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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DARRELL SEAN THOMAS et al., Defendants and Appellants.	B183432 (Los Angeles County Super. Ct. No. MA029875)

APPEALS from judgments of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed in part and reversed in part with directions.

George L. Schraer for Defendant and Appellant Darrell Sean Thomas.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant Carlester E. Gresham.

Jerome McGuire, under appointment by the Court of Appeal, for Defendant and Appellant Marcus D. Young.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels, Deborah J. Chuang, Joseph P. Lee and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendants Darrell Sean Thomas (Thomas), Carlester E. Gresham (Gresham) and Marcus D. Young (Young) appeal from judgments of conviction entered after a jury trial. The jury convicted Thomas of 12 counts of second degree robbery[1] (Pen. Code, § 211) and found true the allegations a principal personally used a firearm in the commission of the robberies (*id*., § 12022.53, subd. (e)(1)). The jury also convicted Thomas of driving or taking a vehicle without the consent of the owner (Veh. Code, § 10851, subd. (a)) and possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1). The jury found true the allegations the crimes were committed for the benefit of a criminal street gang (*id*., § 186.22, subd. (b)(1)). Thomas admitted a prior conviction of a serious felony (*id*., §§ 667, subds. (a), (b)-(i), 1170.12). The trial court sentenced him as a second strike offender to state prison for a total term of 83 years and 8 months.

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[1] In the third amended information, defendants were charged as follows:

Count 1—Robbery of Veronica Villareal (Thomas, Young)
Count 2—Robbery of Heriberto Nieto (Thomas, Young)
Count 3—Robbery of Maribel Urias (Thomas, Young)
Count 4—Robbery of Margarita Romero (Thomas, Young)
Count 5—Robbery of Vanessa Garcia (Thomas, Young)
Count 6—Robbery of Labra Lorena (Thomas, Young)
Count 7—Robbery of Rachel Styskel (Thomas, Young)
Count 8—Robbery of Natalia Beard (Thomas, Young)
Count 9—Robbery of Estella Escajea (Thomas, Young)
Count 10—Robbery of Barbara Bonds (Thomas, Young)
Count 11—Robbery of Freddy Lentz (Thomas, Young)
Count 12—Robbery of Laneea Tolley (Thomas, Young)
Count 13—Grand Theft Auto (Thomas, Young)
Count 14—Unlawful Driving of a Vehicle (Thomas, Young)
Count 19—Receiving Stolen Property (Gresham)
Count 21—Receiving Stolen Property (Gresham)
Count 22—Possession of a Firearm by a Felon (Thomas)
Count 23—Possession of a Firearm by a Felon (Young)

The jury convicted Gresham of receiving stolen property (Pen. Code, § 496, subd. (a)) and found true the allegation he committed the crime for the benefit of a criminal street gang (*id*., § 186.22, subd. (b)(1)). Gresham admitted a prior conviction of a serious or violent felony (*id*., §§ 667, subds. (b)-(i), 1170.12) and a prior conviction for which he served a prison term (*id*., § 667.5). The trial court exercised its discretion to strike the prior convictions (*id*., § 1385) and sentenced Gresham to five years in state prison.

The jury convicted Young of 12 counts of second degree robbery (Pen. Code, § 211) and found true the allegations a principal personally used a firearm in the commission of the robberies (*id*., § 12022.53, subd. (e)(1)). The jury also convicted Young of driving or taking a vehicle without the consent of the owner (Veh. Code, § 10851, subd. (a)) and possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1). The jury found true the allegations the crimes were committed for the benefit of a criminal street gang (*id*., § 186.22, subd. (b)(1)). The trial court sentenced him to state prison for a total term of 64 years and 8 months.

On appeal, defendants challenge their convictions, the gang enhancements and the sentences imposed. We reverse two of Thomas and Young's robbery convictions and the gang enhancements. We also reverse Gresham's conviction. We remand the case for resentencing.

FACTS

The Theft of the Toyota Van

Shortly after noon on September 18, 2004, Merla Castellano's beige 1986 Toyota van was stolen from outside her home. Castellano lived in Palmdale, about five blocks from the Bank of America.

The Bank Robbery

Between 12:45 and 1:00 p.m., four men in dark clothes and ski masks[2] entered the Palmdale Bank of America. One remained near the door while the other three jumped over the counter. Two of the men had guns. The man near the door yelled at the tellers to put their hands up, or to put their hands where the robbers could see them. Another man yelled at the tellers to give him their money. He approached teller Margarita Romero (Romero) and yelled at her to open her cash drawer and give him the money. She complied. He then went to teller Vanessa Garcia (Garcia). Garcia opened her cash drawer and gave the man about $5,000. The man returned to Romero and took more money from her. The money that Romero and Garcia gave him contained bait bills with dye packs.

Teller Lorena Labra (Labra) saw the men walk down the line of tellers, taking money from each of them. When they got to Labra, they took money from her cash drawer. One of the men yelled at tellers Rachel Styskel (Styskel) and Natalia Beard (Beard) to open a portable safe on wheels.

One of the men walked over to the merchant cage, where Veronica Villareal (Villareal) and Eriberto Nieto (Nieto) were working. The man took a pouch containing traveler's checks from Nieto and a bag containing merchant deposits from Villareal.

Branch manager Laneea Tolley (Tolley) was in the lobby when the men entered the bank. Tolley activated a hand-held alarm. Shortly thereafter, the telephones at the bank began ringing. One of the men said that the phones were ringing, and they needed to hurry up. They then left.

Adriana Paredes, an officer of the Bank of America, was one of the people assigned to determine how much money was taken in the robbery. She determined that approximately $68,000 was taken. Money was taken from tellers Romero, Garcia, Labra, Styskel, Beard and Estella Escajeda, and from merchant tellers Villareal and Nieto.

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[2] Three of the "ski masks" later recovered turned out to be beanies, with eye holes cut out of them.

The Escape and Apprehension of the Suspects

Elena Montgomery (Montgomery) saw a van with red smoke and money coming out of it as it drove along the street. Four to six men had their heads out the van's windows. The van stopped. The men got out, ran to a navy SUV, got in and drove away. The following day, Montgomery identified Young from a photographic lineup. Three months later, however, she was unable to identify Young from a live lineup.

Alejandra Castaneda (Castaneda), who was about a block from the bank, saw a cream-colored Toyota van with reddish smoke coming out of it. The sliding door was open, and two men had their heads outside the door. The van stopped. Two men got out and got into a dark blue Ford Expedition with tinted windows. Castaneda was able to write down some of the numbers on the Expedition's license plate: 47KM299.

Los Angeles County Deputy Sheriff Andrew Lynch spoke to Castaneda. By reformatting the numbers Castaneda had given him, Deputy Lynch was able to get a possible identification of the Expedition: a Ford registered to Blanche Thomas, who lived on 56th Street in Los Angeles, about 70 miles from the bank. It would take an hour to an hour and a half to drive from the bank to 56th Street.

Detective Brian Hickey examined the abandoned van. There was money, bank bags and traveler's checks in the van. There were two discharged dye packs in the van, another dye pack wrapped in a sweatshirt, and dye throughout the van. Detective Hickey found a pair of scissors by the front wheel of the van and a gray beanie and a blue beanie in the street.

Deputy David Hernandez recovered a black beanie 15 to 20 feet from the entrance to the Bank of America. He obtained a gray beanie and a blue beanie that were found by the Toyota van.

Los Angeles Police Officers Rogelio Sandoval and Ivan Guillermo went to the 56th Street address in an unmarked car. About 3:30 p.m., the blue Ford Expedition arrived. Thomas was driving; two or three other men were in the vehicle with him. A short time later, Young drove up in a white Mercury Marquis and went into the house.

Within the next hour and a half to two hours, three other cars arrived at the house. Officer Sandoval instructed other officers to stop the cars after they left the house.

While watching the 56th Street house, Officer Guillermo saw some men "milling around" outside the house. He did not see them playing dice or exchanging money.

After several people were detained after leaving the 56th Street house, a police helicopter arrived and began circling the residence. At that point, the remainder of the people inside the house left in various vehicles.

At about 5:00 p.m., Deputy Hector Garcia stopped the Mercury Marquis a few blocks away from the 56th Street house. Young was driving the car; Andre Germany (Germany)[3] and Gresham's brother, Kevin, were in the car with him. Deputy Garcia handcuffed the men and put them in the back seat of his patrol car. Deputy Garcia observed that Young had a large amount of currency in his right front pants pocket. He saw Young remove the money and pass it to Kevin, who passed it to Germany, along with money from his own pocket. Germany put the money in his pocket. Deputy Garcia took the men to the Palmdale sheriff's station.

Gresham was in a different car than Young and Kevin. He was stopped and detained after leaving the house. Blanche Thomas also was stopped and detained as she drove away from the house. Thomas was arrested at his mother's house.

At the Palmdale sheriff's station, Detective David Moore recovered $16,409 from Germany. Young had $290 in his pockets. Detective Moore recovered $2,802 from Thomas's pockets, $275 from Gresham's pockets and $2,353 from Blanche Thomas's purse. Money recovered from Thomas, Blanche Thomas, Young and Gresham had red stains on it. There also were red stains on Thomas's pants and Young's shirt.

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[3] Germany originally was charged along with defendants. His trial was severed after he obtained a substitution of attorneys just prior to trial and defendants refused to waive time for trial.

The Forensic Evidence

The dye packs placed in the Bank of America's bait bills are activated by a transmitter located near the bank's entrance, and they are set to explode five seconds after activation. They contain red dye known as M.A.Q. and C.S. tear gas. The red stains on Thomas's pants and Young's shirt contained M.A.Q. and tear gas.

Three bills recovered from each defendant were tested for red dye and M.A.Q. While there were red stains on the bills selected for testing, they did not contain red dye or M.A.Q.

Russell Baldwin (Baldwin), a forensic scientist with the Orange County Sheriff's Department, performed DNA tests on the three beanies. The gray and blue beanies contained DNA mixtures. DNA on the gray beanie was consistent with Thomas's and Young's DNA, while DNA on the blue beanie was consistent with Thomas's.

The Gang Evidence

Detective Mark Machanic of the Los Angeles County Sheriff's Department executed a search warrant at Blanche Thomas's house the day after the robbery. He found a number of items with writing on them related to the 52nd Street Broadway Crips. Additionally, Jermaine Labriel (Labriel), a member of the 52nd Street Broadway Crips, identified the 56th Street house as his residence.

Sergeant Richard Duran of the Los Angeles Police Department is assigned to the Newton Division, which includes 56th Street. He knew Thomas and had contacted him at the 56th Street house. He had stopped and talked to Thomas twice in August and September 2004, when Thomas was in the blue Expedition. Thomas admitted affiliation with the 52nd Street Broadway Crips. Young, Gresham, Germany and Labriel also told Sergeant Duran that they were members of the 52nd Street Broadway Crips. According to Sergeant Duran, the 52nd Street Broadway Crips is a criminal street gang with about 150 members. Its primary activities include murder, attempted murder, robbery, assault, carjacking, car theft and drug sales.

Officer Patrick Rudolf, assigned to the Newton Division Gang Enforcement Detail, added that in June 2004, a member of the 52nd Street Broadway Crips was convicted of murder by discharging a firearm into a motor vehicle containing members of a rival gang. In September 2004, a member of the 52nd Street Broadway Crips was sentenced to prison after pleading guilty to possession of a controlled substance for sale.

Officer Rudolf noted that it was common for gang members to have tattoos reflecting their gang membership. Gresham and Young had tattoos which reflected their membership in the 52nd Street Broadway Crips. Thomas had tattoos which were consistent with gang membership, but they did not identify him as a member of the 52nd Street Broadway Crips.

Officer Rudolf opined that Thomas, Gresham and Young were all members of the 52nd Street Broadway Crips. Even though Thomas's tattoos did not identify him as a member of the gang, he was associated with the gang, gang members hung out at his house, and he committed the instant crimes with gang members.

It was Officer Rudolf's opinion that the instant crimes were committed for the benefit of the 52nd Street Broadway Crips. Commission of a robbery would show that the gang was "hard core" and would increase its prestige and respect within the gang culture. It also would benefit the gang by bringing in money.

In April 2004, Los Angeles Police Officer Steven Garcia arrested Germany after stopping him in a stolen Toyota minivan. Officer Garcia saw a scissors blade in the van's ignition. Officer Garcia observed that Germany had tattoos indicating membership in the 52nd Street Broadway Crips.

Thomas's Defense

On the evening of September 17, 2004, Thomas went to a party two blocks away from his mother's house. He left at 3:00 a.m. with Germany and Kevin. Germany asked him for a ride. Because he had several drinks at the party, Thomas let Germany drive his mother's Ford Expedition, with the proviso that Germany return the Expedition in the morning.

When Thomas woke up at 10:30 in the morning, Germany had not yet returned the Expedition. Thomas called his girlfriend, who picked him up between 11:30 and 11:45 and took him to her house. Germany called Thomas at about 1:30 p.m. and brought the Expedition to him about an hour later. Thomas drove home alone a little after 3:00 p.m.

When Thomas arrived home, Labriel—who was Thomas's cousin—Germany, Gresham and Kevin were waiting outside. They shot dice in the yard for 30 to 45 minutes. Thomas had been paid the day before and had $1,400. He won close to $3,000 from Germany. He gave some of the money to his mother to hold for him and put the rest in his pocket.

Blanche Thomas left the house to go to the auto mechanic. She was arrested when she got there. She told the police that Thomas and the others had been at the racetrack, not that they had been gambling in front of her house.

Thomas denied being a gang member, although he knew gang members because of where he lived and because his cousin was a gang member. None of the items in his mother's house having gang references on them belonged to him. He denied participating in the bank robbery or having a red stain on his pants.

Gresham's Defense

Retired police officer Steven Strong (Strong) is an expert on street gangs. He noted that gang members do not always act to benefit their gangs. Most robberies committed by gang members are purely for personal gain, not gang benefit.

Strong also noted that the presence of gang tattoos does not mean that a person is a gang member, only that the person may at one time have been a gang member.

Young's Defense

Young's girlfriend, Elvira Magdaleno, worked from 7:00 a.m. to 3:00 p.m. at Gus Burgers in Wilmington. On September 18, 2004, Young came by her work to see her between 12:40 and 1:40 p.m.

DISCUSSION

I

Pleading Error

In the original, first amended and second amended informations, it was alleged as to all three defendants that a principal personally used a firearm in the commission of the robberies within the meaning of Penal Code section 12022.53, subd. (e)(1). These allegations were omitted from the third amended complaint. The trial court nevertheless instructed the jury as to these allegations, and as to defendants Thomas and Young, the jury found the allegations to be true.

Due process requires that a defendant be given notice of the charges against him and the opportunity to defend against them. (*People v. Jones* (1990) 51 Cal.3d 294, 317.) He must have a reasonable opportunity to prepare and present his defense and cannot be taken by surprise by evidence offered at trial. (*Ibid.*) This requirement applies to enhancements as well as substantive charges. (*People v. Hernandez* (1988) 46 Cal.3d 194, 208.)

The Penal Code does not require any specific language to be used in the information. Neither does it require enumeration of the specific code section under which the defendant is charged. (Pen. Code, §§ 952, 958; *People v. Thomas* (1987) 43 Cal.3d 818, 826.) For the most part, it is the transcript of the preliminary hearing, rather than the information, which provides defendant with notice of the criminal acts against which he must defend. (*People v. Jones*, *supra*, 51 Cal.3d at p. 317; see, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 672-673.)

Only where a statute requires that an enhancement be pled and proved must it be specifically pled in the information for the enhancement to be imposed. (*People v.*

Mancebo (2002) 27 Cal.4th 735, 743.) Penal Code section 12022.53, subdivision (e), contains a pleading and proof requirement.[4]

The People argue that defendants were not prejudiced by the failure to specifically plead a Penal Code section 12022.53, subdivision (e), enhancement, in that defendants had notice—from the prior informations and from mention of the enhancement during trial—that the People were seeking imposition of the enhancement. The People cite no authority which supports a claim that this type of harmless error analysis is permissible where a statute specifically requires that an enhancement be pled and proved before it can be imposed.

Under *People v. Mancebo*, *supra*, 27 Cal. 4th at page 745, the question is whether there is any "factual allegation in the information or pleading in the statutory language" which informed defendants that their sentences could be enhanced based on defendants being principals in the commission of the robberies, violating section 186.22, and any principal using a firearm in the commission of the crimes.

The third amended information alleged that defendants took property from the victims, i.e., that they were principals in the commission of the robberies. It alleged that they personally used firearms in the commission of the robberies, i.e., that a principal used a firearm in the commission of the crimes. It further alleged that all the robberies were committed for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, i.e., that defendants violated that section. Accordingly, all the necessary factual allegations were contained within the third amended information, making it adequate to support imposition of enhancements under subdivision (e) of Penal

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[4] Subdivision (e)(1) of Penal Code section 12022.53 provides: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b) [personal use of a firearm], (c) [personal and intentional discharge of a firearm], or (d) [personal and intentional discharge of a firearm causing great bodily injury]."

Code section 12022.53, even though that subdivision was not specifically pled in the third amended information. (*People v. Mancebo*, *supra*, 27 Cal. 4th at p. 745; *People v. Thomas*, *supra*, 43 Cal.3d at p. 826.)

People v. Smart (2006) 145 Cal.App.4th 1216, cited by defendant Thomas in a supplemental letter brief, does not mandate a different conclusion. In *Smart*, defendants were charged with and convicted of a single crime of shooting at an occupied vehicle (Pen. Code, § 246), which qualified for imposition of an enhancement under Penal Code section 12022.53, subdivision (d). However, two enhancements were imposed: one for each occupant of the vehicle. (*Smart*, *supra*, at pp. 1222-1223.) Because subdivision (f) of Penal Code section 12022.53 permits only one enhancement under that section per defendant per crime, the court concluded that defendants did not have fair notice that two enhancements could be imposed. (*Smart*, *supra*, at p. 1225.) Therefore, only one enhancement could be imposed. (*Id*. at p. 1226.)

Here, as discussed above, defendants had "fair notice of their potential punishment" (*People v. Smart*, *supra*, 145 Cal.App.4th at p. 1225) under subdivision (e) of Penal Code section 12022.53. Imposition of an enhancement under that subdivision thus was permissible.

II

Denial of the Motion to Bifurcate Trial of the Gang Allegations

Defendants moved to bifurcate trial of the gang enhancement allegations. The trial court denied the motion, relying on *People v. Hernandez* (2004) 33 Cal.4th 1040. It explained that gang allegations were "inextricably intertwined with the offense." The prosecution planned to introduce the gang evidence "to show modus operandi and that these people were acting in concert, that it would explain why these defendants undertook the conduct that they did, and that they're connected in that way."

In *People v. Hernandez, supra*, the Supreme Court examined the question of bifurcation of gang enhancement allegations. It began by examining its holding on

bifurcation of prior conviction allegations: because of the unique potential for prejudice if the jury learns of the defendant's prior convictions, the value of bifurcating trial of the allegations has been recognized by the Legislature and the courts. (33 Cal.4th at pp. 1048-1049, citing Pen. Code, § 1025 and *People v. Calderon* (1994) 9 Cal.4th 69, 74-77.) The court then observed that trial of gang enhancement allegations differs, in that "[a] prior conviction allegation relates to the defendant's *status* and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (*Hernandez*, *supra*, at p. 1048.)

Additionally, "the Legislature has given no indication of a similar concern regarding enhancements related to the charged offense, such as a street gang enhancement. Nothing in [Penal Code] section 186.22 suggests the street gang enhancement should receive special treatment of the kind given to prior convictions." (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1049.)

The Supreme Court did not go so far as "to say that a court should never bifurcate trial of the gang enhancement from trial of guilt." (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1049.) It noted that the "predicate offenses offered to establish a 'pattern of criminal gang activity' ([Pen. Code,] § 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Hernandez*, *supra*, at p. 1049.)

The Supreme Court left it to the trial court's discretion to determine whether to bifurcate trial of gang enhancement allegations. (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1050.) In doing so, it noted that the trial court's discretion to deny bifurcation is broader than its discretion to admit gang evidence when no gang enhancement is alleged. (*Ibid*.) It also noted that the burden is on the defendant "'to clearly establish that there is

a substantial danger of prejudice requiring that the charges be separately tried.'" (*Id*. at p. 1051.)

Defendants argue, in essence, that the gang evidence had little probative value, in that the substantive offenses could be proven without reference to gang membership. During the commission of the crimes, there was no mention of the 52nd Street Broadway Crips; gang territory or colors played no part in the crimes. The key issue at trial with respect to Thomas and Young was the identity of the robbers, and with respect to Gresham was whether he possessed stolen property. Therefore, the gang evidence lacked probative value and was prejudicial, requiring bifurcation.

As noted in *People v. Hernandez*, *supra*, however, the trial court's discretion to deny bifurcation is broader than its discretion to admit minimally probative gang evidence. (33 Cal.4th at p. 1050.) The question is not whether the prejudicial value of the evidence outweighs its probative value but whether the evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id*. at p. 1049.) Here, that question must be answered in the negative.

Defendants point to nothing in the record showing that they established a substantial danger of prejudice from the evidence the prosecution intended to introduce, above and beyond that inherent in gang evidence. That is, they point to nothing showing the nature of the predicate crimes or their own gang involvement was so extraordinarily prejudicial, that the trial court's decision not to bifurcate trial of the gang enhancement allegations was arbitrary or capricious, or exceeded the bounds of all reason under the circumstances. (*People v. Mitchell* (1984) 152 Cal.App.3d 433, 438, disapproved on other grounds in *People v. Martin* (1986) 42 Cal.3d 437, 451, fn. 13.) We therefore find no abuse of discretion in the trial court's decision. (*People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1050-1051.)

III

Sufficiency of the Evidence to Support the Robbery Convictions on Counts 10 and 11 (Barbara Bonds and Freddy Lentz)

The evidence showed that at the time of the robbery, Barbara Bonds and Freddy Lentz were working at their desks in the bank's lobby customer service area. They did not have cash drawers at their desks. If their customers needed to conduct cash transactions, they would have to go to the tellers to have the tellers conduct the transactions.

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) Possession, however, may be constructive. In *People v. Nguyen* (2000) 24 Cal.4th 756, the court noted that "the theory of constructive possession has been used to expand the concept of possession to include employees and others." (*Id*. at p. 762.) For example, employees and security guards have been held to be victims of store robberies even though they had no possessory interest in the property stolen. (*Id*. at p. 761.) They have sufficient representative capacity on behalf of the owner to be considered robbery victims. (*Ibid*.)

In determining whether employees have constructive possession of property taken from a business, some cases have held that "business employees—whatever their function—have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner." (*People v. Jones* (2000) 82 Cal.App.4th 485, 491; accord, *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 521.) Others have held that the court must engage in "a fact-based inquiry regarding constructive possession by an employee victim . . . . That is, . . . the proper standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property is whether the circumstances indicate that the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property. Under this

standard, employee status does not alone as a matter of law establish constructive possession." (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1115.)[5]

We agree that constructive possession must be based on more than just employee status. The employee must have express or implied authority over the property before it can be said to be in his constructive possession. (*People v. Frazer*, *supra*, 106 Cal.App.4th at p. 1115; cf. *In re Daniel G.* (2004) 120 Cal.App.4th 824, 831 [a person has constructive possession of an item if he "knowingly exercises control or the right to control the object"]; accord, *People v. Morante* (1999) 20 Cal.4th 403, 417.)[6]

Here, there is no evidence that Barbara Bonds and Freddy Lentz had any authority over the money taken in the robbery, i.e., there is no evidence that they had access to the cash drawers or money, or that they had supervisory authority over the employees with access to the cash drawers or money. Accordingly, we conclude the evidence is insufficient to support Thomas's and Young's convictions on counts 10 and 11, and these must be reversed.

IV

Sufficiency of the Evidence to Support the Criminal Street Gang Enhancements

In reviewing the sufficiency of the evidence, the question on appeal is whether there is evidence from which a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) "In making this determination, we '"must view the evidence in a light most favorable to respondent and presume in support of the

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[5] The issue is before the Supreme Court in *People v. Scott*, review granted Nov. 16, 2005, S136498.

[6] In so holding, we respectfully disagree with Division Two of this District, which held to the contrary in *People v. Jones*, *supra*, 82 Cal.App.4th 485.

judgment the existence of every fact the trier could reasonably deduce from the evidence.'" [Citation.]" (*People v. Rayford* (1994) 9 Cal.4th 1, 23; accord, *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) We also must examine the entire record, not merely """isolated bits of evidence.""" (*Cuevas*, *supra*, at p. 261.)

Substantial evidence is that which is reasonable, credible and of solid value. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) Although all reasonable inferences must be drawn in support of the judgment, the court "may not 'go beyond inference and into the realm of speculation in order to find support for a judgment. A finding . . . which is merely the product of conjecture and surmise may not be affirmed.'" (*People v. Memro* (1985) 38 Cal.3d 658, 695; accord, *People v. Waidla* (2000) 22 Cal.4th 690, 735.)

Penal Code section 186.22, subdivision (b)(1) (section 186.22(b)(1)), provides that "any 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 be punished pursuant to that section. The questions here are whether there is substantial evidence that defendants committed felonies "for the benefit of, at the direction of, or in association with any criminal street gang," and whether there is substantial evidence that defendants had "the specific intent to promote, further, or assist in any criminal conduct by gang members."

There was no evidence concerning the commission of the crimes themselves which suggested that they were "gang-related" within the meaning of section 186.22(b)(1) (*People v. Gardeley* (1996) 14 Cal.4th 605, 622), i.e., that they were "committed for the benefit of, at the direction of, or in association with any criminal street gang" (§ 186.22(b)(1)). Defendants did not identify themselves as gang members, wear identifiable gang clothing or make gang signs.

All the evidence relating the gang enhancement allegations was supplied by the police officer expert witnesses. Sergeant Duran testified that Thomas was affiliated with, and Young and Gresham were members of, the 52nd Street Broadway Crips, a criminal street gang. Officer Rudolf similarly opined that Thomas, Gresham and Young were all

members of the 52nd Street Broadway Crips, even though he acknowledged that Thomas's tattoos did not identify him as a member of the gang.

Officer Rudolf also opined that the instant crimes were committed for the benefit of the 52nd Street Broadway Crips. Commission of a robbery would show that the gang was "hard core" and would increase its prestige and respect within the gang culture. It also would benefit the gang by bringing in money.

Contrary to the People's oral argument, there was no evidence of a pattern of similar bank robberies by 52nd Street Broadway Crips members. Sergeant Duran only testified that in 2003, law enforcement agencies began "noticing that numerous gang members from various different subsets for communities of bank robberies." Gang members committing bank robberies wore multiple layers of clothing to hide their faces and so that when they left the bank, they could remove a layer of clothing and not be recognized or discard clothing stained with dye if a dye pack exploded. Generally, these robberies involved three to four individuals in the bank and a getaway driver outside the bank. In May 2004, there was a bank robbery committed in the Rancho Cucamonga area by 52nd Street Broadway Crips. He provided no details as to the 2004 robbery.

There also was no evidence that Thomas's home was a "gang hangout." Sergeant Duran only testified that he had "personally seen gang members in or congregating at that location." Since two gang members lived at that house—Thomas and Labriel—Sergeant Duran's testimony is of little significance.

We cannot agree that gang members' commission of a robbery, with no external signs that it was gang-related, establishes that the crime was for the benefit of, or at the direction of, the gang. This is especially true here, where the robbery was committed far from the gang members' home territory and there was no evidence tying the robbery to the gang rather than some individual gang members.

The more difficult question is whether the crimes were committed "in association with any criminal street gang." (§ 186.22(b)(1).) It appears this was the jury's concern. During deliberations, it asked the court: "In the allegation—felonies committed for the benefit of street gang . . . please define association." The trial court responded: "[T]he

only thing we could come up with, the association, the definition of that is just the common definition, and that is the following: [¶] Association: to unite in action; joined in interest, purpose or objective."

In *People v. Morales* (2003) 112 Cal.App.4th 1176, the question was whether "evidence that one gang member committed a crime in association with other gang members" was sufficient to satisfy this element. (*Id*. at p. 1198.) The court responded that "[a]rguably, such evidence alone would be insufficient, even when supported by expert opinion, to show that a crime was committed for the *benefit* of a gang." (*Ibid*.) The court noted that, however, that section 186.22(b)(1) also applies when a crime is committed *in association* with a gang. "Thus, the typical close case is one in which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang." (*Ibid*.) The court went on to conclude that was not the situation before it. (*Ibid*.)

Here, there simply is no substantial evidence that in committing the crimes, defendants were united in action or joined in interest, purpose or objective with the 52nd Street Broadway Crips, as opposed to being "on a frolic and detour unrelated to the gang" (*People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198). As previously stated, the robbery took place far from the gang's home territory. There was nothing in the way the robbery was committed which suggested that it was a gang-related crime. Additionally, money was found not only in the possession of other gang members, but also in the possession of Thomas's mother. Officer Rudolf's testimony applied to gangs committing robberies in general. As to the instant robbery, it was simply speculative, unsupported by the evidence in this particular case. Accordingly, the gang enhancements must be reversed. (*People v. Memro*, *supra*, 38 Cal.3d at p. 695.)

V

Sufficiency of the Evidence to Support the Conviction of Receiving Stolen Property

In order to prove possession of stolen property, the prosecution must establish that defendant had possession of the property, the property was stolen, and defendant knew the property was stolen. (Pen. Code, § 496, subd. (a); *People v. Price* (1991) 1 Cal.4th 324, 464; *People v. Land* (1994) 30 Cal.App.4th 220, 223.) The knowledge element may be established by evidence of defendant's failure to explain, or unsatisfactory explanation of, how the property came into his possession or by suspicious circumstances surrounding his possession of the property. (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1019-1020.)

The evidence in support of Gresham's conviction is that after the robbery, the dye packs in the stolen money exploded, releasing red dye. Thomas and Young returned to Thomas's house with a large quantity of money, some of which had red stains on it. Within the next hour and a half to two hours, a number of other people arrived at the house. Some time later, a police helicopter arrived and began circling the residence. At that point, the people inside the house left in various vehicles.

Young, Germany, and Kevin left in one car. Young had a large amount of currency in his pocket which he passed to Kevin, who passed it to Germany, along with money from his own pocket. Germany put the money in his pocket.

Gresham left in a different car. He had $275 in his pockets, some of which had red stains on it. None of the stains tested contained red dye or M.A.Q., which would identify it as having come from the bank robbery.

The amount of money in Gresham's possession was not so large as to support an inference that he could not have acquired it other than from the bank robbers. The money itself could not be tied to the robbery—the red-stained bills tested did not contain red dye and M.A.Q. from the dye packs in the money taken from the Bank of America. There was no evidence of an attempt to dispose of the money or an unsatisfactory explanation

as to how he came into possession of the money. In short, there simply is no substantial evidence that the money in Gresham's possession was stolen property. (*People v. Cuevas*, *supra*, 12 Cal.4th at pp. 260-261; *People v. Rayford*, *supra*, 9 Cal.4th at p. 23.) Accordingly, there is insufficient evidence to support his conviction and it must be reversed. (*People v. Price*, *supra*, 1 Cal.4th at p. 464; *People v. Land*, *supra*, 30 Cal.App.4th at p. 223.)

VI

Sufficiency of the Foundation for the Admission of DNA Evidence/Ineffective Assistance of Counsel in Failing to Object to the Evidence

The prosecution's expert witness, forensic scientist Baldwin, performed DNA tests on the three beanies found by the bank and the van. He testified that DNA on the gray beanie was consistent with Thomas's and Young's DNA, while DNA on the blue beanie was consistent with Thomas's. He gave no testimony on the statistical probability of the DNA belonging to Thomas and Young rather than a third party. Defense counsel did not object to his testimony as being without foundation on this basis. Defendants Thomas and Young claim error in admitting the testimony without foundation and ineffective assistance of counsel in failing to object.

Defendants rely on *People v. Venegas* (1998) 18 Cal.4th 47. *Venegas* involved restriction fragment length polymorphism (RFLP) testing, used to generate and compare the DNA profiles in the case. (*Id.* at p. 53.) The court noted that once the testing reveals a match at multiple loci on the DNA, "the next step is to determine its statistical significance," i.e., "the probability that a person chosen at random from the relevant population would likewise have a DNA profile matching that of the evidentiary sample." (*Id*. at pp. 63-64.)

Defendants point to nothing in the record establishing that RFLP testing was used in this case and that evidence of statistical probability was necessary to understand the significance of the results of the DNA testing. Baldwin testified that he coauthored two

articles on RFLP, "which is the original way we analyzed D.N.A. back in 1990." This testimony suggests that he did not use RFLP for testing the DNA in the instant case. Additionally, as noted in *People v. Wilson* (2006) 38 Cal.4th 1237, 1248, "'the science underlying DNA comparisons [has continued] to improve.'" Thus, what was true for RFLP testing in 1998 is not necessarily true for testing done in 2004 or 2005, when Baldwin performed the testing in the instant case.

Assuming arguendo that statistical analysis is still necessary to assist the jury in understanding the significance of DNA evidence (see, e.g., *People v. Wilson*, *supra*, 38 Cal.4th at p. 1242), the question is whether defense counsel's failure to object to the admission of the DNA evidence on this basis constitutes ineffective assistance of counsel.

Young argues that the failure to object constituted ineffective assistance of counsel, in that it deprived him of a crucial or potentially meritorious defense (*People v. Pope* (1979) 23 Cal.3d 412, 424-425), i.e., a challenge to the accuracy of the DNA identification. He also claims prejudice: The jury likely would not have convicted him absent the admission of the DNA evidence (*In re Avena* (1996) 12 Cal.4th 694, 721),[7] in that the eyewitness identification of him as one of the robbers was very weak, and he did not arrive at the 56th Street house in the Expedition with Thomas but arrived separately, half an hour later.

There was, however, additional evidence linking Young with the robbery. Young had a red stain containing M.A.Q. and tear gas on his shirt. He also had a large amount of currency in his pocket when detained. After he was handcuffed and placed in a patrol car, he attempted to get rid of this currency by passing it to Kevin.[8] In light of this evidence, it is not reasonably probable Young would have been acquitted had his counsel

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[7] Young assumes that the trial court would have excluded the evidence outright rather than required the prosecution to present evidence of the statistical probability of a match as a foundation for the admission of the DNA evidence.

[8] It is clear from the convictions that the jury rejected Thomas's testimony as to a dice game as an explanation for the money found in the possession of defendants and others.

objected to the admission of the DNA evidence. Accordingly, he was not deprived of the effective assistance of counsel. (*In re Avena*, *supra*, 12 Cal.4th at p. 721.)

The identification evidence as to Thomas was even stronger, in that his mother's Expedition was identified as the vehicle in which the robbers drove away, and he was thereafter observed arriving at his mother's house in the Expedition. Again, it is not reasonably probable he would have been acquitted had his counsel objected to the admission of the DNA evidence, so he was not deprived of the effective assistance of counsel. (*In re Avena*, *supra*, 12 Cal.4th at p. 721.)

VII

Ineffective Assistance of Counsel in Failing to Object to Hearsay Gang Evidence and Other Inadmissible Evidence

Young challenges his counsel's failure to object to hearsay testimony regarding gang affiliation and intent—information collected by other officers on which the officers testifying relied. The officers testified as gang experts, however, and an expert witness may base his opinion on otherwise inadmissible hearsay if is contained in material reasonably relied upon by experts in the field. (Evid. Code, § 801, subd. (b); *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 618-619.) Their reliance on hearsay in forming their opinions was permissible. (*Gardeley*, *supra*, at pp. 617-619.)

Young also claims "numerous instances of irrelevant and prejudicial testimony and items of evidence," most of which "concerned gang membership and serious crimes." He cites only two of these instances, however. One is Officer Rudolf's testimony that Young was a member of the 52nd Street Broadway Crips based on "[p]revious admissions admitting to the Five Deuce Broadway Gangster Crips, crimes in which he's committed in association with Five Deuce, tattoos basically of his affiliation, having tattoos on his person affiliating himself with the Five Deuce Broadway Gangster Crips." The second is Officer Rudolf's testimony as to the primary criminal activities of the 52nd Street Broadway Crips.

As stated above, Officer Rudolf's testimony based on hearsay was admissible. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 618-619.) It also was relevant to prove the gang enhancement allegations. (*Gardeley*, *supra*, at pp. 619-620.) Inasmuch as the evidence was admissible, counsel was not ineffective in failing to object. (*In re Avena*, *supra*, 12 Cal.4th at p. 721.)

VIII

Instruction on Flight Showing Consciousness of Guilt

Defendants objected to instructing the jury pursuant to CALJIC No. 2.52 on flight after a crime as evidence of consciousness of guilt. Counsel for defendant Gresham argued that the instruction "should not be given, especially as far as Mr. Gresham is concerned. The police are overhead. These people have dealt with the police before, they didn't want to deal with the police again, and they leave . . . [n]ot because of any particular crime, they just don't want to deal with the police. It's fleeing, but it's not fleeing from the crime." He added, "You're gambling, you win some money, you see a helicopter, you leave, you don't want to deal with the police."

The trial court responded that Gresham's counsel could argue that the instruction did not apply to his client. The court found "sufficient controversy" as to flight, however, to give the instruction.

Gresham asserts that the instruction is argumentative, in that it pinpoints specific evidence rather than a particular theory of the case. (*People v. Garceau* (1993) 6 Cal.4th 140, 192.) He also claims that the instruction impermissibly lowered the prosecution's burden of proof by allowing the jury to combine evidence of flight with otherwise insufficient evidence of guilt to convict him. (See, e.g., *Hadden v. State* (Wyo. 2002) 42 P.3d 495, 507-508.)

The Supreme Court has rejected the assertions that CALJIC No. 2.52 is an impermissible pinpoint instruction and that it impermissibly lowers the prosecution's burden of proof. (*People v. Crew* (2003) 31 Cal.4th 822, 848-849; *People v. Jackson*

(1996) 13 Cal.4th 1164, 1223-1224; cf. *People v. Nakahara* (2003) 30 Cal.4th 705, 713.) We are bound by its holdings (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and therefore reject the assertions as well.

IX
Sentencing Errors

We note initially that in light of our conclusions in parts III and IV, *ante*, that the gang enhancements must be reversed and Thomas's and Young's convictions on counts 10 and 11 must be reversed, the case must be remanded for resentencing. Insofar as the contentions may be applicable on resentencing, we address them for the benefit of the trial court.

Imposition of Consecutive Sentences in the Absence of Supporting Factual Findings by the Jury

Defendants' claim of error in consecutive sentencing is based on the holding of *Blakely v. Washington* (2004) 542 U.S 296, 303-304, that the maximum sentence a judge may impose is that permitted by the facts established by the jury verdict or admitted by the defendant. The California Supreme Court held in *People v. Black* (2005) 35 Cal.4th 1238 that *Blakely* does not apply to California's determinate sentencing law (*id*. at p. 1244) or to the decision whether to impose concurrent or consecutive sentences (*id*. at pp. 1261-1264.) In *Cunningham v. California* (2007) 549 U.S.___ [127 S.Ct. 856], the United States Supreme Court held that California's determinate sentencing law violates a defendant's right to a jury trial to the extent it permits a trial court to impose an upper term based on facts found by the court rather than by a jury, overruling *Black* to the extent it held otherwise. (*Id*. at p. ___ [127 S.Ct. at pp. 860, 871].) It did not overrule *Black*'s holding that *Blakely* does not apply to the decision whether to impose concurrent or consecutive sentences, however. Additionally, insofar as the imposition of consecutive sentences was based on the commission of crimes against multiple victims,

"[t]his case does not implicate *Cummingham*" and *Blakely*, in that consecutive sentencing was based on implied findings by the jury. (*People v. Calhoun* (2007) 40 Cal.4th 398, 406.)

Imposition of Consecutive Sentences Without a Statement of Reasons/Ineffective Assistance of Counsel in Failing to Object—Young, Thomas

The decision to impose consecutive sentences is a sentencing choice for which the trial court must state its reasons. (Pen. Code, § 1170, subd. (c); Cal. Rules of Court, rule 4.406(b)(5); *People v. Coelho* (2001) 89 Cal.App.4th 861, 886.) In imposing consecutive sentences for the robberies, the trial court "not[ed] the fact that, as inferred from the jury's verdict, the 12 counts of robbery, counts 1 through 12, involved multiple and distinct victims."

Young argues that in sentencing him, "the trial court effectively stated no reasons for imposing consecutive sentences on the robbery counts. The court simply noted that [he] had been convicted of separate offenses," which does not justify the imposition of consecutive sentences.

Young's argument rests on a faulty premise. The trial court did not merely note that he had been convicted of separate offenses. It noted that those offenses "involved multiple and distinct victims." The existence of multiple victims is a proper basis on which to impose consecutive sentences. (*People v. Calhoun*, *supra*, 40 Cal.4th at p. 408.) Young's contention that the trial court erroneously failed to state reasons for imposing consecutive sentences—and that his counsel was ineffective for failing to object—is without merit.

Thomas contends that his counsel was ineffective for failing to argue against or object to the imposition of consecutive sentences for the robberies. Inasmuch as the case must in any event be remanded for resentencing, we need not address this issue.

Imposition of Consecutive Four-Year Sentences on Counts 14, 22 and 23—Thomas, Young

The People agree that the trial court lacked authority to modify the judgment nunc pro tunc to impose consecutive sentences on counts 14 and 22 (Thomas) and 14 and 23 (Young) after imposing concurrent terms on those counts orally, on the record. (*People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9; *People v. Borja* (2002) 95 Cal.App.4th 481, 485.) Inasmuch as the case must in any event be remanded for resentencing, we need take no action to correct this error.

Stay of Sentence on Counts 14, 22 and 23 Under Penal Code Section 654—Thomas, Young

In count 14, Thomas and Young were convicted of driving or taking a vehicle without consent of the owner. In counts 22 and 23, they were convicted of possession of a firearm by a felon. They contend sentence on these counts must be stayed pursuant to Penal Code section 654.

Penal Code section 654 (section 654) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." (Subd. (a).) The section protects against multiple punishment for "multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

In order to determine whether a course of conduct is indivisible, the court looks to "defendant's intent and objective, not the temporal proximity of his offenses." (*People v. Harrison*, *supra*, 48 Cal.3d at p. 335.) Thus, "if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective,

defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid*.)

Whether a course of conduct is indivisible for the purpose of section 654 is primarily a factual determination for the trial court. (*People v. Harrison*, *supra*, 48 Cal.3d at p. 335; *People v. Nelson* (1989) 211 Cal.App.3d 634, 638.) The trial court's finding must be upheld on appeal if supported by substantial evidence. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713; *Nelson*, *supra*, at p. 638.)

Thomas argues that the evidence shows that in taking or driving the van, he harbored but a single criminal objective—robbery of the bank. Taking or driving the van was merely incidental to the robbery, to facilitate escape. Therefore, he concludes, section 654 applies to preclude separate punishment for taking or driving the van.

We disagree. While Thomas's goal in taking or driving the van was to facilitate his commission of the robbery, the evidence supports a conclusion that he formed a separate intent to take or drive the van and then committed that crime. Thereafter, he committed the robbery. Since "[t]he theft [or driving] of the automobile was a separate crime completed before the robbery was committed[,] . . . he may also be sentenced for that theft." (*People v. Quinn* (1964) 61 Cal.2d 551, 556.)

Both Thomas and Young claim they cannot be separately punished for possession of the firearms used in the robbery. *People v. Bradford* (1976) 17 Cal.3d 8 holds that "'where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.'" (*Id*. at p. 22.)

It is reasonably inferable from the evidence that defendants walked into the Bank of America with the guns used in the robberies and left the bank with those guns. There was no evidence that they acquired the guns in the bank after they arrived, and no guns were found outside the bank, tossed away after the robbery. Inasmuch as the evidence supports an inference of possession both before and after the robbery, defendants may be separately punished for both the robbery and possession of the guns. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1146-1147; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413.)

DISPOSITION

As to Thomas and Young, the convictions on counts 10 and 11 are reversed. The enhancements imposed under Penal Code section 186.22, subdivision (b)(1), are reversed. In all other respects, the judgments of conviction are affirmed. The case is remanded for resentencing in accordance with the views expressed herein.

As to Gresham, the judgment is reversed.

NOT TO BE PUBLISHED

JACKSON, J.*

I concur:

ROTHSCHILD, J.

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

VOGEL, Acting P.J., Concurring and Dissenting.

A.

Part III of the majority opinion finds the evidence insufficient to support the count 10 and count 11 robbery convictions of Thomas and Young because the victims, Barbara Bonds and Freddy Lentz, did not have direct authority over the money taken in the robbery. (Typed opn., pp. 15-17.) For the reasons explained in *People v. Jones* (2000) 82 Cal.App.4th 485, 489-492, I disagree. As Division Two of our court explains in *Jones,* the rule is that "business employees -- whatever their function -- have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner." (*Id.* at p. 491; see also *People v. Nguyen* (2000) 24 Cal.4th 756, 764 [the victims of robbery are those persons in either actual or constructive possession of the property taken].)

In any event and even under the majority's authorities, Bonds and Lentz had "express or implied authority over the bank's money." (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1115.) Bonds and Lentz worked at customer service desks and handled the bank's money; the fact that the mechanics of cash transactions were conducted at teller windows does not in my view diminish their authority over the money. They weren't mail room clerks who happened to be in the front of the bank.

I would affirm these convictions.

B.

Part IV of the majority opinion finds the evidence insufficient to support the criminal street gang enhancements because it does not show that the robberies were committed for the benefit of, at the direction of, or in association with a criminal street gang, or that defendants had the specific intent to promote, further, or assist in any criminal conduct. (Typed opn., p. 18.) I disagree. There is nothing in this record to

suggest these defendants were off on a frolic of their own, and I view Sergeant Duran's and Officer Rudolf's testimony as sufficient to establish all of the elements of Penal Code section 186.22. I would affirm the gang enhancement findings. (*People v. Gardeley* (1996) 14 Cal.4th 605, 619-620.)

In all other respects, I agree with the majority's conclusions.

VOGEL, Acting P.J.