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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSE GUADALUPE REYES PENA, Defendant and Appellant.	E029490 (Super.Ct.No. FSB 26870) OPINION

APPEAL from the Superior Court of San Bernardino County. Patrick J. Morris, Judge. Affirmed.

Dan Mrotek, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Scott C. Taylor and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

Defendant Jose Guadalupe Reyes Pena appeals from a judgment convicting him of transporting and possessing a kilo of cocaine. On appeal, defendant claims the trial court

committed the following errors: denying his motion to suppress evidence obtained after an unlawful detention; failing to instruct the jury with CALJIC No. 17.16.2; and imposing, rather than staying, sentence on the drug transportation offense in violation of Penal Code section 654.

For the reasons provided below, we reject defendant's claims and affirm the judgment in its entirety.

2. Factual and Procedural History

At approximately 7:30 p.m. on June 15, 2000, San Bernardino police officer Gary Schuelke, who was driving an unmarked vehicle, first observed defendant driving his Nissan Maxima by a McDonald's Restaurant in Colton. When defendant stopped at an adjacent parking lot, a Hispanic woman exited the McDonald's and entered his car. Defendant then removed a small "Toastmaster" box from his trunk and went back inside the car with the box. The woman exited defendant's car, placed the box back into the trunk, and walked away from the car.

After this exchange, defendant drove out of the parking lot. Schuelke followed defendant as he traveled out of San Bernardino County and into the City of Bell Gardens in Los Angeles County. Along the way, defendant used counter-surveillance driving techniques.

In Bell Gardens, defendant stopped his car at a parking lot of a Circle K store, which was located at the intersection of Loveland Drive and Garfield Avenue. When defendant left his car and walked to the curbside of Garfield Avenue, he made contact

with a Hispanic man. After a brief encounter, defendant returned to his car and drove to a residence on Grainger Street in Bell Gardens.

At the residence, defendant drove through the driveway to the back of the house. About 10 to 15 minutes later, defendant left the residence in his Nissan Maxima with a Hispanic woman.

After following defendant for another 15 minutes, Schuelke made contact with defendant. Defendant identified himself as "Pedro Lopez." When Schuelke asked for a driver's license or identification, defendant responded that he did not have any form of identification. Schuelke placed defendant under arrest for driving without a driver's license.

Schuelke searched defendant and seized his keys, cellular phone, pager, and wallet, which contained $700 and a business card for "Daniel's Carburetors." The female passenger, Lourdes Valenzuela, was defendant's girlfriend.

After his brief conversations with defendant and Valenzuela, Schuelke took them back to the residence on Grainger Street, which was later discovered to be the home of defendant, defendant's sister, brother, and brother-in-law. Schuelke and other officers conducted a search of the residence. The officers found four semi-automatic weapons, boxes of ammunition, and $1,048 in cash under the dresser of the northwest bedroom. Inside the same bedroom, the officers found a pound scale and two small bindles of cocaine. Items found in the northwest bedroom indicated that defendant shared the room with his brother.

The officers also searched the garage and the Honda Accord, the car that was parked in the garage. Inside the garage, the officers found a gram scale. Inside the trunk of the car, the officers found the "Toastmaster" box, which contained about a kilogram of cocaine. In the car, the officers also found a receipt from "Daniel's Carburetors" with defendant's nickname and cellular phone number.

The San Bernardino District Attorney charged defendant with transporting cocaine (count 1),[1] possessing cocaine for sale (count 2),[2] and being a felon in possession of a firearm (count 3).[3] As to count 2, the district attorney alleged that defendant was personally armed with a firearm within the meaning of Penal Code section 12022, subdivision (c). The district attorney also alleged that defendant had one prior strike conviction[4] and one prior prison term conviction.[5]

The trial court granted defendant's motion to set aside count 3. After the close of trial, the jury returned guilty verdicts on the two remaining offenses and a true finding on the firearm allegation. The court later found true the two prior conviction allegations. At the sentencing hearing, the court imposed a total prison term of 13 years.

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[1] Health & Safety Code section 11352, subdivision (a).

[2] Health & Safety Code section 11351.

[3] Penal Code section 12021, subdivision (a)(1).

[4] Penal Code sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i).

[5] Penal Code section 667.5.

3. Motion to Suppress

In his motion to suppress evidence under Penal Code section 1538.5, defendant claimed that the officers detained him in violation of the Fourth Amendment. In denying defendant's motion, the trial court found that the initial contact between Officer Schuelke and defendant was a consensual encounter.

On appeal, defendant claims the trial court erred in denying his motion. Defendant argues that this case involved a seizure within the meaning of the Fourth Amendment, and, therefore, Schuelke must have had a reasonable suspicion or probable cause to detain him.[6] In citing two United States Supreme Court cases, defendant contends that individualized suspicion is required even when the officer does not compel the defendant to stop his vehicle.

In one of the two cases, *Colorado v. Bannister*,[7] the officer initially observed a speeding vehicle, temporarily lost visual contact, and, after spotting the same vehicle, followed it to a service station. While the vehicle was out of his view, the officer heard a police radio dispatch report concerning a theft of auto parts. As the two occupants of the vehicle that had stopped at the service station exited the vehicle, the officer approached them and a conversation ensued. During this conversation, the officer noticed certain

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[6] See *Delaware v. Prouse* (1979) 440 U.S. 648, 654-655; see also *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 37; *People v. Bennett* (1998) 17 Cal.4th 373, 386-387.

[7] *Colorado v. Bannister* (1980) 449 U.S. 1.

auto parts inside the vehicle in plain view. Based on his observations, the officer arrested the two men and seized the stolen parts.

The issue in *Bannister* was not whether the initial detention constituted a seizure, but whether the officer had probable cause to seize the stolen parts.[8] The court provided no factual details—including whether the officer was wearing a uniform, driving a marked vehicle with lights and sirens, speaking in a demanding or threatening tone of voice, or displaying his weapon—relevant to a determination concerning the nature of initial detention. Rather, the court assumed that the initial detention constituted a traffic stop situation where an officer pulls over a vehicle based on a vehicle code violation.[9] The case therefore does not support defendant's specific argument.[10]

In the other case, *Whren v. United States*,[11] the undercover officers in an unmarked vehicle followed a suspicious truck. As the truck stopped at a traffic light, the officers pulled alongside the truck and one of the officers stepped out and approached the driver. The officer then instructed the driver to park his vehicle.

The facts in *Whren* are distinguishable from the facts in this case. There, although

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[8] *Colorado v. Bannister, supra*, 449 U.S. at page 3.

[9] See *Colorado v. Bannister, supra*, 449 U.S. at pages 2-3.

[10] See *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 943.

[11] *Whren v. United States* (1996) 517 U.S. 806.

the driver had stopped temporarily at a traffic light, the officer still conducted a "traffic stop" by instructing the driver to park his truck. The court noted that, generally, the officer's decision to conduct a traffic stop is reasonable where he has probable cause to believe that a traffic violation occurred.[12] In *Whren*, the defendant acknowledged that the officer had probable cause based on his various traffic violations.[13]

Unlike *Whren*, this case is more akin to the situations where an officer approaches an individual in a public place and engages in a consensual verbal exchange. It is well-settled that a detention does not occur because an officer simply approaches an individual and asks a few questions.[14] This is true even when the individual is in or near a vehicle.[15] "As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.]"[16]

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[12] *Whren v. United States, supra*, 517 U.S. at pages 809-810.

[13] *Whren v. United States, supra*, 517 U.S. at page 810.

[14] *Florida v. Bostick* (1991) 501 U.S. 429, 434; *U.S. v. Mendenhall* (1980) 446 U.S. 544, 552; *In re Manuel G.* (1997) 16 Cal.4th 805, 821; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1253.

[15] See generally *People v. Gonzales* (1985) 164 Cal.App.3d 1194.

[footnote continued on next page]

A court must consider the totality of the circumstances surrounding the encounter to determine the coercive effect of the officers' conduct.[17] "Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.]"[18] In reviewing a trial court's ruling on a motion to suppress evidence, an appellate court applies the deferential substantial evidence test to the court's factual findings and independent judgment to the court's determination of reasonableness under the Fourth Amendment.[19]

Here, substantial evidence supported the trial court's factual findings. During the hearing on defendant's motion, Officer Schuelke described his initial contact with defendant. According to Schuelke, defendant stopped his car of his own accord at his destination—his girlfriend's mother's apartment. Schuelke parked his unmarked car, which was not equipped with sirens or lights, behind defendant's car. Defendant stepped out of his car and stood by the driver's side door. Because defendant voluntarily parked

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[16] *In re Manuel G.*, *supra*, 16 Cal.4th at page 821.

[17] *In re Manuel G.*, *supra*, 16 Cal.4th at page 821.

[18] *In re Manuel G.*, *supra*, 16 Cal.4th at page 821.

[19] *People v. Woods* (1999) 21 Cal.4th 668, 673; see *People v. Spicer* (1984) 157 Cal.App.3d 213, 217.

his car before Schuelke and the other officers displayed any gesture of authority, the initial contact did not constitute a seizure.[20]

After defendant stepped out of his car, Schuelke simply walked up to defendant, identified himself, and asked defendant for his name and identification. Even though Schuelke's questions may not have been phrased as mere suggestions, the manner of Schuelke's inquiry did not transform the encounter into a detention.[21] The trial court found that defendant did not submit to a show of authority, but voluntarily answered Schuelke's questions.

Furthermore, while approximately four officers approached defendant and his girlfriend, the evidence supports that they did nothing to restrain defendant's liberty. Schuelke testified that, contrary to defendant's allegations, he and the other officers, who were also in civilian clothes, did not box defendant in, use physical force, draw their weapons, or make any threats against defendant or his companion.

Schuelke described the setting as a "pretty relaxed environment." During the conversation, defendant provided a false name and stated that he was not issued a driver's license. Once Schuelke discovered that defendant was an unlicensed driver, he then restricted defendant's freedom by placing him under arrest.

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[20] See *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1237-1238.

[21] See *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1370, footnote 10; *In re Frank V., supra*, 233 Cal.App.3d at page 1239.

In viewing the record in the light most favorable to the court's ruling, Schuelke's words or conduct prior to the arrest would not have caused a reasonable person to feel restrained from going about his own business.[22] In practical terms, defendant could have explained that he was late for his girlfriend's mother's birthday party, and thereby avoided Schuelke's questions. Because Schuelke had no basis for detaining him, defendant, after providing some excuse, could have simply walked passed Schuelke and entered the apartment.

Under the circumstances in this case, we reject defendant's claim that the initial encounter constituted a seizure in violation of the Fourth Amendment. We also reject defendant's additional claim that the detention was pretextual for two reasons: first, there was no detention; and, secondly, there was no need for Schuelke to have any legitimate basis for simply walking up to him and asking him a few questions.[23] We therefore conclude that the trial court did not err in denying defendant's motion to suppress evidence found after the initial contact.

4. CALJIC No. 17.16.2

Defendant claims the trial court erred in failing to instruct the jury with CALJIC No. 17.16.2. Defendant argues that, because CALJIC No. 17.16.2 sets forth the necessary "facilitative nexus" element of the firearm allegation under Penal Code section

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[22] *In re Manuel G., supra*, 16 Cal.4th at page 821.

[23] See *Florida v. Bostick, supra*, 501 U.S. at pages 434-435.

[footnote continued on next page]

12022, subdivision (c), the court's failure to provide the instruction amounted to an error of constitutional magnitude.

In count 2 of the information, the district attorney alleged that defendant possessed cocaine for sale in violation of Health and Safety Code section 11351. The district attorney also alleged that defendant was personally armed with a firearm within the meaning of Penal Code section 12022, subdivision (c). Penal Code section 12022, subdivision (c) provides that, ". . . any person who is personally armed with a firearm in the commission or attempted commission of a violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code, shall, upon conviction of that offense and in addition and consecutive to the punishment prescribed for that offense of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for three, four, or five years in the court's discretion. . . ."

As to this enhancement allegation, the court instructed the jury with CALJIC No. 17.16.1, as follows:

"It is alleged in Count 2 that in the commission of the crime therein described, defendant was personally armed with a firearm.

"If you find a defendant guilty of the crime thus charged, you must determine whether the defendant was personally armed with a firearm at the time of the commission or attempted commission of the crime.

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"The term 'armed with a firearm' means knowingly to carry a firearm or have it available for offensive or defensive use.

"The word 'firearm' includes a pistol or revolver.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true. . . ."

After deliberation, the jury found the firearm allegation true.

Later that month, defendant filed a motion for new trial on various grounds, including that the court erred in failing to instruct the jury with CALJIC No. 17.16.2. In its opposition to defendant's motion, the People initially noted that defendant failed to cite to any authority in support of his claim of instructional error. The People also argued that the court properly instructed the jury with the standard instruction, CALJIC No. 17.16.1, and that the court had no sua sponte obligation to elaborate on the elements of the firearm allegation by also including CALJIC No. 17.16.2.

During the hearing on defendant's motion for new trial, the court found that CALJIC No. 17.16.2 provided a permissive, rather than mandatory instruction. The court noted, however, that the jury wrestled with the elements of the allegation and would have benefited from further instruction. Nevertheless, in finding no mandatory duty to provide the instruction, the court denied defendant's motion.

On appeal, as below, defendant relies on the California Supreme Court's opinion

in *People v. Bland*[24] to support his claim that the trial court erred in failing to instruct the jury with CALJIC No. 17.16.2.

In *Bland*, while the defendant sat in a police vehicle outside his house, the officers searched the house and found 17.95 grams of cocaine in the defendant's bedroom. Under the bed in the same bedroom, the officers found a cache of unloaded firearms, including a semiautomatic rifle. The defendant was charged with, in addition to the substantive offenses, the enhancement allegation of being armed with an assault weapon within the meaning of Penal Code section 12022, subdivision (a)(2).

In evaluating the language of Penal Code section 12022, the court first distinguished between *using* and *being armed* with a firearm.[25] The court noted that: ". . . *arming* under the sentence enhancement statutes does not require that a defendant utilize a firearm or even carry one on the body. A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively."[26]

The court then recognized drug possession as a continuing offense.[27] A defendant commits the offense throughout the entire duration of his control and dominion over the

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[24] *People v. Bland* (1995) 10 Cal.4th 991.

[25] *People v. Bland, supra,* 10 Cal.4th at page 997.

[26] *People v. Bland, supra,* 10 Cal.4th at page 997 (citations omitted).

[27] *People v. Bland, supra,* 10 Cal.4th at page 999.

drugs.[28] The court held that, ". . . when, at any time during the commission of the felony drug possession, the defendant can resort to a firearm to further that offense, the defendant satisfies the statutory language of being 'armed with a firearm in the commission . . . of a felony.' [Citation.]"[29] Specifically, the court defined the phrase, "in the commission of a felony," as used in Penal Code section 12022, as "any time during and in furtherance of the felony."[30]

The court conditioned, however, that ". . . contemporaneous possession of illegal drugs and a firearm will satisfy the statutory requirement of being 'armed with a firearm in the commission' of felony drug possession only if the evidence shows a nexus or link between the firearm and the drugs."[31] Federal courts have described this nexus or link as a "facilitative nexus" between the firearm and the drugs.[32] In borrowing this description, the California Supreme Court explained that, "[e]vidence that a firearm is kept in close proximity to illegal drugs satisfies this 'facilitative nexus' requirement: a firearm's

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[28] *People v. Bland, supra,* 10 Cal.4th at page 999.

[29] *People v. Bland, supra,* 10 Cal.4th at page 999, quoting Penal Code section 12022, subdivision (a).

[30] *People v. Bland, supra,* 10 Cal.4th at page 1001 (italics omitted).

[31] *People v. Bland, supra,* 10 Cal.4th at page 1002.

[32] *People v. Bland, supra,* 10 Cal.4th at page 1002, citing *United States v. Paulino* (1st Cir. 1994) 13 F.3d 20, 26.

presence near a drug cache gives rise to the inference that the person in possession of the drugs kept the weapon close at hand for 'ready access' to aid in the drug offense."[33]

In again resorting to federal authority, the court noted that the presence of the firearm must not be the result of accident or coincidence.[34] Therefore, in order to find the enhancement true, the evidence must disclose some reason for the presence of the firearm near the drugs.[35]

The court summarized, ". . . when the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer (1) that the defendant knew of the firearm's presence, (2) that its presence together with the drugs was not accidental or coincidental, and (3) that, at some point during the period of illegal drug possession, the defendant was present with both the drugs and the firearm and thus that the firearm was available for the defendant to put to immediate use to aid in the drug possession. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was

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[33] *People v. Bland, supra,* 10 Cal.4th at page 1002.

[34] *People v. Bland, supra,* 10 Cal.4th at page 1002; citing *Smith v. United States* (1993) 508 U.S. 223, 238.

[35] *People v. Bland, supra,* 10 Cal.4th at page 1002.

'armed with a firearm in the commission' of a felony within the meaning of section 12022."[36]

After the California Supreme Court's decision in *Bland*, CALJIC No. 17.16.2 was added to the 6th edition of the California Criminal Jury Instructions. CALJIC No. 17.16.2 provides:

"A defendant who unlawfully possesses _____ and maintains that substance in proximity to a firearm, in a place that [he] [she] frequents, is armed with that firearm if you find beyond a reasonable doubt that,

"1. The defendant knew of the presence of the firearm;

"2. The presence of the firearm, together with the _____, was not accidental or coincidental; and

"3. At some point during the period of illegal possession of _____, the defendant was present with both the _____ and the firearm so that the firearm was available for the defendant to put to immediate use to aid in the unlawful possession of the _____."[37]

The use note to CALJIC No. 17.16.2 indicates that the instruction should only be given when the defendant is not present at the time and place where the drug and weapon

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[36] *People v. Bland, supra*, 10 Cal.4th at pages 1002-1003, footnote omitted.

[37] CALJIC No. 17.16.2 (6th ed. 1996) at page 585.

are recovered.[38] Under the facts in this case, while the instruction in this case would have been helpful for the jury's determination on the firearm allegation, we conclude that CALJIC No. 17.16.2 is a pinpoint instruction that must be given only upon request.

The pivotal issue is whether CALJIC No. 17.16.2 describes an element of the offense or simply instructs on a specific point or theory. A trial court has a sua sponte duty to instruct on all general principles of law, including the elements of the charged offense and any recognized defenses, relevant to the evidence presented in the case.[39] The court must also explain to the jury any technical terms in the statutes or given instructions that have a peculiar meaning in the law.[40] Apart from these general principles of law, the defendant must request any additional clarifying or amplifying instructions.[41] This is true for pinpoint instructions that relate particular facts to a legal issue in the case.[42]

CALJIC No. 17.16.2 provides a framework for the jury to draw an inference based on particular facts in the case in deciding whether the defendant was armed with a firearm

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[38] Use Note to CALJIC No. 17.16.2, *supra*, at page 585.

[39] *People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.

[40] *People v. Estrada* (1995) 11 Cal.4th 568, 574-575; *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318-1319.

[41] *People v. Estrada, supra,* 11 Cal.4th at page 574; *People v. Ryan, supra,* 76 Cal.App.4th at page 1318.

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within the meaning of Penal Code section 12022. In response to Justice Werdegar's concurring opinion in *Bland*, the majority explained that it was not establishing a rebuttable presumption, but rather an inference, ". . . that is, 'a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.' [Citation.]"[43] Application of this instruction depends on the particular facts involved, rather than some general principle of law governing the case.

Certainly, a true finding under Penal Code section 12022 can be made without resorting to any facilitative nexus requirement. When the defendant is holding a firearm in one hand and the illegal drugs in the other, there is no need to determine whether there is a close proximity between the weapon and drugs to support the enhancement allegation. The instruction applies only when the facts indicate that the defendant is not present with the weapon and the drugs.

Although CALJIC No. 17.16.2 would be useful where such facts exist, the instruction simply clarifies what is meant by the phrase, "armed with a firearm in the commission . . . of [the offense]"[44] In *Bland*, the court wrote: ". . . by specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission'

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[42] *People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120; see also *People v. Barton* (1995) 12 Cal.4th 186, 197.

[43] *People v. Bland, supra*, 10 Cal.4th at page 1003, footnote 5, citing Evidence Code section 600, subdivision (b).

[44] Penal Code section 12022, subdivision (c).

of the felony offense, section 12022 implicitly requires both that the 'arming' takes place during the underlying crime and that it have some 'facilitative nexus' to that offense."[45] These additional requirements are implied in the general element of being armed in the commission of the offense. Absent a defense request, the court was not required to provide clarification or amplification on the general element.[46]

Furthermore, in *Bland*, although the court did not address the argument presented by defendant in this case, the court upheld the jury's true finding on the enhancement allegation despite the absence of an instruction on any "facilitative nexus" requirement. In fact, in *Bland*, the trial court even failed to provide a correct statement of the general elements of the enhancement allegation by omitting the intent requirement from the standard jury instruction. Therefore, while holding that the inference applies under certain circumstances, the court, by example—whether intended or not—demonstrated that criminal liability under Penal Code section 12022 does not depend on whether the jury was informed that it could have arrived at its conclusion by way of the suggested inference. In *Bland*, the court assumed that the jury, after being instructed, albeit incorrectly, on the general elements of the allegation, reasonably inferred that, ". . . from the proximity of the semiautomatic rifle to the drug cache that defendant had the rifle

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[45] *People v. Bland, supra*, 10 Cal.4th at page 1002 (italics omitted).

[46] See *People v. Estrada, supra*, 11 Cal.4th at page 574.

available for his use to aid in the drug crime at some point during his felonious drug possession."[47]

For these reasons, we conclude that CALJIC No. 17.16.2 is a pinpoint instruction that is only required if requested by a party and if supported by substantial evidence in the record. In this case, because defendant made no request, he cannot complain that the court erred in failing to give the instruction.[48]

Moreover, even if the court had an obligation to give the instruction on its own motion, such error would have been harmless beyond a reasonable doubt.[49] Defendant contends that he suffered prejudice because the standard instruction, CALJIC No. 17.16.1, failed to convey to the jury that Penal Code section 12022 required that the firearm be immediately available for defendant's use. Defendant argues that the evidence did not support that the firearms were *immediately* available to him during the commission of the offense. Defendant contends, therefore, that the facts in this case did not reveal the necessary close proximity between the weapons and the drugs.

Defendant, however, fails to realize the subtle difference between the court's actual holding in *Bland* and defendant's interpretation of that holding. In *Bland*, the court was concerned with whether ". . . the firearm was available for . . . immediate use to aid

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[47] *People v. Bland, supra,* 10 Cal.4th at pages 1003-1004.

[48] See *People v. Dennis* (1998) 17 Cal.4th 468, 514.

[49] *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-328.

in the drug possession."[50] Defendant, however, misinterprets the holding by suggesting that the firearm must be "immediately available." In citing *People v. Pena*,[51] defendant writes: "A gun is 'immediately available' if it is possessed, and if the person does not need to engage in any significant degree of 'intervening conduct' to get and use it. [Citation.]"

In *People v. Pena*, the defendant was convicted of being under the influence of a particular drug while in the "immediate personal possession" of a loaded, operable firearm in violation of Health and Safety Code section 11550, subdivision (e). While such an offense may require "immediate availability," Penal Code section 12022 does not. In fact, the court in *Pena* evaluated different types of firearm enhancements and specifically distinguished the statutory term "immediate personal possession" from other narrower terms, such as "personally armed."[52]

Nothing in *Bland* suggests otherwise. Rather, the phrase "available for . . . immediate use to aid in the drug possession" is simply another way of saying, "close at hand for 'ready access' to aid in the drug offense."[53] "Ready access" simply conveys

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[50] *People v. Bland, supra,* 10 Cal.4th at page 1003.

[51] *People v. Pena* (1999) 74 Cal.App.4th 1078.

[52] *People v. Pena, supra,* 74 Cal.App.4th at pages 1085-1088.

[53] *People v. Bland, supra,* 10 Cal.4th at pages 1002-1003.

availability for use.[54] And, for purposes of Penal Code section 12022, availability for use is synonymous with being armed.[55] While "immediate availability" may suggest that the weapon is "within reach" or "available for use without any intervening conduct" for purposes of other enhancement statutes,[56] this is exactly what the California Supreme Court rejected in holding that the defendant need not be present with the weapon and the drugs at the time of his arrest.[57] The enhancement statute in this case requires only that defendant, at some point during the drug possession, have ready access to a firearm to aid in the commission of the drug offense.[58]

Moreover, we are convinced beyond a reasonable doubt that the omitted instruction did not cause defendant any prejudice. While the jury was confused in its deliberation of the enhancement allegation, the court's instruction, under the circumstances, would have clarified the confusion to the prosecution's advantage. In its

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[54] *People v. Bland, supra,* 10 Cal.4th at pages 997; see also *People v. Mendival* (1992) 2 Cal.App.4th 562, 575.

[55] *People v. Bland, supra,* 10 Cal.4th at page 997.

[56] *People v. Pena, supra,* 74 Cal.App.4th at page 1086.

[57] *People v. Bland, supra,* 10 Cal.4th at page 1000-1001 and footnote 4, disapproving *People v. Balbuena* (1992) 11 Cal.App.4th 1136.

[58] *People v. Bland, supra,* 10 Cal.4th at page 1001.

questions to the court, the jury inquired whether it had to find defendant personally armed with the firearm before the arrest or at any time during the commission of the drug offense. The answer according to CALJIC No. 17.16.2 is: at any point during the illegal possession. The jury also inquired whether the enhancement allegation required direct or indirect possession of the firearm. As to this question, CALJIC No. 17.16.2 adds nothing more to the instruction given in CALJIC No. 17.16.1. CALJIC No. 17.16.1 sets forth the element that defendant need not carry the firearm so long as he has the firearm available for offensive or defense use. Had the court instructed the jury with CALJIC No. 17.16.2, the jury would have been able to draw the inference that defendant was unlawfully armed with a firearm based on the existence of the certain facts.

Additionally, to the extent that defendant suggests that he was not armed in the commission of the offense within the meaning of Penal Code section 12022, subdivision (c), the facts overwhelmingly prove otherwise. Before evaluating the evidence in this case, we note that courts have found a defendant personally armed with a firearm in the following circumstances: where a defendant stored his gun in the trunk of the car from which defendant sold drugs;[59] where a defendant left his weapon in the garage as he burglarized the house;[60] where, after the defendant's arrest, the officers found a semiautomatic rifle and a cache of drugs in the defendant's bedroom;[61] and where,

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[59] *People v. Searle* (1989) 213 Cal.App.3d 1091, 1099.

[60] *People v. Garcia* (1986) 183 Cal.App.3d 335, 350-351.

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although the defendant was not present, the officers found the defendant's shotguns in a cabin located on a compound dedicated to the cultivation of marijuana.[62]

Here, the enhancement allegation was attached only to defendant's drug possession offense. The evidence overwhelmingly established that, under a dresser in his bedroom, defendant stored a cache of semiautomatic firearms. Although the weapons were unloaded, they were located next to clips filled with rounds of ammunition.[63] Next to the firearms was $1,045 in cash. Inside one of the dresser drawers were two plastic bindles of cocaine, one of which weighed approximately 1.03 grams, an amount sufficient for sale. Evidence of the cocaine found in the dresser along with the nearby firearms would have supported the substantive offense and the enhancement allegation.

Nevertheless, for the possession offense, the prosecution relied on the kilogram of cocaine found in the trunk of the Honda Accord. The Honda Accord was parked inside the garage, or just outside of it. The unlocked rear door of the house led into the attached garage. Also, nothing hindered access to the firearms under the dresser in defendant's bedroom. Although the kilogram of cocaine was not in the same room with the firearms, the evidence indicates that the firearms were readily accessible to defendant at some point

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[61] *People v. Bland, supra,* 10 Cal.4th at page 1006.

[62] *People v. Bradford* (1995) 38 Cal.App.4th 1733, 1739.

[63] See *People v. Bland, supra,* 10 Cal.4th at page 1005.

during his actual or constructive possession of the illegal substance.[64] Nothing in the record suggests that the weapons were present by accident or coincidence. Rather, the evidence in the record, including the other evidence of items used in drug sales found in defendant's bedroom and inside the garage, clearly indicate that defendant kept the weapons in close proximity to the cocaine to aid in the possession of the drugs for sale.

In summary, we conclude that CALJIC No. 17.16.2 was a pinpoint instruction and, as such, the court was not required to give the instruction absent counsel's request. We also conclude that, even if there was a sua sponte obligation to give CALJIC No. 17.16.2, the record in this case reveals that, even under the *Chapman* standard,[65] the omitted instruction did not contribute to defendant's conviction.

5. Penal Code Section 654

Defendant claims that the trial court erred in sentencing him to concurrent terms for the crimes of transporting and possessing cocaine. The People raise no objection to amending the judgment by staying sentence for the transportation offense. Despite the People's acquiescence, as noted by defendant, this court must determine the legality of his sentence under Penal Code section 654.

Subdivision (a) of Penal Code section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the

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[64] See *People v. Bradford*, *supra*, 38 Cal.App.4th at page 1739.

[65] *Chapman v. California* (1967) 386 U.S. 18, 24.

[footnote continued on next page]

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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Section 654 applies not only to the same criminal act, but also to an indivisible course of conduct committed pursuant to the same criminal intent or objective.[66] ". . . [I]f 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.]"[67] Whether a defendant held multiple criminal objectives is a factual question for the trial court, whose finding will be upheld on appeal if supported by any substantial evidence.[68]

[footnote continued from previous page]

[66] *People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209, citing *Neal v. State of California* (1960) 55 Cal.2d 11; see also *People v. Perez* (1979) 23 Cal.3d 545, 551.

[67] *People v. Harrison* (1989) 48 Cal.3d 321, 335.

[68] *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466; *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1299.

Generally, when a defendant commits a single act of carrying the same contraband in his automobile, the act, while giving rise to both a drug transportation and possession conviction, warrants the imposition of a single sentence.[69] Whether defendant committed one act or had one objective in committing the two offenses, however, is a question that depends upon the particular facts of the case.[70]

Here, the prosecutor argued that defendant possessed the cocaine as he transported it from Colton to Bell Gardens. The prosecutor also argued that defendant's constructive possession of the cocaine continued after he had arrived at, and later departed from, the residence on Grainger Street in Bell Gardens, where the drugs remained. Constructive possession, by maintaining control and dominion over contraband out of one's actual possession, may support a conviction for drug possession.[71] As argued by the prosecutor, defendant continued to exert control and dominion over the cocaine that was locked in the trunk of his Honda Accord even after he left the residence in his Nissan Maxima.

A separate punishment is appropriate where the second offense involves a "prior, different or subsequent possession" apart from the first offense of drug transportation.[72]

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[69] See *People v. Thomas* (1991) 231 Cal.App.3d 299, 306-307; see also *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583; *People v. Watterson* (1991) 234 Cal.App.3d 942, 947, footnote 15.

[70] See *People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.

[71] *People v. Morante* (1999) 20 Cal.4th 403, 417.

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Furthermore, delivery or transportation of the drugs is no longer the objective where the evidence indicates a continued or subsequent possession.[73]

The facts in the record support the court's implied finding that the drug possession offense involved an additional criminal objective of maintaining the drugs in safe keeping or for future sales beyond the objective of transporting the drugs from one location to another. During the search at the Grainger Street residence, the officers found the "Toastmaster" box containing approximately a kilogram of cocaine inside the trunk of defendant's Honda Accord. Earlier that night, the officers observed defendant with the same "Toastmaster" box as he drove his Nissan Maxima from Colton to Bell Gardens. After arriving at the Grainger Street residence, defendant drove to the back of the house, where the officers later found the Honda Accord, and remained at the house for about 10 to 15 minutes. After defendant left the residence in his Nissan Maxima, the officers contacted him, searched the Maxima, and found no contraband. As stated, the officers

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[72] *People v. Rogers* (1971) 5 Cal.3d 129, 134, footnote 3.

[73] See *In re Adams* (1975) 14 Cal.3d 629, 636 (holding separate punishment for the sale and transportation of drugs appropriate where defendant had additional objective beyond the mere delivery of the drugs); see also *People v. McGuire* (1993) 14 Cal.App.4th 687, 698-699 (affirming multiple punishment ingesting methamphetamine hours before driving under the influence of the drug); *People v. Sanders* (1967) 250 Cal.App.2d 123, 134-135 (holding multiple punishment inappropriate where drug possession and transportation offenses were committed concurrently and there was no evidence of possession preceding commencement of transportation), disapproved on other grounds in *People v. Rogers*, *supra*, 5 Cal.3d at page 134, footnote 4.

later found the "Toastmaster" box in the Honda Accord with other evidence indicating that the car belonged to defendant.

This evidence indicates that defendant transferred the cocaine from the Nissan Maxima to the trunk of the Honda Accord. The evidence also indicates that he at least constructively possessed the cocaine during his brief stay at the Grainger Street residence. Defendant's constructive possession continued as he kept the drugs in the locked trunk of his Honda Accord.

While defendant would contend multiple punishment cannot be based on the possession and transportation of the same cocaine, we cannot agree that every drug offense involving the same drug can give rise to only one punishment. We conclude that substantial evidence supported the trial court's implied finding that defendant harbored an additional objective for continuing in the possession of the illegal substance. Accordingly, the prohibition against multiple punishment under Penal Code section 654 did not prevent the court from imposing sentence for both the drug possession and transportation offenses.

6. Disposition

We affirm defendant's convictions.

NOT TO BE PUBLISHED

s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Richli

J.