Filed 11/10/10 P. v. Thompson CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. ANDREW BRUCE THOMPSON III, Defendant and Appellant.	C061568 (Super. Ct. No. SF108385A)

A jury found defendant Andrew Bruce Thompson III guilty of second degree murder, unlawful possession of a handgun, unlawful possession of ammunition, and active participation in a criminal street gang (i.e., street terrorism), with various sentencing enhancements, all in connection with the shooting death of his girlfriend, Erica Orsino. Sentenced to an aggregate term of 68 years 8 months to life in prison, defendant appeals, contending: (1) the trial court violated his constitutional right to confront the witnesses against him by admitting a medical examiner's testimony about an autopsy performed by another examiner; (2) a police detective who testified for the

prosecution committed *Doyle*[1] error by repeatedly testifying about defendant's request for an attorney; (3) the trial court erred when it directed the jury to reconsider inconsistent verdicts on two different firearm enhancements on the murder charge; (4) there was insufficient evidence to support a gang enhancement and the street terrorism charge; and (5) the trial court erred in failing to stay the sentence for street terrorism under Penal Code[2] section 654.

We conclude the trial court did not violate defendant's constitutional rights by admitting testimony about an autopsy by a different medical examiner than the one who performed the autopsy and did not err in sentencing defendant for street terrorism. We also conclude there was no *Doyle* error and defendant has not shown there was insufficient evidence to support the street terrorism charge. We do find error, however, in the trial court asking the jury to "take a second look at the [enhancement] findings on [the murder charge]," because the jury had found the firearm enhancement allegation under section 12022.53, subdivision (d) not true but the allegation under section 12022.5, subdivision (a) true, and the court "wasn't sure if that's what they intended." This was error because the trial court had no right or power to direct or suggest that the

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1 *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91].

2 All further section references are to the Penal Code.

jury reconsider its "not true" finding on the first firearm enhancement.

Because of this error, we will reverse the finding on the section 12022.53, subdivision (d) enhancement that the jurors returned after the court told them to "take a second look" and will remand the case for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

For our purposes, the underlying facts may be briefly stated. On May 24, 2008, Orsino was shot to death in her bedroom at her mother's house. At the time, defendant (her boyfriend) was the only other person in the room. Defendant is an admitted gang member.

The Charges

Defendant was first charged in the death of Orsino four days later. Ultimately, an information charged him with murder. The murder charge included an enhancement allegation under subdivision (d) of section 12022.53, alleging defendant intentionally and personally discharged a handgun in the commission of the murder (the gun discharge enhancement). There was also an enhancement allegation under subdivision (a) of section 12022.5, alleging defendant personally used a firearm in the commission of the murder (the gun use enhancement).

The information also charged defendant with being a felon in possession of a handgun, a rifle, and ammunition. Defendant was also charged with street terrorism and that charge included a gun use enhancement allegation. The information also alleged that defendant had a prior serious felony conviction and two

prior prison terms. Early on in the trial, defendant admitted the prior conviction and prior prison term allegations.

Dr. Omalu's Testimony

At trial, Dr. Bennet Omalu, the chief medical examiner for San Joaquin County, testified for the prosecution. After the prosecution established his qualifications, the court determined that Dr. Omalu qualified as an expert in forensic pathology. Dr. Omalu then testified that "part of [his] job as chief medical examiner is to review autopsies performed by other doctors and then testify independently based on [his] experience at a trial."

Dr. Omalu reviewed the official records of the autopsy of Orsino, including the autopsy photographs, the crime scene photographs, and the clothes Orsino was wearing when she was shot. He also reviewed the autopsy report prepared by Dr. Pakdaman, who performed the autopsy of Orsino. From the report, Dr. Omalu testified to the time of death and about Dr. Pakdaman's examination of Orsino's body and clothing. From autopsy photographs and Orsino's shirt, Dr. Omalu testified about the entrance gunshot wound on Orsino's abdomen and to his opinion that the gun was at least two feet away from Orsino when the shot was fired. From another autopsy photograph showing the exit wound and measurement information that was presumably from the autopsy report, Dr. Omalu testified that the bullet went essentially straight through the body.

With reference to a mannequin (and, again, presumably to information from the autopsy report), Dr. Omalu then testified

about the organs the bullet struck, the damage it caused -- particularly to the iliac artery -- and how that damage caused arterial bleeding that led to Orsino's death. Further testimony addressed the amount of internal bleeding, the absence of additional injuries, and the likelihood that Orsino was lying on the bed when she was shot. At no time did defendant object to Dr. Omalu testifying because he did not perform the autopsy on Orsino.

Detective Rodriguez's Testimony

Stockton Police Detective Eduardo Rodriguez testified that when defendant turned himself in to the police after the police went to his parents' house, defendant had an injury on his upper left arm. Detective Rodriguez further testified that he thought he asked defendant if he wanted medical assistance, but defendant "wouldn't say anything to [him]."

On cross-examination, Detective Rodriguez testified defendant had a wound on his chest as well. As defense counsel pursued the issue of medical care, the following exchange occurred:

"Q. Now, I think you indicated that you offered some medical care to the defendant, and you indicated he just didn't answer your question about whether or not he wanted medical care, or --

"A. It was kind of unusual, because whatever question we asked him, I believe he said he wanted his lawyer.

"Q. Okay.

"A. If we asked him for water, medical help, 'I want my lawyer.'

"Q. Okay. And that was -- you asked him if he wanted to see somebody to get some help for his wounds, and that's the same answer he gave you?

"A. No matter what question we asked him, his response was he wanted his lawyer.

"Q. Here is my question. Did he ask you to see a lawyer prior to the time that he saw someone to get medical care for his wounds?

"A. Well, a lawyer had brought him in, so I assume they discussed it.

"Q. Well, I know. I'm not interested in your assumptions. Please listen to the question. Did he make that reply, I want to talk to my lawyer, when you asked him about getting medical care?

"A. I don't remember. I'd have to refer back to the tape for his response.

"Q. When you were talking to him about whether he wanted medical care or not, was his lawyer present?

"A. No.

"Q. And just for the record, I was not the lawyer who was with him at the time, is that correct?

"A. Correct."

The trial court later instructed the jury as follows: "A defendant has an absolute constitutional right not to make statements to the police and request representation by an

attorney. Do not consider, for any reason at all, the fact that the defendant did not give a statement to the police and requested representation by an attorney. Do not discuss that fact during your deliberations or let it influence your decision in any way."

The Verdicts

The jury returned its verdicts on January 27, 2009, but because the foreperson was not well, the trial court did not unseal them until the morning of January 28. When it did so, the court made the following statement: "Okay. [Jury foreperson], I'm going to have you folks go back into the jury room. You have two verdict forms filled out on Count 1 [the murder charge] that are inconsistent, okay, so I need you folks to tell me what you meant, okay? Put those on top. *And I'm also going to ask you to take a second look at the findings on Count 1.* Okay. Send us a note when you are ready to come back in." (Italics added.)

The jury subsequently sent a note indicating "[t]he corrections have been made for the required paperwork." The jury then returned a verdict of guilty of second degree murder, with true findings on both the gun discharge enhancement and the gun use enhancement on that charge. The jury found defendant guilty of unlawfully possessing a handgun and ammunition, but not guilty of unlawfully possessing a rifle. The jury also found defendant guilty of street terrorism and found the gun use enhancement allegation on that charge true.

The New Trial Motion

Defendant moved for a new trial on the gun discharge enhancement. Defense counsel asserted that on the original guilty verdict form for the murder charge, the jury had found the gun use enhancement true but found the gun discharge enhancement *not* true. The new trial motion was supported by a declaration that addressed discussions defense counsel and the prosecutor had with the jurors after they were dismissed. Defense counsel also related a subsequent conversation he had with one of the jurors, who said that when the jurors returned to the jury room they had not simply corrected the verdict form but had taken an additional ballot on the murder charge before changing the form.

The new trial motion was also supported by a memorandum of points and authorities citing various statutes and cases addressing the different elements of the two firearm enhancements, the law on inconsistent verdicts and findings, and the law on a court's influence on a jury verdict, but nowhere did the moving papers actually include argument expressly asserting why a new trial should be granted based on those authorities.

The prosecutor opposed the motion. To the extent defendant was arguing that the jury was entitled to find defendant guilty of murder and find the gun use enhancement true but find the gun discharge enhancement not true, the prosecutor argued "[t]his would have been impossible" because "[t]he whole Defense argument was that the gun discharged accidentally."

At the hearing on the new trial motion, defense counsel filed a declaration from the jury foreperson, who asserted that when the jurors returned to the jury room no further deliberation occurred and no further ballots were taken (contradicting the earlier statement by the other juror). Defense counsel did not elaborate on the basis on which defendant was seeking a new trial. The trial court then ruled as follows: "The record should reflect, and I think I did not do this after the jury was discharged, but to be clear, the Court received the verdicts initially with the murder verdict form properly executed indicating . . . the defendant was guilty of murder with the degree being fixed as murder in the second degree. [¶] At the same time, there was the verdict form for not guilty for the entire count that was signed, which I clearly explained to the jury verbally and visually on the Elmo was not to be signed unless they found the defendant not guilty completely; not guilty on the Count 1. That presented a[n] inconsistency. [¶] The Court also noticed that the finding for the [gun discharge] enhancement was marked not true, but the [finding for the gun use enhancement] was marked true. I wasn't sure if that's what they intended. So after telling them that they needed to address the inconsistency, I told them just to simply take a second look at the findings on Count 1. [¶] And, apparently, from what I'm given to understand was that the foreperson went back and fixed the forms. It must have been consistent with their thoughts, because I polled the jury, and each juror agreed that that was their intended verdict and

findings on each of the allegations on Count 1. So -- as well as the other counts. So that's the record before the Court. [¶] I'm going to deny the motion for a new trial."

Sentencing

The trial court sentenced defendant as follows: On the murder charge, the court imposed a mandatory term of 15 years to life in prison, doubled to 30 years for defendant's prior conviction. The court imposed a consecutive term of 25 years to life for the gun discharge enhancement and a middle term of four years for the gun use enhancement, but the court stayed the latter term under section 654.

On the remaining charges, the court selected the street terrorism charge as the principal term and imposed the upper term of three years, doubled to six for the prior conviction. The court also imposed a consecutive four-year term for the gun use enhancement on the street terrorism charge. The court imposed consecutive terms of eight months (one-third the middle term), doubled to 16 months for the prior conviction, on the charges of unlawfully possessing a handgun and ammunition. The court imposed two one-year sentences for the prior prison terms, but stayed one of those sentences under section 654. The aggregate prison term was 68 years 8 months to life. Defendant timely appealed.

DISCUSSION

I

The Medical Examiner's Testimony Did Not Violate Defendant's Constitutional Right To Confront The Witnesses Against Him

On appeal, defendant asserts for the first time that "Dr. Omalu's testimony on the basis of non-testifying autopsy pathologist Dr. Pakdaman's report, findings, and conclusions violated the Sixth Amendment Confrontation Clause." We disagree.

As an initial matter, the People contend defendant forfeited this claim of error by failing to raise it in the trial court. "It is, of course, 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.'" (*People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7, quoting *People v. Rogers* (1978) 21 Cal.3d 542, 548.)

Defendant contends the rule of forfeiture (or waiver) does not apply because an objection to Dr. Omalu's testimony on confrontation clause grounds would have been futile. According to defendant, Dr. Omalu's testimony was admissible under a California Supreme Court decision in effect when Dr. Omalu testified -- *People v. Geier* (2007) 41 Cal.4th 555 -- and thus an objection would have been futile, but a subsequent United States Supreme Court decision -- *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [174 L.Ed.2d 314] -- now "directly

contradicts the California Supreme Court's interpretation of the federal [C]onstitution's Sixth Amendment Confrontation Clause."

The futility cases defendant cites do not address *evidentiary* objections, which, by statute, must be made in the trial court or forfeited. (See Evid. Code, § 353 ["A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"].) Moreover, as the People point out, while the trial court may have been bound by *Geier*, an objection in the trial court still would have "preserve[d] [the issue] for ultimate federal review."

Even if we can review defendant's confrontation clause argument despite his failure to raise it in the trial court, for the following reasons we find no merit in it.

In *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177], the United States Supreme Court held that under the Sixth Amendment, which guarantees a criminal defendant "'the right . . . to be confronted with the witnesses against him,'" an out-of-court statement that is "testimonial" in nature cannot be admitted into evidence over the defendant's objection unless the person who made the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. (541 U.S. at pp. 42, 68-69 [158 L.Ed.2d at pp. 187, 203].) The court declined "to spell out a

comprehensive definition of 'testimonial,'" but stated that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68 [158 L.Ed.2d at p. 203].)

In *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224], which also included a second case, *Hammon v. Indiana*, the court qualified the latter part of *Crawford*, holding that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822 [165 L.Ed.2d at p. 237].) Based on this holding, the court concluded the statement at issue in *Davis* was not testimonial, but the statements at issue in *Hammon* were. (*Davis*, at pp. 828-832 [165 L.Ed.2d at pp. 240-243].)

Justice Thomas concurred in the judgment in part and dissented in part, agreeing with the conclusion about the statement in *Davis* but disagreeing about the statement in *Hammon*. (*Davis v. Washington*, *supra*, 547 U.S. at pp. 834, 842 [165 L.Ed.2d at pp. 244-245, 249].) According to Justice Thomas, the standard the court adopted was "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause." (*Id.* at p. 842 [165 L.Ed.2d at

p. 249].) Drawing on his own concurrence in *White v. Illinois* (1992) 502 U.S. 346, 365 [116 L.Ed.2d 848, 865], Justice Thomas stated that "the plain terms of the 'testimony' definition [the court adopted in *Crawford*] necessarily require some degree of solemnity before a statement can be deemed 'testimonial,'" and "[t]his requirement of solemnity supports [his] view that the statements regulated by the Confrontation Clause must include 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Davis v. Washington*, *supra*, 547 U.S. at p. 836 [165 L.Ed.2d at p. 246].)

In 2009, in *Melendez-Diaz*, the court faced the question of whether "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine . . . are 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 319].) Led by Justice Scalia, four members of the court concluded "[t]here is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements.'" (*Id.* at p. ___ [174 L.Ed.2d at p. 321].) Another four members disagreed, concluding "[l]aboratory analysts who conduct routine scientific tests are not the kind of conventional witnesses to whom the Confrontation Clause refers." (*Id.* at p. ___ [174 L.Ed.2d at p. 350], dis. opn. of Kennedy, J.) Justice Thomas concurred with Justice Scalia's opinion, but

wrote "separately to note that [he] continue[s] to adhere to [his] position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Id.* at p. ___ [174 L.Ed.2d at p. 333].) He explained that he "join[ed] the Court's opinion in this case because the documents at issue in this case 'are quite plainly affidavits,'" and "[a]s such, they 'fall within the core class of testimonial statements' governed by the Confrontation Clause."[3] (*Ibid.*)

With this understanding of the current state of the law in mind, we turn to defendant's arguments. He contends that under *Melendez-Diaz*, "when the States seeks [*sic*] to introduce forensic analysis in the form of testimony regarding an autopsy report, absent a showing that the analyst is unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine the analyst, such evidence is inadmissible." We disagree.

In addressing this issue, it is important to emphasize that *Crawford* and *Melendez-Diaz* address the issue of when an out-of-

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[3] The California Supreme Court has granted review in several cases discussing the scope of *Melendez-Diaz*. (*People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620.)

court statement that is "testimonial" in nature can be admitted into evidence. Thus, the first step in any analysis under those cases is to determine exactly what out-of-court statement was admitted into evidence. Defendant skips that step here. While he asserts "the admission of Dr. Omalu's testimony conveying testimonial hearsay of non-testifying autopsy pathologist Dr. Pakdaman violated the Sixth Amendment Confrontation Clause," he never identifies exactly what part or parts of Dr. Omalu's testimony he contends "convey[ed] testimonial hearsay of . . . Dr. Pakdaman." For the sake of argument, however, we will assume that defendant's confrontation clause objection applies to every instance in which Dr. Omalu testified to statements of Dr. Pakdaman contained in the autopsy report.[4]

Referencing a footnote in Justice Scalia's opinion (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. ___, fn. 5 [174 L.Ed.2d at p. 326, fn. 5]), defendant asserts that "the United States Supreme Court in *Melendez-Diaz* specifically referenced autopsy examinations as one kind of forensic analysis that constitutes a testimonial statement to which the forensic analyst is a witness and to which the Confrontation Clause applies." Even assuming this to be true, however, in understanding the Supreme Court's *holding* in *Melendez-Diaz* it is necessary to distinguish between the conclusions and

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[4] For example, Dr. Omalu testified that "in the autopsy report [Dr. Pakdaman] documented he examined some articles of clothing" and "described an article of clothing that exhibited evidence of gunshot wounds on the body."

observations in Justice Scalia's opinion and the conclusions and observations in Justice Thomas's opinion, because "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (*Marks v. United States* (1977) 430 U.S. 188, 193 [51 L.Ed.2d 260, 266].)

As we have explained, in his opinion, Justice Scalia concluded "that the documents at issue in this case fall within the 'core class of testimonial statements.'" (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 321].) The "documents at issue" were not simply forensic laboratory reports, however, but "'certificates of analysis'" that "were sworn to before a notary public." (*Id.* at p. ___ [174 L.Ed.2d at p. 320].) This was significant to Justice Scalia's analysis because although the documents were "denominated by Massachusetts law 'certificates,' [they we]re quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths,'" and thus were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (*Id.* at p. ___ [174 L.Ed.2d at p. 321].) This fact was also significant to Justice Thomas, who concurred in Justice Scalia's opinion *only* because the "certificates" were "'quite plainly affidavits,'" and "[a]s such, they 'fall within the core class of testimonial

statements' governed by the Confrontation Clause." (*Id.* at p. ___ [174 L.Ed.2d at p. 333].)

Whatever broader ideas about what constitutes a "testimonial" statement may be drawn from Justice Scalia's opinion in *Melendez-Diaz*, under *Marks* the *holding* of the court in *Melendez-Diaz* can be found in Justice Thomas's conclusion that "'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 333].)

Based on this understanding of *Melendez-Diaz*, the trial court did not err in admitting Dr. Omalu's testimony regarding statements made by Dr. Pakdaman in his autopsy report because the autopsy report was not formalized testimonial material, like an affidavit, deposition, prior testimony, or confession. Under Government Code section 27491.4, subdivision (a) "[t]he detailed medical findings resulting from an inspection of the body or autopsy by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with medicolegal practice and this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of the death." Thus, the autopsy report is clearly a government record, but that does not make it "formalized testimonial material," as Justice Thomas

employs that term. Accordingly, the statements contained in the autopsy report here were not "testimonial" for purposes of the confrontation clause, and the admission of Dr. Omalu's testimony about those statements did not violate defendant's rights under the Sixth Amendment.

II

Doyle Error

On appeal, defendant argues for the first time that "[i]t was . . . improper for Detective Rodriguez to comment repeatedly that [defendant] requested counsel in response to every question posed to him post-arrest." Defendant asserts that Detective Rodriguez's testimony was "*Doyle* error" and "violate[d] the Sixth Amendment right to counsel and the Fifth Amendment right to Procedural Due Process."

"*Doyle v. Ohio* . . . held that use, for impeachment purposes, of a defendant's silence at the time of arrest and after receipt of *Miranda*[5] warnings violates due process. An express assertion of rights must also be beyond exploitation by the prosecutor. Otherwise, '[i]t cuts down on the privilege [against self-incrimination] by making its assertion costly' [citation]. *Doyle*, *supra*, is not limited to in-custody situations, but is broadly interpreted to apply to any testimony about a defendant's desire or request for counsel [citation]." (*People v. Fabert* (1982) 127 Cal.App.3d 604, 609.)

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5 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

The People contend defendant forfeited his claim of *Doyle* error by failing to object to Detective Rodriguez's testimony at trial. Defendant asserts "[t]he decisional precedent is in conflict on the question of whether this error is subject to procedural default," but he then asks us to "[c]ompare" five California Supreme Court decisions, dating from 1988 to 2008, in which that court found forfeiture, with two California Court of Appeal decisions, dating from 1970 and 1984, in which those courts found no forfeiture. Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, we are bound by the decisions of our Supreme Court, so for us there is no conflict -- defendant's claim of *Doyle* error "was forfeited for appellate purposes by the lack of a contemporaneous objection." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 63.)

Even if we were to reach this forfeited argument, it has no merit. Under *Doyle*, *the prosecutor* "is precluded from commenting on the defendant's assertion of the right to counsel." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 65.) Here, the prosecutor offered no such comment and did not elicit the testimony of which defendant complains; that testimony was elicited by *defense counsel*.

Defendant asserts that *Doyle* applies not only to the prosecutor, but also to a "prosecution investigator," but he cites no authority for that proposition. All the cases he cites involved comment or questioning *by the prosecutor*. Absent any authority for the proposition that testimony by a police officer about the defendant's assertion of the right to counsel,

elicited without objection by defense counsel (whether intentionally or not),[6] violates the defendant's constitutional rights, we conclude defendant has not shown *Doyle* error.

III

Change To The Firearm Discharge Enhancement Finding

Defendant contends the trial court erred and violated his constitutional rights to due process and to a jury trial when it "direct[ed] . . . the jurors to reconsider and remove the inconsistency on the enhancement findings" on the murder charge. We agree the trial court erred under state law.

Section 1161 specifically addresses the issue of when a trial court may direct a jury to reconsider a verdict in a criminal case. That statute permits a court to direct the jury to reconsider "a verdict of conviction" under certain circumstances, but provides that "when there is a verdict of acquittal, the court cannot require the jury to reconsider it."

The People are correct -- and defendant does not argue otherwise -- in asserting that the trial court "properly asked the jury to reconsider its inconsistent verdicts on the murder charge." When a jury presents verdict forms of both guilty and not guilty on a particular count, the trial court may instruct

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[6] We accept defendant's argument that "Detective Rodriguez surprised defense counsel" when the detective first mentioned that defendant asked for his attorney when the police asked defendant if he wanted medical care, but it is clear that rather than objecting to and/or moving to strike the detective's unexpected testimony, defense counsel instead chose to ask further questions on the subject.

the jury to resolve the inconsistency. (E.g., *People v. Keating* (1981) 118 Cal.App.3d 172, 181-182.) In such a situation, directing the jury to reconsider does not run afoul of section 1161 because where there are two mutually exclusive verdicts on a single charge, there is, in fact, no verdict -- neither of conviction nor of acquittal.

But where, as here, the inconsistency is not between two verdict forms on a single count or enhancement, but between two verdict forms on *different* counts and/or enhancements, section 1161 is fully operative, and the trial court may not direct the jury to reconsider a verdict of acquittal, even though that verdict is inconsistent with another verdict the jury has returned. "As a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] For example, 'if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both.'" (*People v. Avila* (2006) 38 Cal.4th 491, 600.)

People v. Guerra (2009) 176 Cal.App.4th 933 provides an example of a case where the trial court erred in refusing to accept inconsistent verdicts. There, "[a] jury convicted the defendant . . . of sex crimes against his daughter and another minor. The jurors initially found untrue five enhancement allegations that multiple victims were involved. After the trial court told the jurors that the verdicts were inconsistent and that the jury might wish to 'reconsider' them and 'should'

find the allegations true if it found the predicate fact of multiple victims true, the jury did reconsider the allegations and found them true." (*Id.* at p. 935.) The Court of Appeal concluded that the trial court "invaded the jury's province" and accordingly "reverse[d] the true findings on the enhancement allegations . . . and remand[ed] the case for resentencing." (*Ibid.*)

The People contend *Guerra* is "inapposite" because here, "by contrast, the record makes clear that the court did not tell the jury to reconsider its verdicts with respect to the firearm enhancement allegations." According to the People, "the most reasonable interpretation of the court's comments was merely that the court was asking for the jury to make sure the forms correctly reflected their intended verdicts."

A closer comparison of what happened in *Guerra* and what happened here does not support the distinction the People attempt to draw between the two cases. In *Guerra*, the trial court noted an apparent inconsistency between the verdict on one of the substantive offenses (count eight) and the verdicts on the enhancements on some of the offenses.[7] (*People v. Guerra*, *supra*, 176 Cal.App.4th at pp. 936-938.) The court told the jury, "'It appears to the court that there may be an

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[7] Count eight involved a second victim and the enhancements alleged multiple victims. The jury found the defendant guilty of count eight (thus finding there *were* multiple victims) but, inconsistently, found *not true* the multiple victim enhancement allegations. (*People v. Guerra*, *supra*, 176 Cal.App.4th at pp. 936-938.)

inconsistency in the verdict,'" and the court asked the foreperson whether the court had "'misinterpreted either the verdict with respect to count eight or the findings with respect to the [enhancement] allegation[s].'" (*Id.* at pp. 937-938.) The foreperson responded, "I think we misunderstood how to fill out the form. [¶] We did find guilty on all eight counts. As to whether there was more than one victim, we thought that meant that one specific charge, that one count." (*Id.* at p. 938.) After a discussion at sidebar with counsel, the court reread an instruction to the jury; clarified that "'if in the case being tried before you there is more than one victim that the defendant has been convicted of sexually assaulting as charged, that the answer to those [enhancement] allegation questions should be true'"; and then said, "'If, based upon this clarification, the jury wishes to change its findings with respect to one or more of those allegations, I'll give you the opportunity to do so, and I'm going to ask the bailiff to take the verdict forms from me at this time and hand them back to the foreperson of the jury. [¶] I will ask, would you like to go back into the jury room to discuss that?" (*Id.* at pp. 939-940.) The foreperson said, "'Yes, sir. We misunderstood,'" and the court responded, "'Very well. [¶] I'll excuse the jury in the company of the bailiff to return to the jury deliberation room to reconsider the findings on those allegations." (*Id.* at p. 940.) The jury then retired for a brief recess, after which it returned verdicts finding the defendant guilty on all eight

counts and the multiple-victim enhancement allegations all true. (*Ibid.*)

At no time in *Guerra* did the trial court *direct* the jury to reconsider its verdicts finding the enhancement allegations not true; instead, the court invited the jury to do so by explaining to the jury why the verdicts on the enhancement allegations were inconsistent with the verdict on count eight and then asking the jury if it wanted to reconsider the verdicts. Still, the Court of Appeal concluded the trial court improperly invaded the jury's province. As the appellate court explained, "Given the formality of the setting of a superior court, over which the trial judge presides in a commanding display of authority, and in light of the jurors' respectful and deferential tone toward the trial court as everyone discussed the inconsistent verdict, it is possible to interpret the court's invitation to reconsider the findings as something akin to an order from the jurors' perspective. Reviewing courts have acknowledged these legal and sociological facts in stating that '"We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade."' [Citation.] So it is no surprise than [*sic*] when the court asked, 'would you like to go back into the jury room to discuss that?' the jury foreperson, without, as far as this record discloses, asking any other juror for an opinion, immediately replied, 'Yes, sir. We misunderstood.'

"To protect defendant's right under section 1161 that 'when there is a verdict of acquittal, the Court cannot require the jury to reconsider it,' while also protecting defendant's right under the same statute not to be convicted of molesting the second victim if the jury had intended to find him not guilty on that count, the trial court should have granted the prosecutor's request to poll the jurors. (See § 1163.) If each answered that the verdicts and findings reflected the juror's individual verdicts and findings, then the court's task was complete under section 1161--the jury had rendered inconsistent verdicts and the court was required to accept and record all of them, thereby satisfying the rule that '"if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both." [Citation.]' [Citation.]

"Instead, the trial court impermissibly invited the jury to 'reconsider' its not true findings and allowed the jurors to deliberate anew. This was in excess of its authority; after the jury returned not true findings as to the five enhancement allegations, 'the trial court could not resubmit [those] matter[s] to the jury for further deliberation.'" (*People v. Guerra*, *supra*, 176 Cal.App.4th at pp. 943-944.)

Here, as in *Guerra*, the trial court did not direct the jury to reconsider its verdicts on the two firearm enhancement allegations. But the court invited the jury to reconsider its verdicts on the enhancements when it "ask[ed the jury] to take a second look at the [enhancement] findings on [the murder

charge].” Asking a jury to “take a second look” at its verdicts is no different than asking a jury if it “‘would . . . like to go back into the jury room to discuss’” its verdicts. It may be true that the trial court did not intend for the jury to deliberate further on the enhancement allegations, but sent the jury back only to confirm that the verdict forms reflected the jury’s actual verdicts because the court “wasn’t sure if that’s what they intended.” But the proper way for the trial court to have addressed that uncertainty was *not* to ask the jury to go back into the jury room and “take a second look.” Instead, the proper thing for the court to have done, as suggested by *Guerra*, was to *poll* the jury. Indeed, section 1163 specifically provides that “[w]hen a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if anyone answer in the negative, *the jury must be sent out for further deliberation*.” (Italics added.) Thus, if upon polling the jury even one juror had indicated the “not true” finding on the gun discharge enhancement was not his or her verdict, the trial court would not just have had the power to send the jury back to reconsider its verdicts, the court would have had the *obligation* to do so. Absent such a poll, however, the court had *no power* with respect to the jury’s “not true” finding on the gun discharge enhancement except to accept and record it. The court could not tell the jury to “take a second look at” the verdict, and by doing so the court erred. The remedy for that error is to reverse the true finding

on the gun discharge enhancement and remand the case to the trial court to resentence defendant on the gun use enhancement instead. (See *People v. Guerra*, *supra*, 176 Cal.App.4th at p. 944.)

IV

The Street Terrorism Count

Defendant contends "[t]he prosecution proceeded primarily upon a theory that [defendant] killed [Orsino], because she told him that she was breaking up with him," and therefore "the gang enhancement finding and gang count are not supported by substantial evidence." As the People point out, however, defendant was not charged with a "gang enhancement." As for the "gang count" -- i.e., the charge of street terrorism -- it turns out defendant does not offer any argument directed at the elements of that crime.

Under subdivision (a) of section 186.22, a 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" is guilty of the crime sometimes called street terrorism. Subdivision (b) of that statute provides a separate criminal street gang sentence enhancement for "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."

Here, defendant's sufficiency of the evidence argument is directed -- or rather, misdirected -- at the elements of the criminal street gang enhancement, which was *not charged here*. First, he argues that "[t]he record fails to contain substantial evidence that the homicide was committed for the benefit [of], at the direction of, or in association with a criminal street gang." Second, he argues that "[t]he record is lacking in evidence that, if the homicide was intentional, [defendant] killed [Orsino] with the specific intent to advance other criminal conduct by gang members." Then he contends that "[f]or the reasons discussed in this argument, the gang enhancement and gang count are not supported by substantial evidence and must be reversed."

In a criminal case, "to prevail on a sufficiency of the evidence argument, the defendant must . . . set forth in his opening brief *all* of the material evidence *on the disputed elements of the crime* in the light most favorable to the People, and then must persuade us that evidence cannot reasonably support the jury's verdict." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574, second italics added.) Obviously, a defendant cannot carry this burden of persuasion if he fails to address *any* of the elements of the crime at issue, let alone the disputed elements of that crime. Such is the case here. Because defendant's sufficiency of the evidence argument addresses only elements of the criminal street gang sentence enhancement that was not charged here and does not address any of the elements of the crime of street terrorism that was

charged,[8] defendant has not carried his burden of persuading us the evidence was insufficient to support his conviction for that crime.

V

Section 654

Defendant contends his sentence for street terrorism must be stayed under section 654 because this charge and the murder charge were based on the same act. We disagree.

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

"Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an 'act or omission,' there can be no universal construction which directs the proper application of section 654 in every instance." (*People v. Beamon* (1973) 8 Cal.3d 625, 636.) Nevertheless, our Supreme Court has set forth some basic principles for applying the statute.

In *Neal v. State of California* (1960) 55 Cal.2d 11, the court explained "'[i]t is the singleness of the act and not of

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[8] For example, defendant does not argue there was insufficient evidence that he "willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of that gang."

the offense that is determinative.' Thus the act of placing a bomb into an automobile to kill the owner may form the basis for a conviction of attempted murder, or assault with intent to kill, or malicious use of explosives. Insofar as only a single act is charged as the basis for the conviction, however, the defendant can be punished only once." (*Id.* at p. 19.)

But our Supreme Court has also explained that "section 654 refers not to *any* physical act or omission which might perchance be common to all of a defendant's violations, but to a defendant's *criminal* acts or omissions." (*In re Hayes* (1969) 70 Cal.2d 604, 607.) "The proper approach, therefore, is to isolate the various *criminal* acts involved, and then to examine only those acts for identity." (*Ibid.*)

In *Hayes*, a majority of our Supreme Court concluded that a defendant who "drove a motor vehicle for some 13 blocks" while under the influence of intoxicating liquor and with knowledge that his driver's license was suspended engaged simultaneously in two distinct criminal acts -- "driving with a suspended license and driving while intoxicated" -- and could be punished for both, even though both criminal acts had in common the noncriminal act of "driving." (*In re Hayes*, *supra*, 70 Cal.2d at pp. 605, 607-608.) Thus, even in a case in which two offenses are based on the same physical act, section 654 may not prohibit punishing the defendant for both offenses. The pertinent question is whether both offenses are based on the same *criminal* act.

To complicate matters further, even when more than one criminal act is shown, section 654 still may bar multiple punishment in some circumstances. This is so because "'[s]ection 654 has been applied not only where there was but one "act" in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.' [Citation.] [¶] Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California*, *supra*, 55 Cal.2d at p. 19.) And "[j]ust as it is the *criminal* 'act or omission' to which section 654 refers, it is the *criminal* 'intent and objective'" to which *Neal* refers. (*In re Hayes*, *supra*, 70 Cal.2d at p. 610.)

With these principles in mind, we turn back to the present case. As we have explained, under subdivision (a) of section 186.22, it is a crime to actively participate in a criminal street gang with knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity, and to willfully promote, further, or assist in any felonious criminal conduct by members of the gang. Here, in pretrial discussions between the court and counsel, the prosecutor made it "clear" that with respect to the charge of

street terrorism, "the felonious conduct [defendant] engaged in was the homicide itself." Shortly thereafter, the prosecutor reiterated, "In order to prove the [street terrorism charge] I have to prove that the defendant did something felonious. [¶] . . . [¶] Here it's the murder. . . . [¶] . . . [¶] . . . The felonious conduct is the murder."[9]

Consistent with this approach, in closing argument the prosecutor asserted defendant "promoted the gang[']s conduct by not letting [Orsino] disrespect him, nor the gang. How so? Because on the night of May 24th, 2008, when [Orsino] was going to break up with the defendant, he shot and killed her. Because had [she] broken up with [him] the day after they did all those shootings, the day after all that happened,[10] he not only would have been disrespected because his girlfriend dumped him, but the gang would have been worried, who is she going to tell? He promoted their conduct by getting rid of witnesses. Snitches, as he calls them. During the commission of [the crime of street terrorism], we know he was armed with a firearm . . . . He did

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[9] Even though the statute refers to "promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of th[e] gang," courts have concluded that the crime of street terrorism applies to the person who actually perpetrates the felonious gang-related criminal conduct as well as to a person who only promotes, furthers, or assists in that conduct. (E.g., *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.) Defendant does not argue otherwise here.

[10] The prosecution presented evidence of an incident the night before Orsino was killed in which Orsino supposedly saw defendant and his compatriots harm a person.

personally discharge it when he shot [Orsino], and he intended to do that."

Thus it is clear the charges of murder and street terrorism were based on the very same physical act -- the shooting of Orsino. Under the authorities discussed above, however, that does not resolve the question of whether section 654 applies here, because, as we have seen, a single physical act may nonetheless constitute two distinct *criminal* acts for purposes of section 654. And if the shooting of Orsino can be deemed to constitute two distinct criminal acts, then the application of section 654 depends on whether defendant can be deemed to have entertained two distinct criminal objectives in committing those acts.

Skipping over the question of whether the shooting of Orsino constituted two distinct criminal acts, the People argue that punishment for both murder and street terrorism was proper here because "the two offenses involve[d] different objectives." According to the People, defendant "had the personal objective of killing the woman who had broken up with him and threatened to abort his child. However, he also had an objective to participate in a criminal street gang by eliminating a witness to the criminal activities of his gang, spreading the fear of his gang and avenging a perceived act of 'disrespect' shown by the victim."

Defendant suggests the two objectives the People identify are not distinct for purposes of applying section 654. In his view, "[a]ccording to the prosecution's gang expert, the killing

was committed to silence a potential witness and to retaliate for disrespect pursuant to gang culture tenets." Thus, what the People characterize as "the personal objective of killing the woman who had broken up with him and threatened to abort his child," defendant characterizes as the gang-related objective of "retaliat[ing] for disrespect." In defendant's view, because "the underlying crime [murder] was not independent of the gang allegations, section 654 applies to preclude separate punishment for the gang crime."

We do not find that either party's parsing of defendant's supposed "objectives" in shooting Orsino provides a satisfactory basis for deciding whether the trial court properly (albeit implicitly) determined that section 654 did not apply here. Consequently, we turn to some of the cases in which the appellate courts have dealt with the application of section 654 to a conviction for street terrorism and one or more other offenses to see what assistance those decisions provide.

In *People v. Herrera* (1999) 70 Cal.App.4th 1456, the defendant personally used a firearm in a gang-related drive-by shooting and was convicted of (among other things) two counts of attempted murder and one count of street terrorism. (*Id.* at pp. 1460-1462.) On appeal, Division Three of the Fourth Appellate District concluded defendant could be separately punished for street terrorism and attempted murder based on the following analysis:

"The characteristics of attempted murder and street terrorism are distinguishable, even though aspects of one may be

similar to those of the other. In the attempted murders, Herrera's objective was simply a desire to kill. For these convictions, the identities (or gang affiliations) of his intended victims were irrelevant. The fact he repeatedly shot a gun on two separate occasions--the interval between the two being brief but distinct--striking cars, occupied apartments and bystanders, is sufficient to establish the specific intent to kill required for both counts of attempted murder. [Citations.]

"In contrast, section 186.22, subdivision (a), encompasses a more complex intent and objective. It is part of the Street Terrorism Enforcement and Prevention Act which was enacted by emergency legislation in 1988. [Citations.] The Legislature passed these criminal penalties and strong economic sanctions as a response to the increasing violence of street gang members throughout the state. Previously, there was no existing law that made the punishment for crimes by a gang member separate and distinct from that of the underlying crimes. [Citation.]

"Section 186.22, subdivision (a) punishes active gang participation where the defendant promotes or assists in felonious conduct by the gang. It is a substantive offense whose gravamen is the *participation in the gang itself*. Hence, under section 186.22, subdivision (a) the defendant must necessarily have the intent and objective to actively participate in a criminal street gang. However, he does not need to have the intent to personally commit the particular felony (e.g., murder, robbery or assault) because the focus of the street terrorism statute is upon the defendant's objective

to promote, further or assist the gang in its felonious conduct, irrespective of who actually commits the offense. For example, this subdivision would allow convictions against both the person who pulls the trigger in a drive-by murder *and* the gang member who later conceals the weapon, even though the latter member never had the specific intent to kill. Hence, section 186.22, subdivision (a) requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess 'two independent, even if simultaneous, objectives[,]' thereby precluding application of section 654. [Citation.]

"Herrera's active participation in [his gang's] 'payback' against [a rival gang] falls squarely within the provisions of section 186.22, subdivision (a), street terrorism. It requires the defendant to actively participate in a criminal street gang, have knowledge that its members engage in criminal activity, and have the intent and objective to further the gang's felonious conduct. (§ 186.22, subd. (a).) Independent of that, Herrera had the simultaneous although separate objective to actively participate in and promote his gang when he attempted to murder [the rival] gang members. Herrera's membership in [his gang] was well established at trial, including expert testimony regarding what such a membership entailed. Herrera testified he got into the Mustang to 'back up' or support the gang. He had told his girlfriend that his gang was going to retaliate against [the rival gang]. The gang experts explained that gang warfare uniformly involved guns. The evidence supports the finding that

Herrera intended to aid his gang in felonious conduct, irrespective of his independent objective to murder.

"Finally, if section 654 were held applicable here, it would render section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang. '[T]he purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his culpability." [Citation.]' [Citation.] We do not believe the Legislature intended to exempt the most culpable parties from the punishment under the street terrorism statutes." (*People v. Herrera*, *supra*, 70 Cal.App.4th at pp. 1466-1468, fns. omitted.)

In *People v. Ferraez* (2003) 112 Cal.App.4th 925, the defendant was convicted of possessing cocaine base for sale and street terrorism on the theory he was selling the rock cocaine for the criminal street gang to which he belonged. (*Id.* at pp. 927-929.) On appeal, another panel from Division Three of the Fourth Appellate District followed *Herrera* and concluded that "the trial court was not required to stay defendant's sentence for the gang crime" because "defendant possessed the drugs with the intent to sell, and he also intended to commit that felony to promote or assist the gang. While he may have pursued both objectives simultaneously, they were nonetheless independent of each other." (*Id.* at p. 935.)

In *People v. Vu* (2006) 143 Cal.App.4th 1009, the defendant was convicted of conspiracy to commit murder and street terrorism for a gang-related revenge shooting. (*Id.* at

pp. 1012-1013.) On appeal, another panel of Division Three of the Fourth Appellate District concluded the sentence for street terrorism should have been stayed under section 654 because "the acts of conspiracy and street terrorism constituted a criminal course of conduct with a single intent and objective. That single criminal intent or objective was to avenge [a fellow gang member's] killing by conspiring to commit murder. Although that intent or objective could be parsed further into intent to promote the gang and intent to kill, those intents were not independent. Each intent was dependent on, and incident to, the other." (*Id.* at p. 1034.)

Rather than disagree with *Herrera* and *Ferraez*, the *Vu* court claimed those cases were distinguishable. (*People v. Vu*, *supra*, 143 Cal.App.4th at p. 1034.) The court claimed *Herrera* was distinguishable "because the defendant was charged with a course of criminal conduct involving two gang-related, drive-by shootings in which two people were injured," and *Ferraez* was distinguishable "because under the facts of that case, the trial court could have found independent objectives." (*Vu*, at p. 1034.)

In *People v. Garcia* (2007) 153 Cal.App.4th 1499, the defendant was convicted of carrying a loaded unregistered firearm in public and street terrorism on the theory that he was carrying the firearm for the benefit of a criminal street gang. (*Id.* at p. 1502.) On appeal, another panel of Division Three of the Fourth Appellate District, without mentioning *Vu*, followed *Herrera* and *Ferraez* and determined that defendant could be

punished for both crimes because he "knew he was in possession of a firearm in public, and intended to commit that crime to promote or assist the gang. While he might have pursued these objectives simultaneously, they were independent of each other." (*Id.* at p. 1514, fn. omitted.)

In *People v. Sanchez* (2009) 179 Cal.App.4th 1297, the defendant was convicted of robbery and gang participation (street terrorism). (*Id.* at p. 1301.) On appeal, Division Two of the Fourth Appellate District concluded that "section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have 'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang," and "(2) the underlying felony that is used to satisfy this element of gang participation." (*Sanchez*, at p. 1301.) In reaching this conclusion, the court considered both *Herrera* and *Vu* at some length. (*Sanchez*, at pp. 1310-1313.) The court noted that "*Vu*'s effort to distinguish *Herrera* was less than satisfying" and concluded that "*Herrera* simply cannot be reconciled with *Vu*." (*Sanchez*, at pp. 1312-1313.) Then, after discussing "a number of problems" the court found with *Herrera*, the *Sanchez* court explained why section 654 barred separate punishment for gang participation in the case before it:

"Here, 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. . . .

"In our view, the crucial point is that, here, as in *Herrera* and *Vu*, the defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself." (*People v. Sanchez*, *supra*, 179 Cal.App.4th at p. 1315.)

The *Sanchez* court concluded that "the robberies--even if not gang motivated--were necessary to satisfy an element of the gang participation charge. . . . Accordingly, almost by definition, defendant had to have the same intent and objective in committing all of these crimes."[11] (*People v. Sanchez*, *supra*, 179 Cal.App.4th at p. 1316.)

The foregoing cases do not reveal a consistent line of reasoning for applying section 654 to cases, like the present one, where the defendant is convicted both of street terrorism and another felony, where the other felony is the "felonious criminal conduct" of the gang that is used to establish the

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[11] *Sanchez* involved the anomalous situation where the jury found gang enhancement allegations on the robbery counts *not* true (*People v. Sanchez*, *supra*, 179 Cal.App.4th at p. 1301) -- thus finding the defendant did not commit the robberies for the benefit of, at the direction of, or in association with the gang -- but nonetheless found the defendant guilty of gang participation apparently on the theory that the felonious criminal conduct of the gang that he promoted and furthered was the very robberies he committed (*id.* at pp. 1305-1308).

charge of street terrorism.[12] Defendant argues that "[t]his case falls within the *Vu* rationale," while the People contend "[t]his case is closer factually to *Herrera* than it is to *Vu*." For the reasons that follow, we believe the result reached in *Herrera* and its progeny is the correct one here.

The first question under section 654 is whether the two offenses involved the same criminal act or distinct criminal acts. We believe that, as a general matter, when the two offenses are a charge of street terrorism that is based on an underlying felony committed by the defendant *and* that underlying felony, two distinct criminal acts are involved. This is so because the charge of street terrorism is not based *only* on the underlying felony that serves as the "felonious criminal conduct" the statute requires, but is also based on the defendant's "active[] participat[ion] in [the] criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (a).) Indeed, as the *Herrera* court observed, participation in the gang is the gravamen of the crime of street terrorism. (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1467.)

Under this reasoning, the murder charge was based on a criminal act distinct from the street terrorism charge, even though both offenses had in common the shooting of Orsino. It

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12 This issue is now before our Supreme Court in *People v. Mesa* (2010) 186 Cal.App.4th 773, review granted October 27, 2010, S185688.

does not necessarily follow from that conclusion, however, that defendant can be punished separately for both acts, because we must still examine his criminal "intent and objective" under *Neal*.

In *Neal*, the defendant was convicted "of one count of arson and two counts of attempted murder [based] upon [his] act of throwing gasoline into the bedroom of [a married couple] and igniting it." (*Neal v. State of California*, *supra*, 55 Cal.2d at p. 18.) In concluding that the defendant could not be separately punished for arson, the Supreme Court wrote as follows:

"If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. [¶] . . . [¶] In the instant case the arson was the means of perpetrating the crime of attempted murder . . . . [Separate punishment for the arson] violated . . . section 654, since the arson was merely incidental to the primary objective of killing [the couple]." (*Neal v. State of California*, *supra*, 55 Cal.2d at pp. 19-20.)

In effect, the court in *Neal* concluded the defendant had only one criminal objective -- murdering the couple. Because the crime of arson was merely the means by which the defendant sought to accomplish that single objective, the defendant could not be punished for both attempted murder and arson under section 654.

We do not believe the reasoning from *Neal* compels the conclusion here that defendant can be punished only for the murder of Orsino and not for the crime of street terrorism as well. Unlike in *Neal*, where the arson was merely "the means of perpetrating the crime of attempted murder," here one crime was not merely the means of perpetrating the other. On this point, it is important to emphasize that street terrorism requires not only the commission of "felonious criminal conduct by members of [a] gang," but also "active[] participat[ion] in [the] gang" separate and apart from that felonious conduct. (See *People v. Castenada* (2000) 23 Cal.4th 743, 752 [describing "section 186.22(a)'s plainly worded requirements" as "criminal knowledge, willful promotion of a felony, and active participation in a criminal street gang"].) Thus, while the murder of Orsino was *part* of the street terrorism crime, the two crimes were not coextensive, and thus the murder was not simply the means by which defendant committed street terrorism, as the arson was the means by which the defendant committed attempted murder in *Neal*. Under this circumstance, the trial court was not bound to conclude both crimes involved only a single objective, such that only one punishment could be imposed for both crimes.

Accordingly, the trial court did not err in failing to stay the sentence on the street terrorism charge pursuant to section 654.

DISPOSITION

The true finding on the gun discharge enhancement under Penal Code section 12022.53, subdivision (d) is reversed, but the judgment of conviction is otherwise affirmed. The case is remanded for resentencing consistent with this opinion.

ROBIE, J.

We concur:

RAYE, Acting P. J.

CANTIL-SAKAUYE, J.