

Appellant contends that after the interviewing detectives accused him of lying and being a principal in the motel robbery and murder, they should have readministered the *Miranda*[2] warnings and ensured appellant understood that he did not have to talk to them. Instead, the detectives lied and made implied threats in order to elicit a confession. Appellant argues that the trial court improperly analyzed the circumstances of the interview in the context of a literate adult with experience in the adult criminal justice system rather than that of an undereducated teen in a coercive environment with two lying and experienced detectives and without the help of a parent or guardian.

B. Relevant Authority

"In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda*, *supr*a, 384 U.S. 436, the

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

scope of our review is well established. 'We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained.' [Citations.] We apply federal standards in reviewing defendant's claim that the challenged statements were elicited from him in violation of *Miranda*. [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033.) In independently determining whether the challenged statements were illegally obtained, we """"give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence." [Citations.]'" (*People v. Whitson* (1998) 17 Cal.4th 229, 248.)

In *Miranda*, *supra*, 384 U.S. 436, the United States Supreme Court held that the prohibition against compelled self-incrimination contained in the Fifth and Fourteenth Amendments mandates that suspects cannot be subjected to custodial interrogation until they have been advised of the right to remain silent and the right to have counsel present during questioning. A suspect may, however, knowingly and intelligently waive these rights following advisement. (*Miranda*, *supra,* at p. 479.) The waiver may be either express or implied (*North Carolina v. Butler* (1979) 441 U.S. 369, 373-376) but it must be knowing and voluntary. (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) A voluntary waiver is the product of a free and deliberate choice, made with a full awareness of the nature of the right waived and the consequences of the decision to waive that right. (*Ibid*.) In assessing whether these criteria were met, we must consider the totality of the circumstances while bearing in mind the particular background, experience and conduct of the suspect. (*North Carolina v. Butler*, *supra*, at pp. 374-375.) If the suspect was advised of his rights, said he understood them, did not request an attorney, and chose to speak to police, an implied waiver may be found. (*Moran v. Burbine*, *supra*, at pp. 422-423; *People v. Sully* (1991) 53 Cal.3d 1195, 1233.) California law is in accord with federal cases in stating that an express waiver is not required. (See *People v. Whitson*, *supra*, 17 Cal.4th at pp. 247-248 and cases cited therein.)

C. Proceedings Below

At a motion hearing under Evidence Code section 402, defense counsel argued that appellant's statement to police should be suppressed because there was no waiver of his *Miranda* rights. Counsel also argued that the statement was coerced and that the probation department failed to protect appellant's rights. Appellant was in custody for a different offense at the time of his interview, and the probation department was responsible for his care and custody. Defense counsel argued that when the detectives asked appellant to start over and tell them what happened, they should have readvised him of his rights and obtained a waiver.

The prosecutor argued that the law required analyzing the totality of the circumstances, and despite appellant's age, he was not new to the criminal justice system. The prosecutor cited appellant's convictions and arrests. The prosecutor noted that appellant made no unambiguous request for counsel or for a parent or guardian.

The court agreed that, viewing the totality of the circumstances, appellant was fully advised of his rights. After reading appellant his *Miranda* rights, Detective Lait asked appellant, "Okay do you want to talk about what happened?" The court found that appellant's answer ("'I don't know—what—about what?'") indicated that appellant was saying that perhaps he wanted to talk to the detectives and perhaps he did not. It was not an unequivocal refusal. Moreover, after the conversation continued, appellant confirmed that he wanted to talk to the officers. The detectives asked appellant if he was ready to start over and tell them what happened that night, and appellant answered, "Yes, Sir." The court found it to be a voluntary, intelligent, and knowing waiver and denied the motion to suppress.

D. Appellant's Statement Properly Admitted

We agree with the trial court that appellant's waiver of his *Miranda* rights was voluntary, intelligent, and knowing. Our independent review of the recording and transcript of the interview leads us to conclude that the totality of the circumstances support the trial court's finding.

As the transcript shows, Detective Lait read appellant each of his rights, and appellant answered "Yes" when asked if he understood each right. When asked if he wanted to talk to the detectives, appellant answered with a question as to what they wanted to talk about.

The prelude to appellant's admissions does not reveal egregious conduct by the detectives such that appellant's will was overborne. Detective Lait gave appellant some general background regarding how their investigation had led them to interview appellant. Detective Lait then asked appellant if he remembered the incident at a motel, and appellant replied he did not. Detective Lait told appellant he was giving him an opportunity to tell the truth and that he knew appellant was there at the motel because of statements by Dog and Dopey. Appellant then admitted being there and knowing what Detective Lait was talking about. Appellant admitted driving around with Dog and Dopey in Dog's car. He said that when "they" stopped the car to "do something" near the hotel, he got out and went to a Popeye's restaurant. When he came out he saw the other two running to the car, and they all took off. He could not remember anything they told him about what happened. Detective Lait continued to ask details about how appellant had made contact with the other two men, and appellant explained that they started driving around and said they were going to rob someone. When he got something to eat, the other two had already robbed someone, he guessed. He said he had no gun, but Dog had a black 9-millimeter gun. Dopey had a .357-revolver or automatic. The men told appellant they had robbed someone. Appellant did not rob anyone.

Detective Lait falsely told appellant that the surviving female had picked him out and that the detectives did not believe he was the shooter. He told appellant he need to stop lying because he had been identified and Dog said "it was you." Detective Garrido told appellant that he was giving the detectives what they already knew. He said that the detectives were testing appellant's honesty, and he was failing the test. Dog told them appellant had admitted in the car that he "shot the dude in the head." Appellant replied that that was a lie, and Detective Garrido falsely said that Dog had passed a polygraph test. Detective Lait said that appellant could hear a recording of what Dog had said, but

at that point it would be too late. Appellant was being given a chance, but he was "blow[ing] it" unless he was ready to start over and tell the detectives what happened that night. Detective Lait then asked appellant if he was "ready to do that" and appellant replied, "Yes, sir." Appellant's incriminating statements followed.

As stated in *In re Bonnie H.* (1997) 56 Cal.App.4th 563, even in the case of a juvenile's waiver of *Miranda* rights, the validity of the waiver is determined by examining the totality of the circumstances. (*In re Bonnie H*., at p. 577; see also *Fare v. Michael C.* (1979) 442 U.S. 707, 725.) "The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. [Citation.]" (*Fare v. Michael C.*, *supra*, at p. 725.)

As stated previously, a waiver of a defendant's *Miranda* rights may be either expressed or implied. (*Fare v. Michael C*., *supra,* 442 U.S. at pp. 724-725; *North Carolina v. Butler*, *supra*, 441 U.S. 369, 373 ["in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated"].) California Supreme Court decisions are in accord. (*People v. Whitson*, *supra*, 17 Cal.4th at pp. 247-250 [defendant's willingness to speak with the police readily apparent from his responses]; *People v. Medina* (1995) 11 Cal.4th 694, 752 [express statement of waiver not required when defendant was read his rights and thereafter made a statement]; *People v. Sully*, *supra*, 53 Cal.3d 1195, 1233 [implied waiver found when defendant was advised of his rights, said he understood them, and then gave a statement]; *People v. Davis* (1981) 29 Cal.3d 814, 823-826 [fact that defendant said he understood his rights and spoke with officers, then refused a polygraph, and later willingly spoke with officers again showed defendant not frightened into submission].)

In the instant case, although appellant did not expressly waive his rights, he impliedly did so by speaking with the detectives and eventually agreeing to tell the truth. The record shows that on the date of this interview appellant was only two months six

days short of his 18th birthday.[3] He had been involved in the justice system since his first encounter with the law at age 13. At the time of the interview he had had five juvenile petitions sustained by the juvenile court. These were for crimes such as theft, possession of marijuana, possession of a concealable firearm (which was loaded), burglary, and receiving stolen property. Appellant committed these crimes when he was between 13 and 16 years of age. The juvenile court had sent appellant to camp four times.

The record also shows that appellant was not cowed by authority. During his last camp placement, which occurred after the current crimes, appellant received numerous write-ups for being unwilling to comply with staff instructions, instigating gang activities, disrespecting staff, and challenging staff authority. In addition, nothing in the record suggests defendant was of low intelligence. He was in the 11th grade at the time of the interview in late 2003, and the record shows he completed high school while in custody in 2004. The fact that he was in special education may have related to his inability to write well, and it proves nothing regarding his cognitive ability or intelligence. The recording does not convey an impression that appellant was slow-witted, confused, or intimidated during his conversation with the detectives. Rather, he displayed mental agility by revealing only as much as he needed to at each juncture of the conversation in order to explain facts relayed to him by the detectives. His experience and demeanor as revealed by the recording belie any suggestion that appellant's will was overborne by the detectives.

It is true that the detectives told appellant several lies. They said that they believed he was merely a witness, that the female victim had circled his photograph and identified him and Dopey, that Dog had passed a polygraph, and that Dog told them that appellant had shot the victim in the head because he was moving too slowly. "Lies told

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[3] The interview took place on October 16, 2003, and appellant was born on December 22, 1985.

by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240; *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280 ["Police trickery that occurs in the process of a criminal interrogation does not, by itself, render a confession involuntary and violate the state or federal due process clause[s]"].) Unless the police conduct coerces a suspect into making a confession, the confession is not considered involuntary. (*Ibid*.; *People v. Jones* (1998) 17 Cal.4th 279, 297-298.) Thus, "[s]o long as a police officer's misrepresentations or omissions are not of a kind likely to produce a *false* confession, confessions prompted by deception are admissible in evidence." (*People v. Chutan*, *supra*, at p. 1280, and cases cited therein.) There must be a proximate causal connection between the deception and the confession, which must be more than '"but for"' causation-in-fact. (*People v. Musselwhite*, *supra*, at p. 1240.)

In *People v. Musselwhite*, *supra*, 17 Cal.4th 1216, police detectives falsely told a murder suspect his fingerprints had been lifted from the murder victim's neck. The court held the defendant's subsequent confession admissible, reasoning that the deception "f[e]ll short of what is required to make out a case of prejudicial deception . . . . it does not follow that telling a murder suspect in the course of questioning that his prints had been lifted from the neck of the homicide victim 'caused' him to confess. The link between inducement and statement . . . falls short of being 'proximate.'" (*Id*. at p. 1241.) Similar cases are legion. In *People v. Thompson* (1990) 50 Cal.3d 134, 160, a detective falsely told a murder suspect that his tire tracks and his car had been linked to the place the victim's body was found, a trunk he had carried in his car contained physical evidence linked to the victim, and certain rope fibers had been found in his bedroom. (*Id*. at pp. 160-161, 167.) The detective also told the suspect that he did not believe the suspect killed the victim intentionally, but if the suspect did not talk, the detective would proceed on a theory of intentional killing. (*Id*. at pp. 169-170.) The court held these facts were insufficient to demonstrate the confession was involuntary. (*Id*. at pp. 167, 170; accord, *People v. Jones*, *supra*, 17 Cal.4th at p. 299 [detective's act of implying he "could

prove more than he could" was permissible, since it was not reasonably likely to procure an untrue statement]; *People v. Chutan*, *supra*, 72 Cal.App.4th at p. 1280, and cases therein [police are free to use "deceptive stratagems" to trick a guilty person into confessing].)

Appellant also claims that the detectives combined lies with threats and, as a result, his confession was coerced. First, as discussed in the previous paragraph, "subterfuge is not necessarily coercive in nature." (*People v. Chutan*, *supra*, 72 Cal.App.4th at p. 1280.) And the statements that appellant labels as threats were simply exhortations to tell the truth. The detectives told appellant several times that he was being given an opportunity at that moment to tell the truth but that he might not be given another. The detectives did not suggest to appellant that he could avoid punishment by telling them what actually happened. It is true that an implied promise of leniency may render a confession involuntary, but mere advice and counsel to tell the truth is not such an implied promise. (*People v. Howard* (1988) 44 Cal.3d 375, 398.) Furthermore, as noted in *People v. Jones*, *supra*, 17 Cal.4th at pages 297-298, "[t]he business of police detectives is investigation, and they may elicit incriminating information from a suspect by any legal means. '[A]lthough adversarial balance, or rough equality, may be the norm that dictates trial procedures, it has never been the norm that dictates the rules of investigation and the gathering of proof.' [Citation.] 'The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' [Citation.]"

In the instant case, the circumstances surrounding appellant's incriminating statement do not establish "prejudicial deception." (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1241.) The detectives were doing nothing more than asserting that they had more proof than they actually had. (*People v. Jones*, *supra*, 17 Cal.4th at p. 299.) As set out in the cases mentioned *ante*, this type of statement is not reasonably likely to result in an untruthful confession. (*Ibid*.) The recording shows that the atmosphere during the interview was not coercive. Given appellant's criminal history, it is unlikely he was

unable to comprehend the effect of his statement, despite his question at the end regarding whether other charges would be filed. We find no error.

II. Refusal to Instruct on Grand Theft Person

A. Argument

Appellant contends that the trial court erred when it refused to instruct the jury that section 487, subdivision (c), grand theft of a person, is a lesser included offense to robbery. Appellant claims there was some evidence to support a grand theft instruction in count 3, which charged him with the robbery of Ivory. In appellant's statement, he said Ivory threw her jewelry after Dopey told her and Henrickson to give up their stuff. She took off her chain and threw it on the car, and appellant told her she could have it, but he grabbed it when she threw it towards him. She also threw her purse. Given this evidence, appellant argues, the jury should have been instructed on the offense of grand theft rather than being left with an all-or-nothing choice to convict or acquit appellant of the robbery of Ivory.

B. Relevant Authority

The California Supreme Court has stated that "[t]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

C. Proceedings Below

In count 3, appellant was charged with the robbery of Ivory in violation of section 211. During a discussion of jury instructions, defense counsel asked the trial court to read the instruction for grand theft person as a lesser included offense of the count 3 robbery. He asserted that appellant said that Ivory threw her jewelry at him and that he did not request it from her. It was the other suspect that said, "You have to give up all

your stuff." The prosecutor argued that the witness stated appellant snatched the chain out of her hand.

The court acknowledged that grand theft was a lesser included offense of robbery. The court believed, however, that the evidence showed that if appellant was at the scene, the crime was a robbery. The crime was clearly not a robbery only if he was not there. Based on the evidence, the two individuals pulled guns and asked Ivory and Henrickson for their property, and the court did not see any element of robbery that was missing. The court refused to give the requested instruction.

D. Instruction Properly Denied

As the jury was instructed in CALJIC No. 9.40, it had to find that the following elements were proved in order to find appellant guilty of robbery: That a person had property of some value, that the property was taken from that person or her immediate presence, that the property was taken against that person's will, that the taking was accomplished either by force or fear; and that the property was taken with the specific intent permanently to deprive that person of the property.[4] The CALJIC instruction for

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[4] The trial court read the robbery instruction, CALJIC No. 9.40, as follows: "The Defendant is accused in counts 2 and 3 of having committed the crime of robbery, a violation of section 211 of the Penal Code. Every person who takes personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property is guilty of the crime of robbery, in violation of Penal Code section 211. The words 'take' or 'taking' require proof of, 1, taking possession of the personal property, and, 2, carrying it away for some distance, slight or otherwise. 'Immediate presence' means an area within the alleged victim's reach, observation, or control so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property. 'Against the will' means without consent. In order to prove this crime, each of the following elements must be proved: 1. A person had possession of property of some value, however slight; 2. The property was taken from that person or from his or her immediate presence; 3. The property was taken against the will of that person; 4. The taking was accomplished either by force or fear; and 5. The property was taken with the specific intent permanently to deprive that person of the property."

grand theft of a person, No. 14.23, defines the offense as "[t]he theft of personal property of any value from the person of another."

"'[T]o support a robbery conviction, the taking, either the gaining possession or the carrying away, must be accomplished by force or fear.' [Citation.]" (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771.) Whether force or fear existed is a factual question for the jury. (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1707.) It does not matter if the fear experienced by the victim is caused by specific words or actions designed to frighten or by circumstances surrounding the taking. (*People v. Flynn*, *supra*, at p. 772.) Where the element of force or fear is absent, a taking from the person is grand theft rather than robbery. (*People v. Morales* (1975) 49 Cal.App.3d 134, 139.)

As the trial court stated, there was evidence sufficient to prove every element of the crime of robbery with respect to Ivory. Appellant and Dopey accosted Henrickson and Ivory with guns pointed, and Dopey demanded their property. Appellant therefore was clearly, at a minimum, an aider and abettor in the robbery of Ivory. The fact that Ivory threw her chain when one of the robbers demanded that she hand over her jewelry does not affect any element of the crime of robbery. There was clearly a "taking," and it was unquestionably accomplished by appellant's (and his cohort's) use of fear. Lesser included offense instructions are required """when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]""" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) There was no evidence that the offense was anything less than a robbery, and appellant's argument fails.

III. Sufficiency of Evidence in Count 2

A. Argument

Appellant claims that the prosecution did not establish all elements of a completed robbery in count 2; i.e., that *property was taken* from a person or from his immediate presence. According to appellant, Ivory's testimony established only that Henrickson told the Hispanic man, "This is what you want? You can have this." He claims that Ivory did not say that Henrickson handed over any property. She testified that when she

snatched the chain from her neck and the Black male grabbed it from her, the Black male said, "Dome that nigger." Therefore, appellant argues, the record shows that the Hispanic man shot Henrickson because he was too slow in obeying the command and before he had the chance to hand over any property. Appellant asserts that his statement to police does not indicate that any property was taken from Henrickson either. Appellant contends that this court should reduce appellant's conviction to attempted robbery, a lesser included offense to robbery.

B. Relevant Authority

"In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: '[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.' [Citations.] The United States Supreme Court has held: '[T]his inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] . . . . The California Supreme Court has held, 'Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' [Citations.]" (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1430.)

Given this court's limited role on appeal, appellant bears an enormous burden in arguing insufficient evidence to sustain the verdict. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

C. Evidence Sufficient

The record shows that Ivory testified that after she took off her chains and bracelets the Black man snatched them out of her hands. Meanwhile Henrickson and the

Hispanic man were going "back and forth" because the Hispanic man told Henrickson to take off his jewelry "or whatever." Henrickson told the Hispanic man, "This what you want? You can have this. Who are ya'll anyway, approaching me, asking me where I'm from." The Black man then said, "Fuck that, dome that nigger."

The prosecutor also presented the evidence of Detective Gordon, one of the lead investigators who interviewed Ivory on the morning of the murder. Detective Gordon stated that Ivory said the suspects demanded both money and jewelry from her and Henrickson. She also told him that she and Henrickson gave the suspects "chains and their property."

Given this evidence, a jury could reasonably find that Henrickson handed over some item or items of property before being shot. As stated previously, reversal of a conviction on the ground of insufficient evidence "'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citations.]'" (*People v. Gaut*, *supra*, 95 Cal.App.4th at p. 1430.) We find the evidence sufficient to sustain the robbery conviction in count 2.

IV. Alleged Sentencing Errors

A. Sentence in Count 2 and Section 654

1. Argument

Appellant points out that the act of robbery as charged in count 2 was the same act that made the killing of Henrickson first degree murder. Therefore, he contends, punishing him for the murder of Henrickson during the commission of a robbery-murder as alleged in count 1 and also for the same robbery of Henrickson in count 2 offends the precepts of section 654, which bars multiple punishment for a single act that violates more than one statute.

2. Relevant Authority

Section 654, subdivision (a) provides that "[a]n 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 protects against

multiple punishment rather than multiple conviction. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The protection applies where several offenses were committed during "'a course of conduct which . . . comprises an indivisible transaction punishable under more than one statute.'" (*People v. Coleman* (1989) 48 Cal.3d 112, 162; accord, *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Thus, "if all of the offenses 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. Harrison*, *supra*, at p. 335.)

Whether a defendant entertained a single or multiple criminal objectives is a question of fact for the trial court, and its determination will be sustained on appeal if it is supported by substantial evidence. (*People v. Coleman*, *supra*, 48 Cal.3d at p. 162.) If the court makes no express finding on the issue, a finding that the crimes were divisible "inheres in the judgment" and must be upheld if supported by substantial evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

3. Separate Objectives Justify Punishment

In order to determine whether a course of conduct is indivisible, the court looks to "defendant's intent and objective, not the temporal proximity of his offenses." (*People v. Harrison*, *supr*a, 48 Cal.3d at p. 335.) Thus, "if all of 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. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*)

The court's implicit finding of separate objectives for the robbery and murder was supported here.[5] There was substantial evidence that the intent and objective in murdering Henrickson was to punish him for his disrespect and to send a message that gang members must not be disrespected. Ivory's evidence showed that Henrickson handed over an item of his property and said, "This what you want? You can have this. Who are ya'all anyway, approaching me, asking me where I'm from." Henrickson also told the robbers he was a grown man. At that point, "the Black guy said, 'Fuck that, dome that nigger.'" As Detective Severns, the gang expert testified, Henrickson's response would show "you're not bowing down or complying, you're not fearful, you're not doing the typical, oh god, it's a gang member, I'm just going to go along with the program." Henrickson's response would be considered disrespectful to the gangster. This would result in escalating the situation to violence. According to Detective Severns, not moving quickly enough was also a sign of disrespect.

In *People v. Osband* (1996) 13 Cal.4th 622 (*Osband*), the trial court imposed consecutive sentences for the rape and robbery of one of Osband's victims. The victim was stabbed to death and raped, and cash and other items were taken from the victim's home. (*Osband*, *supra*, at pp. 653-654.) Osband was found guilty of murder, burglary, robbery, and forcible rape. The jury found true three special-circumstance allegations, including the circumstance that the murder was committed during a robbery. (*Id*. at pp. 652-653.) Osband claimed, inter alia, that the court erred under state law (§ 654) in imposing consecutive sentences for the rape and robbery because the crimes were committed for a single objective. (*Id*. at p. 730.) The People responded that there was no question of a single objective, since the court sentenced Osband on the rape and robbery and therefore implicitly found that the crimes involved more than one objective. (*Ibid*.)

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5 In the instant case, the jury was allowed to find appellant guilty of first degree murder on a felony-murder theory or, alternatively, on a premeditation and deliberation theory. The prosecutor argued both theories to the jury.

The People asserted this was a factual determination that had to be sustained on appeal if supported by substantial evidence, citing *People v. Saffle* (1992) 4 Cal.App.4th 434, 438 (*Saffle*). (*Osband*, *supra*, at p. 730.) The California Supreme Court agreed with the People that the *Saffle* standard of review was the correct one, and it concluded that substantial evidence sustained the court's implicit determination that Osband held more than one objective when he committed the crimes. The court declined to stay any portion of the sentence on section 654 grounds. (*Saffle*, *supra,* at pp. 730-731.)

In *People v. Cleveland* (2001) 87 Cal.App.4th 263 (*Cleveland*), as well, the court stated that if a defendant had multiple *or simultaneous* objectives that were independent of and not merely incidental to each other, "the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (*Id*. at pp. 267-268.) Cleveland was seen beating an elderly man with a two-by-four piece of wood inside the man's apartment. The witness saw Cleveland leaving the victim's apartment carrying the victim's Walkman radio. Cleveland was arrested and eventually convicted of attempted murder, robbery, and assault with a deadly weapon. (*Id*. at p. 267.)

Cleveland argued on appeal that his robbery sentence should have been stayed under section 654 because the robbery and attempted murder occurred during an indivisible course of conduct pursuant to the sole objective of robbing the victim. (*Cleveland*, *supra*, 87 Cal.App.4th at p. 268.) The appellate court upheld the trial court's determination of Cleveland's separate intent, stating, "the amount of force used in taking the Walkman was far more than necessary to achieve one objective." (*Id*. at pp. 271-272.) The court stated that, under some circumstances, the force of an attempted murder can constitute the force necessary to commit a robbery. It was not, however, the necessary force in Cleveland's case. The court added that "[a]s the court in *People v. Nguyen* (1988) 204 Cal.App.3d 181, 191 . . . observed: 'at some point the means to achieve an objective may become so extreme they can no longer be termed "incidental" and must be considered to express a different and more sinister goal than mere successful

commission of the original crime . . . . [S]ection [654] cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense." (*Id*. at p. 272.) Likewise, in the instant case, appellant's order to shoot Henrickson in the head cannot be seen as part and parcel of his goal to rob him.

We conclude that there was substantial evidence to support the trial court's finding (implied in this case) that appellant held separate objectives in robbing Henrickson and in ordering that he be shot in the head. Appellant's sentence on count 2 stands.

B. Firearm Enhancement in Count 2 as a Conduct Enhancement

Appellant contends that even if his sentence for the Henrickson robbery (count 2) is not stayed pursuant to section 654, the enhancement imposed under section 12022.53, subdivision (b) in count 2 should be stayed or stricken. The greatest enhancement possible under section 12022.53 was imposed for the same act in count 1 and the trial court therefore imposed an unauthorized sentence under section 654.

The California Supreme Court recently held that "the sentence enhancement provisions of Penal Code section 12022.53 are not limited by the multiple punishment prohibition of [] section 654." (*People v. Palacios* (2007) 41 Cal.4th 720, 723 (*Palacios*).) Palacios was convicted of attempted premeditated murder, kidnapping for robbery, kidnapping for carjacking, carjacking, and robbery. (*Id*. at p. 724.) The crimes occurred when Palacios carjacked the victim, took his car and other property, drove him to a park, and shot him once. (*Ibid*.) The jury found that Palacios discharged a firearm and personally inflicted great bodily injury in the commission of these offenses pursuant to section 12022.53, subdivision (d) and section 12022.7, subdivision (a). (*Palacios*, *supra,* at p. 724.) The trial court imposed section 12022.53, subdivision (d) enhancements of 25 years to life for the attempted murder and the two kidnapping convictions. (*Palacios, supra,* at p. 724.)

On appeal, Palacios argued that imposition of sentence for three section 12022.53 enhancements violated section 654's bar against multiple punishment because he fired one shot at a single victim. (*Palacios*, *supra*, 41 Cal.4th at p. 725.) The Court of Appeal

agreed with Palacios, and the Supreme Court reversed. (*Id*. at pp. 725, 734.) The Supreme Court concluded that, by finding the section 12022.53 allegations true, the jury necessarily determined that the defendant fired the gun and caused great bodily injury during the commission of each of the offenses. Therefore, section 12022.53 mandated punishment for each of the enhancements. (*Palacios*, *supra,* at p. 726.)

The Supreme Court cited the language of section 12022.53 stating that the enhancements "'*shall*'" be applied "'*[n]otwithstanding any other provision of law*'" as "'an additional and consecutive term of imprisonment.'" (*Palacios*, *supra,* 41 Cal.4th at pp. 725-726, 728-730.) The court stated it was "persuaded that, in enacting section 12022.53, the Legislature made clear that it intended to create a sentencing scheme unfettered by section 654." (*Id*. at pp. 727-728.) The court concluded that in enacting section 12022.53, subdivision (f), which provides that only one additional term of imprisonment may be imposed per person for each crime, the Legislature chose to limit the number of enhancements imposed *only* for each *crime*, not for each transaction, act, occurrence, or number of injuries. (*Palacios*, *supra,* at pp. 731-732.)

In this case, the record shows, that in each of counts 1, 2, and 3, the information alleged three firearm enhancements pursuant to section 12022.53—the enhancements described in subdivisions (b), (c), and (d) of that statute. All three enhancements were alleged in conjunction with section 12022.53, subdivision (e), which provides in pertinent part that the firearm enhancements of section 12022.53 shall apply to any person who is a principal in the commission of an offense if it is pleaded and proved that the person violated section 186.22, subdivision (b)[6] and that a principal committed the acts specified in subdivisions (b), (c), or (d).

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[6] Section 186.22, subdivision (b) provides for enhancements to be imposed when a person is convicted of a felony that was committed for the benefit of, at the direction of, or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members.

The enhancement imposed on appellant in connection with the murder in count 1, that of section 12022.53, subdivisions (d) and (e), was necessarily imposed because Dopey, a principal, personally and intentionally discharged a firearm proximately causing death to Henrickson. With respect to count 2, the enhancement was imposed upon appellant pursuant to section 12022.53, subdivisions (b) and (e), because a "principal" (a category that includes appellant) personally used a firearm during the robbery of Henrickson. The jury was instructed that, in order to make a true finding on the section 12022.53, subdivision (b) allegation, it had to find that "the defendant personally used a firearm," meaning that he "must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck a human being with it."

Because appellant committed two distinct crimes that were subject to enhancements under section 12022.53, his argument is without merit.

C. Gang Enhancements in Counts 2 and 3

Appellant's sentence for the murder in count 1 was enhanced pursuant to section 186.22, subdivision (b)(5). This enhancement provides that appellant cannot be paroled for a minimum of 15 years because he was convicted of a felony carrying a life term that was committed for the benefit of a criminal street gang. Appellant contends that since the murder and both robberies constituted a single act that resulted in a life term and triggered application of section 186.22, subdivision (b)(5), he should not have received additional section 186.22 enhancement terms for the robberies in counts 2 and 3. According to appellant, the gang-related enhancements attached to counts 2 and 3 should be stayed pursuant to section 654 or stricken.

The issue of section 654 and its application to sentence enhancements *in general* has yet to be decided by the California Supreme Court. (*People v. Palacio*, *supra,* 41 Cal.4th at p. 728.) However, appellant's argument that imposition of multiple gang enhancements violates section 654 was addressed in *People v. Akins* (1997) 56 Cal.App.4th 331 (*Akins*). As stated in *Akins* (and as noted previously in this opinion), "[s]ection 654 provides that even though an act violates more than one statute and thus constitutes more than one crime, a defendant may not be punished multiple times for that

single act." (*Id*. at p. 338.) An "act" within the meaning of section 654 may be "a continuous '"course of conduct" . . . comprising an indivisible transaction.'" (*Ibid*.) If the defendant had multiple independent criminal objectives that were independent of and not merely incidental to each other, however, "'the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.]'" (*Id*. at pp. 338-339.)

The court added that this conclusion "is appropriate and is consistent with the legislative intent to punish and deter criminal gang activity pursuant to section 186.22, subdivision (b)(1)." (*Akins*, *supr*a, 56 Cal.App.4th at p. 341.) It effectuates the Legislature's purpose of using the law "to the fullest extent possible . . . to deter criminal gang activity." (*Ibid*.) The *Akins* court found that the trial court did not err in imposing two separate gang enhancements where there were two separate robberies of two separate victims. (*Id*. at p. 339.)

We conclude that imposing multiple gang enhancements for each of appellant's crimes does not violate section 654. First, as *Akins* points out, where a defendant commits acts of violence against separate victims, section 654 does not bar punishment for each act of violence. (*Akins*, *supra*, 56 Cal.App.4th at p. 339.) If section 654 does not bar punishment for each act, then it does not bar imposition of an enhancement under section 186.22, subdivision (b)(1), for each act. (*Akins*, *supra,* at p. 340.) Each separate act was committed for the benefit of and at the direction of a criminal street gang in order to enhance the gang's status within the community. (*Ibid*.) Therefore, the gang enhancement was properly applied to count 3, which charged appellant with the robbery of Ivory, the second of two victims. It is true that *Akins* is distinguishable with respect to the two crimes perpetrated on the same victim, Henrickson. We have already determined, however, that the murder of Henrickson and the robbery of Henrickson can be separately punished. If section 654 does not bar punishment for each act, it does not bar imposition of a gang enhancement under section 186.22 for each act: "'The question whether the defendant entertained multiple criminal objectives is one of fact for the trial

court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. [Citations.]'" (*Akins*, *supra,* at p. 339.)

The *Akins* court also noted that the Courts of Appeal are split on whether section 654 applies to enhancements, but that "nearly all of the cases that have applied section 654 to limit enhancements have done so in the context of a single act committed against a single victim"—a situation we do not have in the instant case. (*Akins*, *supra*, 56 Cal.App.4th at pp. 337-338.) Counts 1 and 2 were committed against a single victim (Henrickson), but they were two separate acts, and count 3 *was* committed against a separate victim (Ivory). Appellant's argument is without merit.

D. Remaining Stayed Firearm-Use Enhancements

Appellant contends that the trial court erroneously stayed, rather than struck, the remaining enhancements pursuant to section 12022.53, subdivisions (b) and (c) that were alleged in all three counts.

Appellant acknowledges that in *People v. Bracamonte* (2003) 106 Cal.App.4th 704 (*Bracamonte*), Division Four of this district discussed the conflict between section 12022.53, subdivisions (f) and (h). Subdivision (f) states that only one enhancement may be imposed under section 12022.53, but subdivision (h) prohibits striking any enhancement imposed under section 12022.53. Harmonizing the two sections, the *Bracamonte* court held that each section 12022.53 enhancement should be imposed with a stay of execution for all but the enhancement with the greatest term of imprisonment. (*Bracamonte*, *supra,* at p. 713.) Division Seven of this district followed *Bracamonte* in *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061-1062. In an opinion recently taken up for review, the Third Appellate District disagreed with *Bracamonte*. (*People v. Gonzalez* (2006) 146 Cal.App.4th 327, review granted Mar. 14, 2007, S149898.)

We agree with *Bracamonte* and conclude that the trial court correctly imposed the applicable enhancement for each firearm-use allegation found true under section 12022.53 and stayed the execution of all such enhancements except the one providing for the longest prison term.

The reasoning of *People v. Crites* (2006) 135 Cal.App.4th 1251 is pertinent here. In that case, the defendant contended that when two equal weapon-use enhancements are imposed, one must be stricken rather than stayed. The appellate court pointed out that """[a] stay is a temporary suspension of a procedure in a case until the happening of a defined contingency . . . ,"' whereas striking an enhancement '". . . implies that the enhancement is legally insupportable, and must be dismissed. . . ."' [Citation.]" (*People v. Crites*, *supra*, at pp. 1255-1256.) In *People v. Crites*, as in the instant case, there is no basis for rejecting the jury's factual finding as to all the firearm-use allegations. "[A] reversal on appeal of one enhancement is a 'defined contingency' where imposition of a term of imprisonment for the other would be warranted." (*Id*. at p. 1256.) The trial court properly stayed rather than struck the remaining firearm-use enhancements.

E. Reducing the Enhancements to One–Third the Full Term in Subordinate Counts

In a supplemental letter brief, appellant contends that if this court disagrees with appellant's section 654 analysis regarding the gang enhancements, the enhancement on count 3 should be reduced from the full 10-year term to one-third of that term, or three years four months. Appellant adds that the trial court also erroneously imposed full 10-year enhancements under section 12022.53, subdivision (b) in counts 2 and 3. Therefore, the firearm enhancement in count 3 must be reduced to one-third of 10 years, or three years four months. Respondent concedes that appellant is correct under *People v. Moody* (2002) 96 Cal.App.4th 987 (*Moody*).

Section 1170.1, subdivision (a), provides that where a defendant is sentenced to consecutive terms, "[t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any *specific enhancements* applicable to those subordinate offenses." (Italics added.) The court in *Moody* interpreted the above section's "'specific enhancement'" provision to require reduction of the term of an enhancement imposed in a consecutive subordinate term to one-third of the enhancement term. (*Moody*, *supra*, 96

Cal.App.4th at pp. 992-993.) The *Moody* court further held that, although the language of section 12022.53 would appear to require a full 10-year enhancement ("Notwithstanding any other provisions of law . . ."), the Legislature's amendment of section 1170.11 to provide that the term "specific enhancement" within the meaning of section 1170.1 includes the enhancements provided for in section 12022.53 was a specific statutory mandate prevailing over the more general language of section 12022.53, an earlier statute. (*Moody*, *supra*, at p. 992.)

We agree with *Moody* and conclude that appellant's enhancement terms associated with his subordinate offense in count 3 must be reduced. Accordingly, the 10-year firearm enhancement associated with the subordinate term for robbery in count 3 is reduced to 40 months, or three years four months. The 10-year enhancement associated with the same subordinate term for robbery in count 3 is also reduced to three years four months. As so modified, and in anticipation of our conclusion in the succeeding section of this opinion, appellant's total unstayed term is 89 years four months in state prison.

F. Appellant's Upper Term Sentence in Count 2

At the request of this court, appellant and respondent filed supplemental briefs discussing the impact of *Cunningham*, *supra*, 549 U.S. ___ [127 S.Ct. 856] on appellant's upper term sentence in count 2. Further briefing was requested and received following the decisions of the California Supreme Court in *People v. Black* (2007) 41 Cal.4th 799 (*Black*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*).

1. Appellant's Argument

Appellant contends that the trial court improperly relied upon judicially-found facts in imposing the upper term in count 2, thereby violating his Sixth Amendment rights. Appellant argues that not one of the factors used by the trial court was a proper qualifying factor under *Black*.

2. Proceedings Below

In imposing sentence, the trial court stated, "I have read and considered the probation and sentencing report in this matter. The probation report does set forth the circumstances in aggravation. They are: the crime involved great violence, great bodily

harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. The defendant was armed with and used a weapon at the time of the commission of the crime. The crime involved multiple victims. The planning, sophistication, or professionalism with which the crime was carried out or other facts do indicate premeditation. The defendant's prior conviction as an adult or adjudication of commission of crimes as a juvenile are numerous or of increasing seriousness. The defendant was on probation or parole when he committed the crime. The defendant's prior performance on probation or parole was unsatisfactory. Mitigating factors are none. I certainly find that the aggravating factors outweigh the mitigating factors."

3. Relevant Authority

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States 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.) The Supreme Court subsequently held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely v. Washington* (2004) 542 U.S. 296, 303 (*Blakely*).) The high court recently made it clear that, "[i]n accord with *Blakely*, . . . the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Cunningham*, *supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 868].) The court therefore concluded that the California determinate sentencing law was unconstitutional to the extent it authorized the trial court to impose an upper term sentence based on facts that were found by the court, rather than by a jury beyond a reasonable doubt. (*Cunningham*, *supra*, at p. ___ [127 S.Ct. at p. 871.)

In interpreting *Cunningham* in *Black*, *supra*, 41 Cal.4th at page 812, the California Supreme Court determined that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by

the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." *Black* emphasized that the "'prior conviction' exception" must not be read too narrowly; it includes "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Black*, *supra*, at p. 819.) *Black* and its companion case, *Sandoval*, reiterated that the right to a jury trial does not apply to the fact of a prior conviction. (*Black*, *supra*, at p. 818; *Sandoval*, *supra*, 41 Cal.4th at pp. 836-837.)

4. Upper Term Properly Imposed

Among the factors named by the trial court in the instant case that fall under the prior conviction exception are that of the increasing number and seriousness of appellant's prior convictions or juvenile adjudications, the fact that he was on probation when the instant offenses were committed, and his unsatisfactory performance on probation. Appellant acknowledges that "the *Apprendi-Blakely-Cunningham* jury trial rule does not apply to the aggravating factor of numerous or increasingly serious prior convictions." (See *Black*, *supra*, 41 Cal.4th at pp. 818-820.) He argues, however, that he has no prior convictions, only juvenile offenses, which are not crimes and do not result in a conviction, but rather an adjudication. Appellant does not contend that the evidence that the trial court obtained from the probation report was insufficient as a matter of law to prove the fact of his prior juvenile adjudications.

The issue of whether a sentencing court may enhance an adult offender's sentence on the basis of prior juvenile adjudications without violating the offender's constitutional right to jury trial is currently before the California Supreme Court. (See *People v. Grayson* (2007) 155 Cal.App.4th 1059, review granted Dec. 19, 2007, S157952; *People v. Tu* (2007) 154 Cal.App.4th 735, review granted Dec. 12, 2007, S156995; *People v. Nguyen* (2007) 152 Cal.App.4th 1205, review granted Oct. 10, 2007, S154847.)

We need not rely on the fact of the increasing number and seriousness of appellant's juvenile adjudications, however, to find that appellant was eligible for the

upper term. The circumstances that appellant was on probation at the time of the instant offenses and performed poorly on probation previously are the types of findings relating to a defendant's recidivism "that may be determined by examining the records of the prior convictions" and that are "'typically and appropriately undertaken by a court.'"[7] (*Black*, *supra*, 41 Cal.4th at pp. 819-820; accord, *People v. Yim* (2007) 152 Cal.App.4th 366, 370-371.)[8]

The record shows that appellant was on probation at the time of the instant crimes. Appellant was furloughed from a camp community placement on January 5, 2001. On February 26, 2001, his probation officer filed a violation report regarding a curfew violation and a citation for trespassing on the campus of the University of Southern California.[9] Appellant failed to appear in court and an arrest warrant was issued on March 16, 2001. Appellant remained in warrant status until he was arrested on the warrant on August 27, 2001. The instant crimes were committed on August 17, 2001.

The record also reveals other instances of appellant's poor performance on probation. On June 8, 2000, he was placed on informal probation for six months after the juvenile court sustained a petition alleging appellant had possessed marijuana. On June 22, 2000, he was arrested for being a minor in possession of live ammunition and a

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7 California Rules of Court, rule 4.421(b)(4) lists as a factor in aggravation: "The defendant was on probation or parole when the crime was committed." Rule 4.421(b)(5) states that another factor in aggravation is: "The defendant's prior performance on probation or parole was unsatisfactory."

8 The issue of whether a trial court can constitutionally impose an upper term based on the fact that the defendant was on parole when the crime was committed or the defendant's prior performance on probation or parole was unsatisfactory, without a jury determination, is currently before the California Supreme Court in *People v. Towne* (S125677, review granted Jul. 14, 2004).

9 Appellant had been ordered to stay off the campus grounds. In July 1999, he was arrested and charged with theft of personal property and receiving stolen property after a runner at the university track had her property stolen. In October 1995 he was arrested for driving a university utility vehicle.

concealable firearm and carrying a loaded firearm in a public place. The allegation of being in possession of a loaded firearm was sustained and minor was sent to camp. The record also shows that after appellant was arrested on his probation violation on August 27, 2001 (and after the current offenses were committed), appellant was charged on August 30, 2001, with having committed a burglary on August 9, 2001. The burglary allegation was sustained and appellant was order placed in a camp on September 21, 2001.

Once the trial court made its determination of these aggravating factors, appellant was eligible for the upper term, which became the statutory maximum. (*Black*, *supra*, at p. 816.) The trial court's finding of additional facts in support of its discretionary choice of the upper term did not violate appellant's right to trial by jury. (*Id.* at pp. 816, 820.)

We therefore conclude that the trial court properly imposed the upper term in count 2 based on the recidivist factor that appellant was on probation at the time that he committed the serious offenses in the instant case and that his prior performance on parole was unsatisfactory. Moreover, we conclude that under *Sandoval*, any error was harmless. *Sandoval* articulated a harmless error test for *Cunningham* error, stating that "if a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless." (*Sandoval*, *supra*, 41 Cal.4th at p. 839.) The reviewing court must take into consideration the fact that the factual record might not have been the same if the aggravating factors had been charged and tried to a jury. (*Id*. at p. 840.) The reviewing court must also consider whether the wording of the enumerated aggravating factor creates a vague or subjective standard and whether the facts of the aggravating factor were contested, so that it would be difficult to determine how the jury would resolve the dispute. (*Id*. at pp. 839-841.)

In the instant case, there are several factors that pass muster under the *Sandoval* test. Among these are the factors that the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty,

viciousness or callousness, and that appellant was armed with and used a weapon at the time of the commission of the crime. We conclude beyond a reasonable doubt that, in addition to the two factors discussed previously, the jury would have found beyond a reasonable doubt that these latter two factors, at a minimum, were present in this case.

We believe these latter factors do not create a vague or subjective standard. The facts proving the aggravating factors were not contested, and under the circumstances of this case, it is clear beyond a reasonable doubt that the jury would have "assessed the facts in the same manner as did the trial court" (*id*. at p. 840), and "had the jury been instructed on [these] point[s] it would have found [these] aggravating circumstance[s] to be true" (*id*. at p. 843). Therefore, defendant's upper term sentence will stand.

V. Cruel and Unusual Punishment

A. Argument

Appellant contends that imposing a sentence of nearly 100 years constitutes cruel and unusual punishment for a youngster who was only 15 when he committed the crimes. He argues that the sentence passed upon him was unconstitutional under both the California and federal standards.

With respect to the federal standard for finding a sentence to be cruel and unusual, a three-part analysis to determine whether a sentence was disproportionate to a crime was set out in *Solem v. Helm* (1983) 463 U.S. 277 (*Solem*).[10] *Solem*'s test did not retain the support of a majority of the Supreme Court in *Harmelin v. Michigan* (1991) 501 U.S. 957. In that case, Justice Scalia, joined by Chief Justice Rehnquist, concluded *Solem* was wrongly decided and that the Eighth Amendment does not guarantee proportionality of sentences. (*Harmelin v. Michigan*, *supra,* at p. 965.) Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment prohibits only sentences

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[10] The three-part test required the reviewing court to look to the gravity of the offense and the harshness of the penalty, to compare the sentence imposed on other crimes in the same jurisdiction, and to compare the sentences imposed for the same crime in other jurisdictions. (*Solem*, *supra*, 463 U.S. at pp. 290-292.)

that are "'grossly disproportionate'" to the crime. (*Harmelin v. Michigan*, *supra,* at p. 1001 (conc. opn. of Kennedy, J.).) These three justices concluded that consideration of the second and third *Solem* factors is necessary only when the first factor suggests the sentence may be grossly disproportionate. Thus, it is sufficient to find the sentence constitutional under the first *Solem* factor in order to complete the analysis. (*Harmelin v. Michigan*, *supra,* at p. 1005.) Justice Kennedy noted that "'"outside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [are] exceedingly rare."'" (*Id.* at p. 1001.)

The federal gross proportionality test is similar to, and accepts the same analysis as, the first technique in the three-part test of *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*) for analyzing whether a sentence is cruel or unusual under the California Constitution. *Lynch* held that, in determining whether a sentence is cruel or unusual, it is useful to: (1) examine the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*id*. at p. 425); (2) compare the challenged punishment with punishments prescribed for more serious offenses in the same jurisdiction (*id*. at p. 426); and (3) compare the challenged punishment with punishments prescribed for the same offense in other jurisdictions (*id*. at p. 427).

Appellant focuses his argument on the first *Lynch* factor and essentially argues that appellant's sentence is grossly disproportionate, which would meet the federal standard. With respect to the nature of the offense and the offender, appellant argues that he was a 15-year-old high school student in special education classes when the crime occurred. Although he was 17 and in the 11th grade at the time of his interview with the detectives, other circumstances must be considered. Appellant cannot really write. He lived with his grandmother because both of his parents are drug addicts, and his mother has been in and out of jail. Instead of a family life, appellant had the gang, where he was influenced by older gang members who recruited him when he entered his teens. They inculcated appellant with the gang culture and taught him misguided notions of loyalty and obedience to older gang members. The current crimes were committed on the orders

of two older gang members, Dog and Black. Appellant maintains that sentencing an unformed teen to a century in prison must shock the conscience of any rational citizen.

Throughout his analysis, appellant relies on *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*). In *Dillon*, the California Supreme Court considered whether the life sentence imposed on a 17-year-old convicted of first degree felony murder violated the California Constitution's prohibition against cruel or unusual punishment. (*Id*. at p. 450.) Dillon, an unusually immature 17-year-old high school student, attempted to rob a marijuana farm with some friends. (*Id*. at p. 451.) Separated from his companions, Dillon heard shotgun blasts and feared two of his friends had been shot by one of the owners guarding the crop. The man approached Dillon, who was unable to retreat or hide, and it appeared to Dillon that the man pointed a shotgun at him. Believing he was about to be shot, Dillon panicked, shot nine times, and fatally wounded the owner. (*Id*. at pp. 482-483.) Dillon had no prior record, and he was perceived by a clinical psychologist, the judge, and the jury to be uniquely immature. (*Id*. at pp. 483-486.) The jury expressed reluctance and unease at finding Dillon guilty of first degree felony murder. (*Id*. at p. 484.) The trial court was of the opinion that the evidence did not support a first degree murder conviction outside the felony-murder context. (*Id*. at p. 486.)

The California Supreme Court found the punishment unconstitutionally cruel and unusual, and ordered that Dillon be punished as a second degree murderer. (*Dillon*, *supra,* 34 Cal.3d at pp. 488-489.) The court observed that, "[w]ith respect to 'the nature of the offense,' we recognize that when it is viewed in the abstract robbery-murder presents a very high level of . . . danger, second only to deliberate and premeditated murder with malice aforethought. In conducting this inquiry, however, the courts are to consider not only the offense in the abstract—i.e., as defined by the Legislature—but also 'the facts of the crime in question' [citation]—i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Id*. at p. 479.)

With respect to the nature of the offense and the offender, therefore, we evaluate the totality of the circumstances surrounding the commission of the current offense, as did the *Dillon* court. We also consider appellant's "'individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.'" (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.)

We conclude that both the circumstances of appellant's offense and his personal characteristics indicate that appellant represents a danger to society, and that the sentence is not unconstitutionally cruel and unusual punishment as applied to appellant. The evidence showed that appellant's offense was characterized by extreme violence and callousness. With their guns drawn, appellant and his cohort approached two persons and not only demanded their belongings, but demanded to receive an answer as to where Ivory and Henrickson "were from." When Henrickson responded by saying he was a grown man and demanding to know who they were to ask him where he was from, appellant told Dopey to "dome that nigger." With that heartless and callous act, appellant demonstrated a dangerous inability to control his impulses and a complete indifference to the consequences of his actions. Unlike the defendant in *Dillon*, appellant had no reason to fear for his own safety and did not face down the barrel of a shotgun. Appellant's behavior during the current offense was that of an extremely dangerous individual, and it was not his last violation of the law.

With respect to the nature of the offender, it is true that appellant reportedly was taking special education classes in high school. Yet, he has not been shown to have a low IQ or to have any particular learning disability. Although appellant was 15 years old at the time of the shooting, he was found unfit for adjudication in juvenile court. Unlike Dillon, appellant's criminal record is not insignificant. The probation report shows that in September 1999 the juvenile court sustained a petition alleging that appellant committed the offenses of receiving stolen property and theft of personal property, and the court ordered camp placement. In June 2000 the court sustained a petition alleging that appellant possessed marijuana, and appellant received six months' probation. Again in June 2000, while appellant was still on probation, the court sustained a petition

alleging that appellant was in possession of a concealable firearm. He was ordered to camp community placement. In August 2001, the court sustained a petition alleging that appellant committed burglary, and a gang allegation was apparently dismissed. The current crimes were committed on August 17, 2001. Appellant was ordered to camp community placement for the burglary in September 2001. In October 2002, appellant suffered a sustained petition for receiving stolen property. Appellant was once again sent to camp. Appellant's recalcitrant behavior and his instigation of gang activities while in camp was mentioned previously. The probation report indicates appellant admitted being a member of the Rolling 40's Crips. Thus, from the age of 13 to his arrest for the current crimes, appellant was dedicated to his gang and to breaking the law.

Appellant does not address the last two *Lynch* techniques, which deal with "intercase" review, and we question whether any analysis is still required. The California Supreme Court has held in death penalty decisions subsequent to *Lynch* that intercase proportionality review "is not mandated under our state Constitution in order to ensure due process and equal protection, nor is it required in order to avoid the infliction of cruel or unusual punishment." (*People v. Crittenden* (1994) 9 Cal.4th 83, 156; accord, *People v. Barnett* (1998) 17 Cal.4th 1044, 1182; *People v. Bradford* (1997) 15 Cal.4th 1229, 1384.) The court has indicated that all that is required is "intracase" review, i.e., an evaluation of whether the sentence is "grossly disproportionate" to the offense. (*People v. Bradford*, *supra*, at p. 1384.)

After considering the nature of the offense and the offender, we find that appellant's sentence is not grossly disproportionate to his crime and does not "shock[] the conscience and offend[] fundamental notions of human dignity." (*Lynch*, *supra*, 8 Cal.3d at p. 424.)

DISPOSITION

The judgment is modified to reflect a consecutive firearm enhancement of three years four months with respect to count 3 and a consecutive gang enhancement of three years four months with respect to count 3. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

____________________, P. J.
BOREN

We concur:

____________________, J.
ASHMANN-GERST

____________________, J.
CHAVEZ