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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Appellant,** **v.** **CARLOS ROBINSON,** **Defendant and Appellant.**	**A126064** **(Contra Costa County Super. Ct. No. 05-050746-7)**

Carlos Robinson (defendant) appeals from the judgment entered following a jury trial that resulted in his conviction of assault on a peace officer with an assault weapon, possession of heroin for sale, being a felon in possession of a firearm and ammunition, and participation in a criminal street gang. The jury found true sentencing enhancements associated with various counts. On appeal, defendant contends the trial court erred in denying his motion to suppress evidence discovered following a warrantless entry into a residence. We conclude denial of the motion was proper under the independent source doctrine. Among other things, we conclude the police did not violate the Fourth Amendment of the United States Constitution by testing a key in the front door lock to the residence; the information gained by testing the key is, therefore, properly considered in applying the independent source doctrine. We also reject defendant's contentions that the trial court erred in failing to instruct the jury on the offense of brandishing a firearm in the presence of a peace officer as a lesser included offense to the assault charge, that

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I.B., I.C., II., III., and V.

gang enhancement findings are not supported by substantial evidence, and that the trial court committed error under Penal Code section 654.

The People cross-appeal, contending the trial court erred in staying an enhancement to the assault charge for commission of a violent felony for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C)).[1] We conclude the California Supreme Court's decision in *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*) did not obligate the trial court to stay the enhancement because section 12022.53, subdivision (e)(2) expressly authorized imposition of enhancements under both section 186.22(b)(1)(C) and section 12022.53, subdivision (b).[2] We remand for resentencing and otherwise affirm.

PROCEDURAL BACKGROUND

An indictment filed on May 20, 2005, in Contra Costa County Superior Court charged defendant in counts 1 and 2 with assault on a peace officer with an assault weapon (§ 245, subd. (d)(3)), with enhancements for personal use of a firearm (§ 12022.53(b)), carrying a firearm in the commission of a street gang crime (§ 12021.5, subd. (a)), carrying a firearm with a detachable magazine in the commission of a street gang crime (§ 12021.5, subd. (b)), and commission of a violent felony for the benefit of a criminal street gang (§ 186.22(b)(1)(C)). Count 3 charged defendant with possession of heroin for sale (Health & Saf. Code, § 11351), with enhancements for being armed with a firearm (§ 12022, subd. (c)) and commission of a crime for the benefit of a criminal street gang (§ 186.22(b)(1)), and a probation ineligibility allegation for possession of more than 14.25 grams of heroin (§ 1203.07, subd. (a)(1)). Count 4 charged defendant with being a felon in possession of a firearm (§ 12021, subd. (a)(1)), with an enhancement for commission of a crime for the benefit of a criminal street gang (§ 186.22(b)(1)). Count 5 charged defendant with being a felon in possession of ammunition (§ 12316, subd.

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[1] All undesignated section references are to the Penal Code; further references to section 186.22, subdivision (b) will be styled as section 186.22(b).

[2] All references to section 12022.53, subdivision (b) will be styled as section 12022.53(b); and section 12022.53, subdivision (e) will be styled as section 12022.53(e).

(b)(1)), and count 7 charged him with participation in a criminal street gang (§ 186.22, subd. (a)). The indictment also included allegations relating to defendant's prior convictions.[3]

In June 2009, a jury found defendant not guilty on count 2, and guilty on counts 1, 3, 4, 5, and 7. The jury found true the enhancements alleged as to counts 1, 3, and 4.

In August 2009, the trial court sentenced defendant to a prison term of 30 years, including consecutive 10-year terms for both the section 12022.53(b) and the section 186.22(b)(1)(C) enhancements to count 1. Subsequently, the trial court resentenced defendant and imposed a new sentence of 29 years four months in state prison, including 10 years for the section 12022.53(b) enhancement; the court stayed the count 1 section 186.22(b)(1)(C) gang enhancement.

Defendant appealed and the People filed a cross-appeal as to the trial court's order staying the section 186.22(b)(1)(C) enhancement to count 1.

FACTUAL BACKGROUND

Around 10:00 a.m. on February 17, 2004, then Richmond Police Officer Amy Bublak was responding to a report of a burglary when she heard 13 to 15 gunshots coming from the 300 block of Sanford Avenue (Sanford). She drove her patrol car down Filbert Street (Filbert), in the direction of the gunfire, and observed a silver Volkswagen on Sanford moving toward her. As the Volkswagen entered the intersection at Sanford and Filbert, Bublak moved her patrol car forward causing the Volkswagen to stop with its passenger door in front of the patrol car's bumper. The passenger in the Volkswagen leaned out of the window and aimed a rifle at Bublak for about 10 seconds. At trial, Bublak identified defendant as the person who pointed the rifle at her.

The Volkswagen drove off and Bublak pursued it. The Volkswagen stopped at 221 Sanford, and the driver and defendant exited the car and fled on foot. Defendant turned, briefly pointed the rifle at Bublak a second time, and then continued fleeing.

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[3] The indictment also included charges against two codefendants, who are not parties to this appeal.

Multiple officers responded to the area to assist Bublak. Expended cartridges were recovered from in front of 319/321, 324, and 330 Sanford.[4] A lot with two residences is located at 319/321 Sanford; 321 Sanford is behind 319 Sanford. Bublak had recovered a set of keys from the ignition of the abandoned Volkswagen, and one of the keys fit the front door of 321 Sanford. Without obtaining a warrant, police officers entered 321 Sanford and found heroin, marijuana, drug packaging materials, and ammunition. The police also found photographs, and Bublak identified defendant in one of the photographs as the person who had pointed a rifle at her.

Two witnesses saw the shooting that preceded the incident involving Bublak. Christopher Barfield testified pursuant to a plea agreement. On February 17, 2004, Barfield was living at 412 Sanford. That afternoon, he saw defendant arguing with others over a drug sale. Defendant ran to a house across the street and emerged shortly thereafter holding an assault rifle (a police officer testified that Barfield told him defendant retrieved the weapon from 321 Sanford). Defendant fired at the men he was arguing with, and they returned fire with handguns. Defendant then fled up the street and encountered a police vehicle. He pointed the assault rifle at a female officer in the patrol car. Defendant then continued running on Sanford and met up with his brother, who was driving a Volkswagen.

The second witness to the shooting, Cal Harris, lived across the street from 319/321 Sanford. On February 17, 2004, he was standing at his front door when he saw a man shooting a gun directly across the street from his house. He could not identify the man. In an earlier statement to the police, Harris said he had seen the shooter go into 321 Sanford, apparently before the shooting occurred. At trial, Harris testified the shooter entered a blue, full-sized car and drove off. In his earlier statement to the police, Harris said the man ran down the street after the shooting.

Cynthia Peters, a confidential informant for the police, was at a construction jobsite in February 2004 when she heard gunfire. Defendant ran by her holding an

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[4] The crime scene investigator who testified at trial apparently misspoke and referred to 319/321 Sanford as 313/321 Sanford.

assault rifle. Peters knew defendant because she had purchased heroin from him about 50 times. On one occasion she purchased drugs from him inside 321 Sanford.

Inspector Shawn Pate of the Contra Costa County District Attorney's Office testified as an expert on Project Trojans. Project Trojans is a criminal street gang based in a 13-block area of North Richmond. Its primary purpose is the sale of narcotics, including heroin. There are several Project Trojans gang subsets. The subsets have independent narcotics sales operations, and a member may not sell narcotics outside the geographic boundary of his or her subset. Members of a subset will attack outsiders who attempt to sell drugs in their territory. The Yard is a subset of Project Trojans involved primarily in heroin sales. The Yard's "focal point" is 330 Sanford.

Pate opined that defendant and his brother, Ronnie Thrower, were members of Project Trojans on February 17, 2004, based on the assumed facts, among others, that they ran a significant heroin sales operation from a house in the 300 block of Sanford and photographs taken from 321 Sanford depicted defendant with persons flashing Project Trojans gang signs.

Pate also opined, based on Barfield's observations, that the shooting on February 17, 2004, involved a dispute between defendant and another person over the sale of narcotics to a customer. According to Pate, defendant's use of violence would benefit Project Trojans by maintaining order in the gang's narcotics sales operation. Defendant's act of pointing an assault rifle at Bublak would benefit the gang by holding her at bay, thereby allowing defendant and other members of the gang an opportunity to escape and hide or destroy evidence. Defendant's violent conduct would also benefit the gang by instilling fear in the community about cooperating with the police.

Defense Case

Barfield's mother denied that Barfield lived in her home at 412 Sanford in February 2004 and denied that he was present there on the day of the shooting. Barfield's brother also testified that Barfield was not at 412 Sanford on February 17, 2004.

Defendant's mother testified that 321 Sanford was rented for her, but she discovered that her oldest son, Thrower, was selling heroin from the residence. Defendant visited her at the 321 Sanford residence, but he was not involved in Thrower's drug sales. She moved to Fresno and was not living at the residence on February 17, 2004.

DISCUSSION

I. *The Trial Court Did Not Err in Denying Defendant's Motion to Suppress*

As explained above, following the alleged assault on Bublak, police officers made a warrantless entry into 321 Sanford, using a key retrieved from the abandoned Volkswagon. Once inside, the police observed narcotics, narcotics paraphernalia, and ammunition. Richmond Police Detective Mitch Peixoto included those observations in an affidavit in support of a search warrant for the residence. The magistrate issued the warrant. Defendant moved to suppress all evidence recovered from 321 Sanford. He contended the warrantless entry was unlawful, and issuance of the warrant was based on the police officers' observations during that illegal search. Although the trial court found no exigency justified the warrantless entry, it concluded the warrant affidavit, excised of the fruits of the unlawful entry, still contained probable cause for issuance of the search warrant, and the police would have sought the warrant even without the information gained during the illegal entry. The court denied defendant's motion to suppress under the independent source doctrine.

" 'The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. . . . [I]t teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position tha[n] they would have been in if no police error or misconduct had occurred. [Citations.] When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.' [Citation.]" (*People v. Weiss* (1999) 20 Cal.4th 1073, 1077-1078 (*Weiss*).) Where the affidavit supporting a

search warrant contains both information obtained by unlawful conduct as well as untainted information, a two prong test applies to justify application of the independent source doctrine. (*Id.* at pp. 1078, 1082.) First, the affidavit, *excised of any illegally-obtained information*, must be sufficient to establish probable cause. (*Id.* at p. 1082.) Second, the evidence must support a finding that "the police subjectively would have sought the warrant even without the illegal conduct." (*Id.* at p. 1079; see also *id.* at p. 1082 [" 'if the application contains probable cause apart from the improper information, then the warrant is lawful and the independent source doctrine applies, provided that the officers were not prompted to obtain the warrant by what they observed during the initial entry' "].) Defendant agrees that the test articulated in *Weiss* is the appropriate analysis for applying the independent source doctrine in the circumstances of this case.

In reviewing the trial court's denial of defendant's motion to suppress evidence, we defer to the trial court's factual determinations if supported by substantial evidence. (*People v. Woods* (1999) 21 Cal.4th 668, 673.) We then independently determine whether, under the facts as found by the trial court, the challenged police action was lawful. (*Id.* at pp. 673-674.) Although we normally accord deference to a magistrate's determination of probable cause to issue a warrant, we accord no such deference when police officers include tainted information in a warrant application. (*Weiss*, *supra*, 20 Cal.4th at pp. 1082-1083.) Accordingly, we determine de novo whether the search warrant affidavit is sufficient to establish probable cause to search 321 Sanford absent the tainted information obtained by the illegal entry into that residence.

A. *It Is Proper to Consider the Information the Police Obtained by Testing the Key Retrieved From the Volkswagen in the Front Door Lock*

Defendant contends that, in assessing the existence of probable cause for the warrant absent the fruit of the police's illegal conduct, this court cannot consider the fact that the key retrieved from the Volkswagon fit the front door lock at 321 Sanford, because the act of inserting the key was itself illegal. He argues that without the evidence of defendant's connection to the residence, obtained by testing the key in the lock,

probable cause was lacking and, therefore, the independent source doctrine is inapplicable.

At the outset, we reject the proposition that, because the officers proceeded to enter the residence after turning the key, it is improper to consider whether the act of inserting and turning the key, alone, violated the Fourth Amendment.[5] For that proposition, defendant cites only *United States v. Portillo-Reyes* (9th Cir. 1975) 529 F.2d 844 (*Portillo-Reyes*), in which the court stated, without any analysis or citation to authority, "the insertion of the key in the door of the [vehicle], to see if it fit constituted the beginning of the search." (*Id.* at p. 848; but see *U.S. v. Grandstaff* (9th Cir. 1987) 813 F.2d 1353, 1358, fn. 5 (*Grandstaff*) [*Portillo-Reyes* "has been undermined by intervening decisions of the [United States] Supreme Court and this court"].)[6] We agree with the reasoning of *U.S. v. Moses* (4th Cir. 2008) 540 F.3d 263, 272 (*Moses*) on the issue: "While the acts of *inserting the key* into the lock and *entering the house* were part of a continuous activity, the information obtained from inserting the key into the lock was nonetheless discrete from the information obtained from the illegal entry because the use of the key in the lock need not have led to entry of the residence at all. The officers could simply have tried the key and then left to obtain a warrant. If they improperly entered the residence (which the district court found they did), anything gleaned from the entry would obviously have to be excluded from the probable cause analysis (which it was)." Accordingly, whether this court can properly rely on the information gained from

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5 The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

6 Defendant's citation to *People v. Hughston* (2008) 168 Cal.App.4th 1062 is inapposite. In that case, the police entered an area covered by tarps and *then* unlocked and searched the defendant's vehicle, which was *within* the area covered by the tarps. (*Id.* at p. 1067.) Because the defendant had a reasonable expectation of privacy within the area covered by tarps, the warrantless entry violated his rights under the Fourth Amendment. (*Hughston*, at pp. 1070-1071.)

inserting and turning the key, in determining whether the warrant is supported by probable cause under the independent source doctrine, depends on whether inserting and turning the key by itself violated the Fourth Amendment.

On that issue, defendant contends that testing the key in the lock was a search that could only be performed pursuant to a warrant. It is a close question whether inserting and turning the key constituted a search. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." (*United States v. Jacobsen* (1984) 466 U.S. 109, 113, fn. omitted.) The court in *U.S. v. Concepcion* (7th Cir. 1991) 942 F.2d 1170, 1172 (*Concepcion*), concluded that testing a key in an apartment door lock was a search, reasoning: "A keyhole contains *information*—information about who has access to the space beyond. As the [F]ourth [A]mendment protects private information rather than formal definitions of property, [citations], the lock is a potentially protected zone. And as the tumbler of a lock is not accessible to strangers . . . , the use of an instrument to examine its workings (that is, a key) looks a lot like a search. . . . [¶] Because the agents obtain information from the inside of the lock, which is both used frequently by the owner and not open to public view, it seems irresistible that inserting and turning the key is a 'search'." (See also *Arizona v. Hicks* (1987) 480 U.S. 321, 324-325 [officer's act of turning over a turntable to read its serial number constituted a search]; *Portillo-Reyes*, *supra*, 529 F.2d at p. 848.)

On the other hand, other courts have concluded that defendants had no reasonable expectation of privacy in external, publicly-accessible locks and/or that insertions of keys into such locks were not searches. The court in *U.S. v. Salgado* (6th Cir. 2001) 250 F.3d 438, 456 (*Salgado*), held that "the mere insertion of a key into a lock, by an officer who lawfully possesses the key and is in a location where he has a right to be, to determine whether the key operates the lock, is not a search." The court emphasized that the defendant's apartment door was accessible to anyone passing through a hallway open to the public, and the function of the apartment door lock was to protect and keep private the contents of the apartment itself. (*Id.* at pp. 456-457; see also *U.S. v. Hawkins* (1st Cir. 1998) 139 F.3d 29, 33, fn. 1 ["insertion of a key into the lock of a storage compartment

for the purpose of identifying ownership does not constitute a search"]; *United States v. Lyons* (1st Cir.1990) 898 F.2d 210, 212-213 (*Lyons*) [insertion of key into padlock of storage unit for purpose of identifying ownership did not infringe on any reasonable expectation of privacy]; *United States v. DeBardeleben* (6th Cir. 1984) 740 F.2d 440, 444 (*DeBardeleben*) [the defendant had no "reasonable expectation of privacy in the identity of his vehicle"]; *Mathis v. State* (Alaska 1989) 778 P.2d 1161, 1165 ["Insertion of the key did not constitute a search of the locker, but merely an identification of it as belonging to the [defendants]."]; *People v. Carroll* (1973) 12 Ill.App.3d 869 [299 N.E.2d 134, 139] [insertion and turning of key not a search].)

Ultimately, we need not determine whether testing the key in the lock was a search, because, even assuming it was a search, the search was not unreasonable.[7] "As a general rule, the question of whether a particular practice is unreasonable, and thus violates the Fourth Amendment, ' "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ' (*Skinner v. Railway Labor Executives' Assn.* [(1989) 489 U.S. 602, 619], quoting from *Delaware v. Prouse* (1979) 440 U.S. 648, 654, and *United States v. Martinez-Fuerte* (1976) 428 U.S. 543.) 'Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' (*Bell v. Wolfish* (1979) 441 U.S. 520, 559.)" (*People v. King* (2000) 82 Cal.App.4th 1363, 1371; see also *Concepcion*, *supra*, 942 F.2d at pp. 1172-1173.) Thus, "even if the challenged action triggers the protections of the Fourth Amendment, a 'minimally intrusive' action 'may be reasonable in view of the

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[7] As other courts have pointed out, where a purported search is only minimally intrusive, it can be difficult to draw a clear line between acts that do not constitute searches and those that constitute searches that are not unreasonable under the Fourth Amendment. (*Grandstaff, supra*, 813 F.2d at p. 1358, fn. 5; *United States v. White* (9th Cir. 1985) 766 F.2d 1328, 1331-1332.) Where the intrusion is minimal and justifiable under the circumstances, the distinction is not critical. (*Grandstaff*, at p. 1358, fn. 5; *White*, at p. 1332; see also *Lyons, supra,* 898 F.2d 210 at pp. 212-213.)

government interests it serves.' " (*U.S. v. $109,179 in U.S. Currency* (9th Cir. 2000) 228 F.3d 1080, 1087, fn. omitted.)

The court in *Concepcion* focused on the minimal degree of intrusion in concluding that officers did not need a warrant or probable cause to test a key found on the defendant in an apartment door. (*Concepcion*, *supra*, 942 F.2d at pp. 1172-1173.) The court reasoned that the act only minimally invaded the defendant's "interest in security of information" because the police could have verified his connection to the apartment in other ways. (*Id.* at p. 1173.) In other words, because the information ascertainable by testing the key was not genuinely private information—and, of course, the police were not in a private area at the time of the search—the intrusion was minimal. Ultimately, the court held, "Although the owner of a lock has a privacy interest in a keyhole—enough to make the inspection of that lock a 'search'—the privacy interest is so small that the officers do not need probable cause to inspect it. Because agents are entitled to learn a suspect's address without probable cause, the use of the key to accomplish that objective did not violate the [F]ourth [A]mendment." (*Ibid*.; see also 1 LaFave, Search and Seizure (4th ed. 2004) § 2.3(b), pp. 571-572 [favorably describing *Concepcion* decision].) Similarly, the court in *Salgado*, *supra*, 250 F.3d at pages 456-457, emphasized the accessibility of external locks and that the function of locks is to protect privacy *inside* the residence. (See also *Lyons*, *supra*, 898 F.2d at p. 213 [the contents of a storage unit were "the object of the lessee's privacy expectations, not the padlock"]; *U.S. v. $109,179 in U.S. Currency*, *supra*, 228 F.3d at p. 1088 [the insertion of a key into a car door lock provided the police information regarding the defendant's access to the car without giving the police any information about the vehicle's contents];[8] *Commonwealth v.*

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[8] Defendant points out that several of the cases relied upon by the People involve automobiles, and persons have a diminished expectation of privacy in their automobiles. (See, e.g., *U.S. v. $109,179 in U.S. Currency*, *supra*, 228 F.3d at p. 1088.) However, in those cases the diminished expectation of privacy in automobiles was only one of several considerations, and the reasoning we rely on also applies outside that context. (See *Salgado*, *supra*, 250 F.3d at p. 457.) Moreover, many of the decisions cited herein do not involve automobiles.

Alvarez (1996) 422 Mass. 198, 210 [661 N.E.2d 1293, 1302] (*Alvarez*) ["Given the nature of the lock mechanism, which was accessible from a common hallway, any expectation of privacy in the contents of the lock tumbler was minimal."].)

The other critical consideration is the justification for the intrusion. In the present case, testing the key in the lock "served the discrete investigative purpose of confirming that" defendant had access to 321 Sanford. (*Moses, supra,* 540 F.3d at p. 272; see also *Lyons, supra*, 898 F.2d at p. 213 ["the insertion of the key into the padlock was merely a means of identifying a storage unit to which [the defendant] had access"]; *DeBardeleben, supra*, 740 F.2d at p. 443 ["There was therefore a legitimate reason to insert the keys . . . to see whether they fit in order to identify that automobile as belonging to [the] defendant for purposes of obtaining a search warrant." (Fn. omitted.)].) Moreover, regardless of whether the police had probable cause to believe that there was evidence inside the residence without trying the key in the lock, the police certainly reasonably suspected the residence was connected to the crime under investigation. (*United States v. Martinez-Fuerte* (1976) 428 U.S. 543, 560-561 ["to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure"]; *DeBardeleben*, at p. 445 [insertion of key was supported "by a 'founded suspicion' and by the legitimate crime investigation"]; *Alvarez, supra*, 422 Mass. at p. 210 [661 N.E.2d at p. 1302] ["for such an unobtrusive search, the police needed only a founded or reasonable suspicion to insert the key"]; *Cole v. State* (Tenn.Crim.App. 1993) 858 S.W.2d 915, 917 ["the privacy interests in an exterior lock are so inconsequential that the intrusion requires neither a search warrant nor probable cause, only a founded suspicion"].)

In sum, assuming the challenged key insertion in the present case was a search, the search was based on reasonable suspicion and served legitimate investigative purposes, without disclosing anything about the contents of the house or any information of a

private nature.[9] Based on the above reasoning and authorities, we conclude that testing the key in the front door lock of 321 Sanford was not, by itself, an unreasonable search under the Fourth Amendment, even though the act was not authorized by a warrant and even if the police did not have probable cause to believe there was evidence in the house before inserting the key in the lock. Accordingly, the information the police gained by testing the key in the lock is properly considered by this court in determining whether the warrant issued after the illegal entry was supported by probable cause.

B. *Absent the Evidence Obtained by the Illegal Entry, the Search Warrant Affidavit Still Establishes Probable Cause for a Warrant*[*]

Excising all of the information obtained due to the illegal entry into 321 Sanford, the warrant affidavit included at least the following facts: (1) while on patrol, Bublak heard multiple gunshots and, as she drove in the direction of the shots, observed a silver Volkswagen on Sanford and saw the passenger door close and the car start to move; (2) Bublak attempted to block the Volkswagen at the intersection of Sanford and Filbert, and the passenger of the Volkswagen pointed a rifle at her; (3) the Volkswagen continued down Sanford with Bublak in pursuit, until the driver and passenger abandoned the Volkswagen and fled on foot; (4) seven expended shell casings for a rifle were found in front of 321 Sanford and broken glass was found in front of 330 Sanford;[10] (5) an eyewitness reported that the shooter had arrived in a white Toyota, "walked to 321 Sanford . . . and out of [the witness's] view," emerged a short time later holding an assault rifle, and stood in front of 321 Sanford shooting the rifle across the street in the direction of 330 Sanford; and (6) a key retrieved from the abandoned Volkswagen

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[9] There is no indication in the record that defendant's connection to the residence was private information, concealed from public view. (See *Concepcion, supra,* 942 F.2d at p. 1173.)

[*] See footnote, *ante*, page 1.

[10] Testimony at the hearing on the motion to suppress clarified that only five casings were in front of 319/321 Sanford.

unlocked the door to 321 Sanford.[11] The affidavit also stated "that 321 Sanford . . . is to the rear of 319 Sanford . . . . 319 Sanford . . . had a 'For Rent' sign in the front window of the residence and [it] appeared the residence was vacant. From the outside of 321 Sanford . . . it appeared the residence was being occupied."

That information clearly established a " 'fair probability' " that evidence of criminal activity would be found at 321 Sanford. (*People v. Carrington* (2009) 47 Cal.4th 145, 161.) In particular, the evidence at least established a fair probability that the person who pointed the assault rifle at Bublak had obtained the rifle from 321 Sanford, because a witness observed the shooter obtain a rifle from the area of that residence and the key retrieved from the Volkswagen fit the lock at 321 Sanford. Defendant only weakly disputes that probable cause exists if this court considers the information obtained from trying the key in the door of 321 Sanford. Defendant's primary argument is that most of the information cited in the affidavit was "common to all the houses on the block" and did not provide a particularized basis to search 321 Sanford. He points out that the affidavit did not indicate that the eyewitness saw the shooter *enter* 321 Sanford; the shooter could have obtained the weapon from the side, back, or inside of 319 Sanford. The information that the key fit the lock on 321 Sanford bridged any gap by specifically linking defendant to that particular address. Defendant also points out that the key apparently belonged to the driver of the Volkswagen rather than to defendant. However, given defendant's clear association with the driver, the fact that the driver was in possession of a key to 321 Sanford was sufficient to connect defendant to the residence as well.

We conclude that the search warrant affidavit, excised of the illegally-obtained information, is sufficient to establish probable cause for issuance of a warrant to search

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11 The affidavit also included information obtained from a confidential informant. Defendant contends that information should not be considered because the affidavit did not address the reliability of the informant. We need not decide whether it is proper to consider the information from the informant, because that information did not connect defendant with 321 Sanford and the other information in the affidavit is sufficient to establish probable cause.

321 Sanford. Accordingly, the first prong of the *Weiss* test has been satisfied. (*Weiss, supra,* 20 Cal.App.4th at p. 1082.)

C. *Substantial Evidence Supports the Trial Court's Finding That the Police Would Have Sought a Warrant*[*]

Defendant also contests the second prong of the *Weiss* test, whether the police would have sought a warrant to search 321 Sanford absent the illegal entry. (*Weiss, supra,* 20 Cal.4th at p. 1079.) The trial court found: "[A]ny officer would have sought the issuance of a warrant for entry into the house in question without the information that was gathered during the entry or original entry, given the circumstances I have already described, the seriousness of the offense, fact that officer had been assaulted, meaning . . . that an assault weapon had been pointed at her from the very close distance on two separate occasions . . . ."

Defendant argues the trial court misunderstood the law; he asserts the court merely found that the police would have continued their investigation and eventually gathered information that would have caused them to seek a search warrant for 321 Sanford. This mischaracterizes the court's ruling, which does not refer to a further investigation disclosing additional information. Instead, we understand the court's reasoning to be that, given the gravity of the crime, the officers would have used all legal means available to them to investigate it, including securing a search warrant for 321 Sanford based on the evidence connecting the shooter to that address. That reasoning is sound.

Defendant also argues the court's finding is not supported by the evidence because the testimony relied upon by the court was ambiguous. At the hearing on defendant's motion to suppress, Peixoto testified that he had made arrests for drug dealing in front of 319 Sanford (which was also in front of 321 Sanford). He testified he made the warrantless entry into 321 Sanford to check for persons who might have been wounded during the shootout. The prosecutor asked him, "And what was the purpose behind having . . . Bublak come in and take a look at the photos [found inside 321 Sanford]?" In response, Peixoto stated, "Well, obviously, I knew prior to doing the first search that

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[*] See footnote, *ante*, page 1.

based on everything up to that point, in my opinion, I had enough to write a search warrant and a judge would have signed it."[12] Defendant argues this testimony is inadequate to support the trial court's finding because Peixoto may have been referring to Bublak's review of the photographs as the "first search." We fail to perceive any ambiguity in Peixoto's testimony; in context, it is clear he was referring to his own first search, which was the initial warrantless entry. Because Peixoto's testimony demonstrates he knew he had probable cause to obtain a warrant before entering the house, and was already contemplating the possibility of obtaining a warrant at that point, it provides substantial evidence for the trial court's finding that he would have sought a search warrant even without the information he discovered during the illegal entry. Having linked defendant to 321 Sanford through the key found in the Volkswagen, there is little reason to conclude the police would not have sought a warrant in the circumstances of this case.

Because both prongs of the *Weiss* test are satisfied, the independent source doctrine applies, and the trial court properly denied defendant's motion to suppress.

II. *Brandishing Is Not a Lesser Included Offense to Assault with a Firearm*[*]

The information charged defendant with committing assault on a peace officer with an assault weapon (§ 245, subd. (d)(3)). Defendant contends the trial court erred in failing to sua sponte instruct the jury on the lesser offense of brandishing a firearm in the presence of a peace officer (§ 417, subd. (c)).[13]

"The definition of a lesser necessarily included offense is technical and relatively clear. Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the

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[12] In his reply brief, defendant concedes that this court may consider this testimony, even though the trial court sustained the defense attorney's objection to this testimony as to "that part of the answer that reflects what the officer knew or understood." (See § 1252.) Peixoto's subjective beliefs were relevant to application of the independent source doctrine. (*Weiss*, *supra*, 20 Cal.4th at p. 1079.)

[*] See footnote, *ante*, page 1.

[13] Defendant does not dispute substantial evidence supports his conviction for assault.

accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117-118, fn. omitted.) "The determination of whether an offense is lesser included is made from either the wording of the information or the statutory language, and not from the evidence adduced at trial. [Citations.]" (*People v. Steele* (2000) 83 Cal.App.4th 212, 217-218 (*Steele*).) A trial court "must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser. [Citations.]" (*Birks*, at p. 118; see also *Steele*, at p. 217.)

Defendant argues that brandishing a firearm is a lesser included offense of assault with a firearm.[14] California courts have repeatedly rejected that contention: "Even though most assaults with a firearm undoubtedly include conduct fitting into the definition of brandishing, it has long been held that brandishing is a lesser related offense, rather than lesser included. [Citations.] The reason of course, is that it is theoretically possible to assault someone with a firearm without exhibiting the firearm in a rude, angry or threatening manner, e.g., firing or pointing it from concealment, or behind the victim's back. [Citation.]" (*Steele, supra,* 83 Cal.App.4th at p. 218 and cases cited therein, fn. omitted.) We agree with these cases.[15]

Defendant argues that this court should follow statements in two California Supreme Court decisions which appear to suggest that brandishing a firearm is a lesser included offense to assault with a firearm, *People v. Coffey* (1967) 67 Cal.2d 204 and *People v. Wilson* (1967) 66 Cal.2d 749. The *Steele* court rejected the same contention after a lengthy and thoughtful analysis. (*Steele, supra,* 83 Cal.App.4th at pp. 219-221.) We agree with *Steele*'s analysis of the significance of the decisions in *Coffey* and *Wilson*.

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14 No party argues that the fact that the present case relates to particular statutory offenses involving peace officers affects the analysis.

15 Because we conclude that one may commit an assault with a firearm without committing a brandishing, we need not address the question of whether section 417 requires that the victim be aware of the brandishing.

The trial court did not err in failing to sua sponte instruct the jury on the offense of brandishing a firearm in the presence of a peace officer.

III. *The Gang Enhancement Findings Are Supported by Substantial Evidence*[*]

Defendant challenges the sufficiency of the evidence supporting the jury's finding that the count 1 assault was committed for the benefit of a criminal street gang. (§ 186.22(b)(1)(C).) He also challenges the findings on two of the count 1 firearm enhancements, for carrying a firearm and for carrying a firearm with a detachable magazine in the commission of a street gang crime (§ 12021.5, subds. (a) & (b)). As to those enhancements, he contends there is insufficient evidence that the assault was a street gang crime.[16]

In considering a challenge to the sufficiency of the evidence, this court reviews the record " ' "in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" ' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) " 'We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.] Thus, we presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.' [Citation.]" (*Ibid.*)

Section 186.22(b)(1), provides for enhanced punishment for persons "convicted of a felony 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." Defendant contends the evidence was insufficient both to show that he committed the assault "for the benefit of, at the direction of, or in association with any criminal street gang" and that, in committing the assault, he had the

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[*] See footnote, *ante*, page 1.

[16] The trial court stayed these three gang-related enhancements to count 1. The People's cross-appeal, addressed later in this decision, challenges the stay of the section 186.22(b)(1)(C) enhancement.

"specific intent to promote, further, or assist in . . . criminal conduct by gang members." Defendant does not dispute there was sufficient evidence that he was a member of Project Trojans.

As to the "for the benefit of . . . any criminal street gang" prong, gang expert Pate opined that defendant and his brother were operating a heroin stash house out of 321 Sanford for the benefit of Project Trojans. He further opined that defendant had fired his rifle during a dispute over the sale of narcotics to a customer, and that the use of violence benefited Project Trojans by maintaining order in the narcotics sales operation. Pate further opined that, by pointing an assault rifle at Bublak, defendant benefited the gang by holding her at bay, thereby allowing defendant and other members of the gang an opportunity to escape and hide or destroy evidence.[17]

Defendant argues that Pate's testimony was insufficient because there was no evidence that other gang members had been present and needed time to escape or that anyone had tried to remove evidence from the area or from 321 Sanford. However, the jury could reasonably infer the assault was intended to facilitate the escape of defendant and his brother (a fellow gang member), and the escape benefited Project Trojans by decreasing the likelihood the narcotics operation at 321 Sanford would be discovered. (See *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1261 [where there is " 'an underlying evidentiary foundation,' " an expert's testimony is sufficient to support a finding that an offense was gang-related].) That the effectiveness of the escape was ultimately undermined because the keys to 321 Sanford were left behind does not change the reasonableness of the inference that the assault was for the benefit of the gang.

As to the requirement that the assault was committed with the "specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22(b)(1)), defendant argues the statute requires proof that he intended to assist criminal conduct by gang members *other* than the charged offense, and that the record here fails to support such an inference. The California Supreme Court rejected that contention in *People v.*

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[17] Pate also testified that defendant's violent conduct towards Bublak would benefit Project Trojans by instilling fear in the community about cooperating with the police.

Albillar (2010) 51 Cal.4th 47, 66, concluding there need not be proof of specific intent to promote criminal conduct by gang members " 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." Defendant disputes the applicability of that holding in *Albillar* in the circumstances of this case; we need not resolve that dispute, because the record, as described previously, provides substantial evidence that the assault was committed with the specific intent to assist Project Trojans' narcotics sales operation.

IV. *The Trial Court Erred in Staying the Section 186.22(b)(1)(C) Gang Enhancement*

In their cross-appeal, the People contend the trial court erred in staying the 10-year section 186.22(b)(1)(C) gang enhancement to count 1. The issue "involves the interplay between two highly complex statutes: section 186.22, which targets participants in criminal street gangs; and section 12022.53 . . . , which 'prescribes substantial sentence enhancements for using a firearm in the commission of certain listed felonies' [citation]." (*People v. Brookfield* (2009) 47 Cal.4th 583, 588 (*Brookfield*).)

"Where, as here, the issue presented is one of statutory construction, our fundamental task is 'to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.' [Citations.] We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. [Citation.] We give the language its usual and ordinary meaning, and '[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs.' [Citation.] If, however, the statutory language is ambiguous, 'we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.' [Citation.] Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. [Citations.] Any interpretation that would lead to absurd consequences is to be avoided. [Citation.]" (*Allen v. Sully–Miller Contracting Co.* (2002) 28 Cal.4th 222, 227.)

A. *The Procedural Background and the* Rodriguez *Decision*

The section 186.22(b)(1)(C) enhancement applies to a violent felony committed to benefit a criminal street gang.[18] (See *Brookfield*, *supra*, 47 Cal.4th at p. 589.) Here, defendant's crime was a violent felony because the jury found true the section 12022.53(b) enhancement, personal use of a firearm in a specified offense.[19] (§ 667.5, subd. (c)(22).) Assault with a firearm on a peace officer in violation of section 245, subdivision (d) is one of the specified offenses. (§ 12022.53, subd. (a)(7).) On August 14, 2009, the trial court sentenced defendant to a prison term of 30 years, including consecutive terms of 10 years for both the section 12022.53(b) and section 186.22(b)(1)(C) enhancements. On August 31, the court vacated the sentence in light of the California Supreme Court's then new decision in *Rodriguez*, *supra*, 47 Cal.4th 501. The court interpreted *Rodriguez* as prohibiting imposition of both the section 12022.53(b) and the section 186.22(b)(1)(C) enhancements. The trial court resentenced defendant and imposed a prison term of 29 years four months, including a 10-year enhancement on count 1 under section 12022.53(b); the court stayed the 10-year enhancement under 186.22(b)(1)(C).

In *Rodriguez*, the defendant fired several shots at three individuals associated with a rival gang. (*Rodriguez*, *supra*, 47 Cal.4th at p. 504.) The defendant was convicted of three counts of assault with a firearm (§ 245, subd. (a)(2)), and the jury also found that he

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18 Section 186.22(b)(1)(C) provides in relevant part: "[A]ny person who is convicted of a felony 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

19 Section 12022.53(b) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply."

personally used a firearm (§ 12022.5, subd. (a))[20] and committed a violent felony to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). (*Rodriguez*, at pp. 504-505.) With respect to each offense, the trial court imposed both the firearm enhancement and the gang enhancement. (*Id.* at pp. 504, 506.) The California Supreme Court held that this violated section 1170.1, subdivision (f) (hereafter section 1170.(f)), which provides in pertinent part: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. . . ." The court reasoned that both the firearm enhancement and the gang enhancement punished the defendant for using a firearm. (*Rodriguez*, at pp. 508-509.) It was clear that the section 12022.5 enhancements punished the defendant for using a firearm during the commission of the assaults. (*Rodriguez*, at p. 508.) And, as the court explained, so did the gang enhancements: "Here, defendant became eligible for this 10-year punishment *only* because he 'use[d] a firearm which use [was] charged and proved as provided in . . . Section 12022.5.' (§ 667.5, subd. (c)(8).) Thus, defendant's firearm use resulted in additional punishment not only under section 12022.5's subdivision (a) (providing for additional punishment for personal use of a firearm) but also under section 186.22's subdivision (b)(1)(C), for committing a violent felony as defined in section 667.5, subdivision (c)(8) (by personal use of a firearm) to benefit a criminal street gang." (*Rodriguez*, at p. 509.) Accordingly, the imposition and execution of both enhancements violated section 1170.1(f), and the court remanded the matter for resentencing. (*Rodriguez*, at p. 509.)

Similarly, here, a firearm enhancement was imposed under section 12022.53(b), because defendant personally used a firearm in committing a specified offense, assault with a firearm on a peace officer. And with respect to the gang enhancement, as the

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[20] Section 12022.5, subdivision (a) provides in relevant part: "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment . . . for 3, 4, or 10 years . . . ." (See *Rodriguez, supra*, 47 Cal.4th at p. 505.)

People concede, defendant became eligible for the section 186.22(b)(1)(C) enhancement because the assault constituted a "violation of section 12022.53," which made it qualify as a violent felony (§ 667.5, subd. (c)(22)). Thus, defendant's firearm use resulted in additional punishment under both section 12022.53(b) and section 186.22(b)(1)(C). This led the trial court to conclude that section 1170.1(f) obligated it to stay the section 186.22(b)(1)(C) enhancement.

B. *The Conflict Between Section 1170.1(f) and Section 12022.53, Subdivision (e)(2)*

The People argue the trial court erred in staying the section 186.22(b)(1)(C) enhancement because the Legislature intended for both enhancements to be imposed in circumstances where the defendant personally used a firearm in a specified felony. In particular, section 12022.53(e)(2) provides: "An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, *unless* the person personally used or personally discharged a firearm in the commission of the offense." (Italics added.) Section 12022.5, at issue in *Rodriguez*, contains no analogous provision. The California Supreme Court interpreted section 12022.53(e)(2) in *Brookfield*, *supra*, 47 Cal.4th 583. The court explained that section 12022.53(e) "explains how a trial court is to sentence a defendant in a case in which the provisions of sections 186.22 and 12022.53 *both* apply," and under section 12022.53(e)(2) "[a] defendant who *personally* uses or discharges a firearm in the commission of a gang-related offense is subject to *both* the increased punishment provided for in section 186.22 *and* the increased punishment provided for in section 12022.53." (*Brookfield*, at p. 590; see also *id.* at p. 593 ["offenders who personally used or discharged a firearm in committing a gang-related offense that is specified in section 12022.53 . . . are subject to *both* . . . the harsh enhancement provisions of 12022.53 *and* the gang-related sentence increases of section 186.22"]; *id.* at p. 594 ["a defendant who *personally* used or discharged a firearm in a gang-related felony specified in section 12022.53 will be subject to greater punishment for *both* gang participation under section

186.22 *and* firearm use under section 12022.53"]; *People v. Campos* (2011) 196 Cal.App.4th 438, 447; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282.)

Although defendant characterizes that aspect of *Brookfield*'s interpretation of section 12022.53(e)(2) as dicta, he does not dispute that *Brookfield*'s interpretation is a proper, plain language construction of the statute. The crux of defendant's argument is that section 1170.1(f), prohibiting the imposition of multiple firearm enhancements, should prevail because section 12022.53(e)(2) does not expressly state that both enhancements should be imposed notwithstanding section 1170.1(f).

We conclude that section 12022.53(e)(2), which expressly authorizes imposition of both enhancements in the circumstances of this case, is in conflict with section 1170.1(f), which directs that only one firearm enhancement be imposed. We reject defendant's contention that section 12022.53(e)(2)'s silence regarding section 1170.1(f) means there is no conflict, because the former provision clearly reflects the Legislature's intent that both the section 12022.53(b) and the section 186.22(b)(1)(C) enhancements be imposed where a defendant personally used a firearm. That intent cannot be accomplished if section 1170.1(f) prohibits such a sentence.

C. *Legislative History*

Because our ultimate goal is to effectuate the Legislature's intent, we consider whether any legislative history provides insight into the Legislature's intent as to which statute prevails. (*Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1064 (*Turner*).) Section 12022.53(e)(2) and section 1170.1(f) were enacted nearly simultaneously during the Legislature's 1997-1998 Regular Session. The Legislature approved Assembly Bill No. 4 (1997-1998 Reg. Sess.) (hereafter Assembly Bill No. 4), including section 12022.53(e)(2), on September 13, 1997, and the Governor approved it on September 25, 1997. (Stats., ch. 503, § 3, p. 3135.) The Legislature approved Senate Bill No. 721 (1997-1998 Reg. Sess.) (hereafter Senate Bill No. 721), including section 1170.1(f), on September 12, 1997, and the Governor approved it on October 7, 1977. (Stats. 1997, ch. 750, § 3, p. 5060.)

Neither bill's legislative history references the other, much less addresses the conflict between section 12022.53(e)(2) and section 1170.1(f). Assembly Bill No. 4 enacted section 12022.53, specifying a range of different enhancements for the use of firearms in the commission of offenses. In an uncodified preamble, the Legislature found and declared "that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime." (Stats. 1997, ch. 503, § 1, p. 3135; see also *People v. Palacios* (2007) 41 Cal.4th 720, 730 (*Palacios*).) Senate Bill No. 721 revised various aspects of the California sentencing scheme; it amended five sections, added a new section, and repealed another section. (Stats. 1997, ch. 750, p. 5060.) The final Senate Rules Committee analysis explained that the bill "would simplify California's consecutive sentencing scheme and remove several of the caps and limitations on imposing consecutive sentences." (Sen. Rules Com., Analysis of Sen. Bill No. 721 (1997-1998 Reg. Sess.) as amended Sept. 5, 1997, p. 2.) The Legislative Counsel's Digest makes clear that section 1170.1(f) did not, as relevant in the present case, make a substantive change in the law. The digest explained that under both existing law and Senate Bill No. 721, when multiple enhancements relating to firearms are applicable, only the greatest one shall be imposed. (Legis. Counsel's Dig., Sen. Bill No. 721 (1997-1998 Reg. Sess.) 6 Stats. 1997, Summary Dig., p. 336.) Based on our review, we conclude that, although section 12022.53(e)(2) and section 1170.1(f) are consistent with the goals of the larger enactments of which they are parts, the legislative history to the enactments provides no specific guidance regarding which provision should prevail in the event of a conflict like that in this case.[21]

D. *Section 12022.53(e)(2), the More Specific Statute, Prevails*

In resolving the statutory conflict, the most significant factor is that section 12022.53(e)(2) is the more specific of the two statutes, because it specifically addresses

[21] No party has cited any relevant legislative history specifically addressing the question of which statute should take precedence in the event of a conflict, and we have not discovered any. (*Turner, supra,* 193 Cal.App.4th at p. 1064.)

the two enhancements at issue in this case, whereas section 1170.1(f) relates to firearm enhancements generally. Indeed, section 12022.53, subdivision (f) actually provides that the section 12022.53 firearm enhancement shall not be imposed in addition to firearm enhancements under six specified other sections.[22] Accordingly, not only is section 12022.53(e)(2) more specific regarding the application of the two enhancements at issue in this case, but section 12022.53, subdivision (f) is more specific than section 1170.1(f) on the issue of when the section 12022.53 firearm enhancement may not be imposed in addition to other firearm enhancements.

"[W]here there is a conflict between a general statute and a more specific one, the specific statute controls and will be treated as an exception to the general statute. [Citation.] As courts have explained, ' "Unless repealed expressly or by necessary implication, a special statute dealing with a particular subject constitutes an exception so as to control and take precedence over a conflicting general statute on the same subject. [Citations.] This is the case regardless of whether the special provision is enacted before or after the general one [citation], and notwithstanding that the general provision, standing alone, would be broad enough to include the subject to which the more particular one relates." [Citation.]' [Citations.]" (*Turner, supra*, 193 Cal.App.4th at p. 1065; see also *Salazar v. Eastin* (1995) 9 Cal.4th 836, 857 ["To the extent a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statute must be read as an exception to the more general statute. [Citations.]"].) The decision in *People v. Powell* (1991) 230 Cal.App.3d 438, 441, employed that principle of statutory interpretation in concluding that "the specific legislative intent to impose additional punishment for certain drug offenses, expressly stated in [Health and Safety Code] section 11370.2, prevails over the general legislative

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[22] Section 12022.53, subdivision (f) provides in relevant part: "An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section."

intent against double punishment expressed in Penal Code section 654." (See also *Palacios, supra,* 41 Cal.4th at p. 730.)

Although the decision did not rely on the principle that the more specific statute prevails, *People v. Pieters* (1991) 52 Cal.3d 894 is also instructive. There, the Supreme Court found a three-year enhancement for cocaine offenses involving more than 10 pounds of the drug was impliedly excepted from a section of the Penal Code that limited prison terms to double the base term (former § 1170.1, subd. (g)). (*Pieters*, at p. 940.) The court explained that limiting the enhancement by the general rule would undermine the "manifest intention" of the Legislature that dealers in large quantities of drugs should be more severely punished. (*Id.* at p. 901.) The court concluded the omission of an express exception was an instance of "draft[er's] oversight," and characterized the new enhancement as an implied exception to the general sentencing law. (*Id.* at p. 902 & fn. 5; see also *People v. Jackson* (1985) 37 Cal.3d 826, 838 ["we read" former § 1170.1, subd. (g) "as if it contained an exception for enhancements for serious felonies pursuant to" former § 667], disapproved on other grounds in *People v. Guerrero* (1988) 44 Cal.3d 343, 348.) In the present case, treating section 12022.53(e)(2) as an exception to section 1170.1(f) is consistent with the Legislature's intent to impose enhanced punishment on those who *personally* use firearms in gang-related felonies. (*Brookfield*, *supra*, 47 Cal.4th at pp. 593-594; *Palacios*, *supra*, 41 Cal.4th at pp. 725, 733; *People v. Oates* (2004) 32 Cal.4th 1048, 1057-1058.)[23]

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[23] Enactment of Assembly Bill No. 4 indisputably was motivated by a desire to severely punish those who use firearms. An Assembly Committee on Public Safety analysis provided the following author's statement: "According to the author, 'For far too long, criminals have been using guns to prey on their victims. . . . The problem is not guns, the problem is gun violence . . . criminals misusing guns to terrorize, injure and kill their victims. . . . With the Three Strikes law, the voters sent a clear message to criminals. With the 10-20-life provisions of [Assembly Bill No. 4], we are sending another clear message: If you use a gun to commit a crime, you're going to jail, and you're staying there." (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 4 (1997-1998 Reg. Sess.) as amended Apr. 9, 1997, p. 2.)

In conclusion, because section 12022.53(e)(2) specifically authorizes the imposition of both the section 12022.53(b) and the section 186.22(b)(1)(C) enhancements in the circumstances of this case, the trial court erred in staying the section 186.22(b)(1)(C) enhancement under the reasoning of *Rodriguez*, *supra*, 47 Cal.4th 501, which did not consider statutory language analogous to section 12022.53(e)(2).[24] The proper remedy is to reverse the trial court's judgment and remand the matter for resentencing, which will give the trial court an opportunity to restructure its sentencing choices in light of our decision. (*Rodriguez*, at p. 509.)

V. *Defendant's Section 654 Claim is Without Merit*[*]

In a supplemental opening brief, defendant contends that, under section 654, he could not be punished for participation in a criminal street gang as well as for assaulting Bublak with a firearm and possessing heroin for sale. He contends the trial court erred in

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[24] This conclusion finds support in the *Palacios* decision. There, the California Supreme Court held that section 654 does not bar punishment for more than one firearm use enhancement under section 12022.53, subdivision (d). (*Palacios*, *supra*, 41 Cal.4th at p. 723.) The court reasoned that the Legislature's use of the words "[n]otwithstanding any other provision of law" in the section 12022.53, subdivision (d) enhancement made that section an express exception to the application of section 654, despite the absence of a specific reference to section 654. (*Palacios*, at pp. 729-730.) Arguably, the Legislature's use of the same phrase, "[n]otwithstanding any other provision of law," in section 12022.53(b) made that section an exception to the application of section 1170.1(f). However, we need not reach that issue in light of our conclusion that section 12022.53(e)(2) expressly authorized imposition of the two enhancements in the present case.

Defendant also contends that section 654 prohibits the imposition of both enhancements. We reject that contention for the same reasons that we reject defendant's argument based on section 1170.1(f). That is, even assuming that section 654 prohibits the imposition of both enhancements, we conclude that section 12022.53(e)(2), which is more specific, must be treated as an exception to section 654. (See *Rodriguez*, *supra*, 47 Cal.4th at p. 507.)

[*] See footnote, *ante*, page 1.

imposing a concurrent two-year sentence for the gang participation offense (§ 186.22, subd. (a)) (hereafter section 186.22(a)). We reject his contention.[25]

Section 654 "prohibits multiple punishment if the defendant commits more than one act in violation of different statutes when the acts comprise an indivisible course of conduct having a single intent and objective." (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)[26] "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.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*); see also *In re Jose P.*, at p. 469.) Whether a defendant entertained multiple criminal objectives presents a question of fact for the trial court, and its findings, express or implied, will be upheld on appeal if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466 (*Herrera*).)

There is a split of authority among the Courts of Appeal regarding the proper application of section 654 in the context of sentencing for the offense of active participation in a criminal street gang (§ 186.22(a)) and one or more other felonies committed within the same timeframe. The issue arises from the fact that "[p]articipation in felonious conduct in association with, or for the benefit of a gang is one of the elements necessary to prove the substantive gang crime described by section 186.22(a)." (*In re Jose P., supra*, 106 Cal.App.4th at p. 469.)[27] The question is whether it violates

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[25] This issue is presently before the Supreme Court in *People v. Mesa* (2010) 186 Cal.App.4th 773, review granted October 27, 2010, S185688.

[26] Section 654, subdivision (a) states, in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

[27] Section 186.22(a) states: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for

section 654 to punish a defendant for both the charged offense or offenses as well as under section 186.22(a), where the charged offense or offenses constitute the felonious conduct required to support the section 186.22(a) charge.

Defendant relies on a line of cases, exemplified by *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*), that conclude section 654 bars such multiple punishment. In *Sanchez*, the defendant and an accomplice robbed a pizza restaurant. (*Sanchez*, at p. 1302.) The defendant was convicted of two robberies and active participation in a criminal street gang. In concluding that section 654 barred his punishment for both crimes, the court stated: "the underlying robberies were the act that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation. Accordingly, it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies." (*Sanchez*, at p. 1315; see also *People v. Vu* (2006) 143 Cal.App.4th 1009, 1032-1034.)

The People rely on another line of cases, beginning with *Herrera*, *supra*, 70 Cal.App.4th 1456, upholding multiple punishment for active gang participation and for the underlying felony or felonies. In *Herrera*, the defendant was charged with a course of criminal conduct involving two gang-related, drive-by shootings in which two people were injured. He was convicted of numerous crimes, including two counts of attempted murder and one count of active participation in a criminal street gang. (*Id.* at pp. 1461, 1467.) *Herrera* held that, for purposes of section 654, the defendant's conviction for gang participation was divisible from his two attempted murder convictions because the gang participation offense required "a separate intent and objective from the underlying felony committed on behalf of the gang." (*Herrera*, at p. 1468.) The court reasoned that section 186.22(a) "is a substantive offense whose gravamen is the *participation in the gang itself*." (*Herrera*, at p. 1467, fn. omitted.) To violate that statute, the defendant "must necessarily have the intent and objective to actively participate in a criminal street gang," but need not "have the intent to personally commit the particular felony." (*Ibid.*;

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a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

see also *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935 (*Ferraez*); *In re Jose P.*, *supra*, 106 Cal.App.4th at pp. 468-471.) The *Herrera* court believed that to conclude section 654 was applicable "would render section [186.22(a)] a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang." (*Herrera*, at p. 1468.)

We need not decide here whether we agree with *Hererra*'s apparent conclusion that, in every case, a defendant's intent to participate in a gang is independent from his intent to commit a specific crime to benefit the gang. We need not reach that issue because substantial evidence supports the trial court's implied finding that defendant harbored " 'multiple criminal objectives' " (*Harrison*, *supra*, 48 Cal.3d at p. 335) in committing the charged assault and narcotics offenses. On the one hand, as the jury concluded, defendant committed the assault on Bublak and possessed heroin for sale for the benefit of Project Trojans. On the other hand, the trial court could reasonably have inferred from the evidence that he also had the objective of benefiting himself in committing those offenses. In particular, it is clear the assault on Bublak benefited defendant personally by enabling him to avoid immediate arrest, and it was reasonable to infer that he personally profited by selling narcotics.**[28]**

While defendant may have pursued the objectives of benefiting himself and benefiting Project Trojans "simultaneously, they were nonetheless independent of each other. Consequently, the trial court was not required to stay defendant's sentence for the gang crime under . . . section 654. [Citation.]" (*Ferraez*, *supra*, 112 Cal.App.4th at p.

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28 The parties and trial court below assumed defendant harbored at least a personal motive in committing the charged offenses. In fact, defense counsel moved for judgment notwithstanding the verdict or a new trial on the basis that there was insufficient evidence that defendant committed the offenses to benefit Project Trojans as well. In denying defendant's motion, the trial court expressed its understanding that defendant harbored multiple motives commenting, "The fact that he may have had selfish reasons to get away from the police and not be arrested doesn't to me, diminish the fact that this activity was in contemplation of promotion, furthering or assisting criminal conduct by the gang members, including previous and future drug sales."

935; see also *In re Jose P.*, *supra*, 106 Cal.App.4th at p. 471; *Herrera*, *supra*, 70 Cal.App.4th at p. 1468.)

DISPOSITION

The trial court's judgment is reversed as to the sentence imposed, and affirmed in all other respects. The matter is remanded for resentencing.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

Superior Court of Contra Costa County, No. 05-050746-7, Charles B. Burch, Judge.

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