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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW ROGILLO MANCILLA,

Defendant and Appellant.

F061394

(Super. Ct. Nos. 10CM7002 &
09CM7180)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Donna Tarter,
Judge.

Kyle Gee, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Rebecca
Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On June 4, 2009, appellant Andrew Rogillo Mancilla entered into a negotiated plea agreement in Kings County case No. 09CM7180. In exchange for his no contest plea to one count of robbery and one count of active participation in a criminal street gang, he was placed on felony probation for five years. (Pen. Code,¹ §§ 211, 186.22, subd. (a).)

On October 19, 2010, appellant was convicted after jury trial in Kings County case No. 10CM7002 of two counts of attempted murder (§§ 664/187, subd. (a); counts 1 & 2), three counts of assault with a deadly weapon (§ 245, subd. (a)(1); counts 3, 4, 5), one count of burglary (§ 459; count 6), three counts of felony vandalism (§ 594, subd. (a); counts 7, 8, 9); and one count of active participation in a criminal street gang (§ 186.22, subd. (a); count 10). The jury found true special allegations that appellant personally inflicted great bodily injury during the commission of counts 1, 2, 4, 5, 6, and 10 (§ 12022.7, subd. (a)) and that counts 1 through 9 were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury found true two prior strike allegations arising from the convictions in case No. 09CM7180. (§§ 1170.12, subs. (a)-(d), 667, subs. (b)-(i).)² After the verdicts were entered, the court found in case No. 09CM7180 that appellant violated his probation by failing to obey all laws and by associating with gang members.

Appellant was sentenced in both cases on November 17, 2010. In case No. 10CM7002, the court imposed two aggregate terms of 40 years to life for counts 1 and 2,

¹ Unless otherwise specified all statutory references are to the Penal Code.

² Appellant was jointly tried with Francisco Anthony Carmona (Francisco), Nathaniel Christopher Ojeda-Carmona (Nathaniel), Juan Carlos Alvarez and Malaquias Gomes Guzman.

Solely to avoid confusion, some individuals will be referenced by their first names. No disrespect is intended or implied by this informality.

plus an aggregate term of 30 years to life for count 3, and three aggregate terms of 28 years to life for counts 7, 8 and 9. All of the terms were ordered to run consecutively. Sentences were imposed and stayed on counts 4, 5, 6 and 10. In case No. 09CM7180, the court imposed three years for count 1 and a consecutive term of eight months for count 2. The sentence in case No. 09CM7180 was ordered to run consecutive to the sentence in case No. 10CM7002.

Appellant argues that section 654 precludes imposition of separate punishment for the two convictions in case No. 09CM7180. Following and applying our Supreme Court's recent decision in *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*), we agree; the eight-month term that was imposed for the street terrorism conviction must be stayed. Appellant raises several additional appellate issues. He presents three challenges to the vandalism convictions, arguing: (1) he can properly be convicted of only one felony violation of section 594; (2) the absence of an instruction on aggregation was either judicial error or ineffective assistance of counsel; and (3) count 9 is not supported by substantial evidence. Appellant challenges the sufficiency of the evidence supporting the great bodily injury enhancements attached to the attempted murder counts. He argues that the trial court erred by giving CALCRIM No. 416 because conspiracy is not a valid theory of derivative criminal liability. Finally, appellant argues that defense counsel was ineffective because he did not file a motion to dismiss one of the prior strikes in the interests of justice. None of these arguments is persuasive. We will modify the sentence in case No. 09CM7180 and, as modified, affirm the judgments.

FACTS

Oscar Ocampo (Oscar) and Zaira Ramirez (Zaira) lived with their children in a house located on Dairy Avenue in Corcoran (Oscar's house). Zaira's brother, Edgar Ramirez (Edgar), lived with them. Edgar's bedroom area was in the garage, which had two doors; one door led inside the house and the other one led to an outdoor parking area (the outside door).

On the evening of January 2, 2010,³ Julio Diaz, Manuel Andrade (Manuel) and Manuel's brother, Juan Ruiz, were drinking and playing video games in the garage. Around midnight, Ruiz went into the front yard to smoke cigarettes. Appellant and Juan Alvarez walked by Oscar's house.⁴ They yelled, "Norte and stuff like that." Ruiz and one of the men began fistfighting. Edgar, Diaz and Manuel heard the commotion and went outside. Manuel attempted to break up the fight and someone hit him on the back of the head. Oscar heard appellant and Alvarez say, "[W]e are Norte and we are going to fuck you up, we are coming back." Then they left. Edgar and his friends went back inside the garage.

Manuel's cousin, Tony Andrade (Tony), passed by Oscar's house. Seeing Ruiz's parked car, he stopped and joined the group in the garage. When Tony learned that appellant and Alvarez said that they were going to return, Tony armed himself with a large tree branch and stood outside Oscar's house. Edgar, Manuel and Ruiz armed themselves with large sticks and joined Tony outside. Oscar, Zaira and the children remained inside the house. Oscar called the police.

Appellant and Alvarez returned to Oscar's house. Malaquias Guzman accompanied them. Appellant stood in the middle of the street swinging a stick or bat. Manuel told Guzman that the police were coming. Guzman pulled a gun out of his pocket. Everyone fell to the ground except appellant and Alvarez. Ruiz tried to crawl under Zaira's Chevrolet Tahoe. Appellant broke the Tahoe's back window, windshield and a side window. Appellant also broke the back window of Ruiz's Chevrolet Camaro and two windows on Oscar's house.

³ Unless otherwise noted all dates refer to 2010.

⁴ Although Manuel and Ruiz did not specifically identify the two men who walked by Oscar's house during their trial testimony, it is reasonably inferable from the entirety of their testimony that the two men were appellant and Alvarez.

Manuel, Tony and Ruiz got into the Camaro and drove away. Appellant's mother lived in a house located on Lorena Avenue, which is around the block from Dairy Avenue. Tony got out of the Camaro and broke one of the windows on appellant's mother's house.

Meanwhile, Edgar and Diaz went back inside the garage. About six men in dark clothes joined appellant and Alvarez in front of Oscar's house. The men ran towards the house and threw beer bottles at it.

Five young-looking men kicked open the outside door and entered the garage. Zaira and Oscar heard the sounds of fighting. Oscar did not recognize any of the voices. Then Oscar saw five young men exit the garage by the outside door. One of the men, not appellant, had a cut on his head and his shirt was covered in blood. The men who exited the garage all fled in the same direction towards Lorena Avenue. The injured man fell, and "his other friends picked him up." The men who had not gone into the garage ran away along a different street.

When Zaira went into the garage she saw that Diaz was bleeding from the back of his head and Edgar was unconscious.⁵ Both men were hospitalized. Diaz sustained puncture wounds to his abdomen, rib cage and one armpit. He had lacerations on the back of his head, over his left eyebrow, right arm and hand. Edgar sustained puncture wounds to his torso, below his right armpit and his right leg. One of his lungs collapsed. He had lacerations on his head, left arm and right thigh.

Former Corcoran Police Detective Sergeant Jason Bietz testified that when he arrived at the crime scene he noticed "a large amount of blood in the driveway, sidewalk and the asphalt in front of the residence." Blood drops were discovered leading from the outside door to the sidewalk, "north to Lorena Avenue, and then west on Lorena

⁵ Edgar and Diaz said that they did not remember anything about the stabbing and did not identify any of the assailants.

Avenue.” The blood drops ended at the house where appellant’s mother lived. Sergeant Bietz estimated that there were more than 100 blood drops. He placed evidence placards on the blood drops, photographed them and requested that some of them be collected for testing. Sergeant Bietz testified that he directed crime scene technicians to take two samples of blood that was deposited on the outside doorway because “I believe that I had two distinct different trails of blood that were left by two different people, and by taking the swab from each of those trails would identify the person who left those two samples behind.”

Some of the blood drops were sampled and tested for DNA identification. A sample from blood found on the outside doorway was consistent with the DNA profile of Nathaniel. A sample of the blood found outside the house where appellant’s mother lived was consistent with the DNA profile of Nathaniel. Another sample of the blood found outside the house where appellant’s mother lived was consistent with appellant’s DNA profile.⁶ Deposits of blood were found inside the garage, on the driveway of Oscar’s house, the fence in front of Oscar’s house, the sidewalk and the street in front of Oscar’s house. A sample of blood on the Camaro’s trunk lid was collected; it was consistent with appellant’s DNA profile.

Police found two clubs made from tree branches, an aluminum bat and a kitchen knife inside the garage. Swabs taken from the bat and one of the clubs were consistent with Alvarez’s DNA profile. A swab taken from the other club and a sample of blood that was deposited on the handle of the knife were consistent with Diaz’s DNA profile. A swab taken from the knife blade produced a mixture that was consistent with DNA profiles of Diaz, Nathaniel and Francisco.

⁶ Individual blood droplets along the trail from the outside doorway to the house where appellant’s mother lived were not tested.

A photographic lineup of 12 persons that included appellant, Alvarez and Guzman was compiled. Manuel and Tony selected photographs of all three men. Oscar selected photographs of appellant and Guzman. Ruiz selected a photograph of Guzman.

When appellant was arrested, his right hand was swollen and there was a cut on the middle finger. Alvarez had a black eye, several abrasions on the back of his head and a laceration on his scalp. Nathaniel and Francisco were injured.

Corcoran Police Officer Frank Castellanoz testified as a gang expert. He opined that appellant was an active Norteno gang member. Based on a hypothetical, he opined that the acts at Oscar's house during the night of January 2 and January 3 were committed in association with, at the direction of, or for the benefit of a Norteno criminal street gang.

Appellant testified that he was standing in his mother's backyard during the early morning hours of January 3 when he heard glass shattering. He walked to the front of her house and saw many people fighting in the street. The front window of his mother's house was broken. He picked up a large stick and started swinging it around. He hit the back window of the Camaro, cutting his finger. At this point, the fights stopped. Some of the people got into a car and drove away. The other people "took off." Appellant said that he telephoned an unnamed female and drove to Fresno with her, where they remained until approximately 9:30 a.m.

In rebuttal, Corcoran Police Officer Eric Essman testified that appellant told him that "earlier" in the evening on January 2, he and a female named "Sophia" traveled to Fresno, where they remained "throughout the evening." Appellant said that "he had fallen off of a bicycle while doing a trick and cut his finger on a piece of glass." Appellant did not mention anything about people fighting in front of his mother's house. Officer Essman did not see any glass that was consistent with a car window in the street in front of appellant's mother's house during the morning of January 3.

DISCUSSION

I. Appellant Was Properly Convicted Of Three Counts Of Felony Vandalism.

A. The *Bailey* rule did not require aggregation of the three acts of vandalism.

Appellant argues that two of the vandalism convictions must be reversed because he acted pursuant to a single intent, impulse and general plan when he broke the windows on Oscar's house, Zaira's Tahoe and Ruiz's Camaro. Acceptance of appellant's argument requires this court to extend the holding of *In re Arthur V.* (2008) 166 Cal.App.4th 61 (*Arthur*), which is itself an extension of *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*), to cases where the defendant's crimes involve separate acts of vandalism on property that is owned by different victims. In *In re David D.* (1997) 52 Cal.App.4th 304 (*David*), this court held that "one limitation of the *Bailey* doctrine is its inapplicability to offenses involving multiple victims." (*Id.* at p. 310.) We continue to adhere to this view. Even if we were to assume *arguendo* that the *Bailey* rule is properly extended to the crime of vandalism, it is not applicable in this case because appellant's crimes involved multiple victims.

In 1961, the California Supreme Court decided *Bailey, supra*, 55 Cal.2d 514. There, the defendant committed welfare fraud and received a number of payments, none of which alone sufficed to constitute grand theft, but collectively they did. The court decided that defendant was properly convicted of grand theft rather than a series of petty thefts. It authorized the aggregation of separate acts of theft into a single offense for the purpose of bringing a felony allegation when the thefts were committed pursuant to a single intent, impulse and plan. (*Id.* at pp. 518-519.)⁷ This holding has become known

⁷ The question whether multiple takings are committed pursuant to one intention, general impulse, and plan is a question of fact for the jury based on the particular circumstances of each case. (*People v. Packard, supra*, 131 Cal.App.3d at p. 626.) On appeal, we uphold the fact finder's conclusion if it is supported by substantial evidence. (*People v. Tabb* (2009) 170 Cal.App.4th 1142, 1149-1150.) Where the evidence supports

as the *Bailey* rule. The *Bailey* rule has been extended to prevent a defendant from being convicted of more than one count of grand theft where the takings were committed against a single victim and the evidence discloses only one general intent. (*People v. Richardson* (1978) 83 Cal.App.3d 853, 858; *People v. Packard* (1982) 131 Cal.App.3d 622, 626; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 324, 363-364.) For the next 47 years, the *Bailey* rule was limited to theft cases. (*People v. Neder* (1971) 16 Cal.App.3d 846, 852 [not extended to forgery]; *People v. Drake* (1996) 42 Cal.App.4th 592, 596 [not extended to fraud]; *People v. Washington* (1996) 50 Cal.App.4th 568, 575, 577-578 [not extended to burglary].)

In *David, supra*, 52 Cal.App.4th 304, we were presented with the question whether the *Bailey* rule was properly extended to the non-theft crime of vandalism. We decided that the lower court erred by allowing aggregation of 34 separate acts of vandalism into a single count felony count. Our decision identified “an additional factor which the previous authorities have not emphasized, but which we think is important—whether the count involved crimes against a single victim or multiple victims.” (*Id.* at p. 309.) Application of the *Bailey* rule “has been limited not only to the crime of theft, but generally to thefts involving a single victim.” (*Ibid.*, fn. omitted.) Relying on *People v. Church* (1989) 215 Cal.App.3d 1151 and *People v. Garcia* (1990) 224 Cal.App.3d 297, we concluded that “one limitation of the *Bailey* doctrine is its inapplicability to offenses involving multiple victims.” (*David, supra*, 52 Cal.App.4th at p. 310.) The *Bailey* rule did not apply because David “and his friends drove throughout the city, tagging property they happened upon which appeared isolated and safe from witnesses.” (*Id.* at p. 311.) Thus, his “crimes did not arise out of the ‘same transaction’; they arose out of 34 ‘transactions,’ one occurring each time he or a co-perpetrator sprayed an item of

only one reasonable conclusion, the question may be resolved as a matter of law. (*Packard, supra*, at pp. 626-627.)

property.” (*Id.* at pp. 310-311.) *People v. Tabb, supra*, 170 Cal.App.4th at page 1149 cited *David* in support of the proposition that the *Bailey* rule “has also generally been limited to thefts involving a single victim.”

In 2008, *Arthur, supra*, 166 Cal.App.4th 61 was decided by Division One of the Fourth Appellate District. The *Arthur* decision diverged from the line of authority limiting the *Bailey* rule to theft crimes. There, the minor broke the victim’s car windshield. Then he kicked the escaping victim, which caused the victim to drop his cell phone and it broke on impact. The minor was found to have committed one count of felony vandalism; on appeal, he argued that the evidence supported two counts of misdemeanor vandalism. The appellate court rejected the reasoning and result in *David, supra*, 52 Cal.App.4th 304. It acknowledged that “the modern case law demonstrates a clear trend toward limiting the *Bailey* doctrine to theft cases” and recognized that “[t]he potential hardness of this result—allowing multiple convictions in circumstances that might be viewed as a single crime—is mitigated by the application of section 654, which ‘limits the *punishment* for separate offenses committed during a single transaction.’ [Citations.]” (*Arthur, supra*, 166 Cal.App.4th at p. 67.) Nonetheless, the court found “that the rule announced in *Bailey* applies with equal force to the offense of vandalism.” (*Ibid.*) In the court’s “view, the principal analytical distinction to be drawn in applying *Bailey* is not between theft and nontheft crimes (the rough distinction that has arisen in the case law), but rather between offenses that can be aggregated to create a felony offense, such as petty theft and misdemeanor vandalism, and those that cannot, such as burglary.” (*Ibid.*, fn. omitted.) Based on this reasoning, it held that “[t]he *Bailey* rule ... has application whenever, as here, a defendant is charged with a felony offense based on an aggregation of multiple misdemeanor offenses.” (*Id.* at pp. 67-68.)

Most recently, in *People v. Carrasco* (2012) 209 Cal.App.4th 715, Division Four of the Second Appellate District applied the analysis in *Arthur, supra*, 166 Cal.App.4th 61 and held “that where a defendant commits multiple acts of vandalism pursuant to a

single general impulse, intention or plan, the fact that the damage is to property owned by more than one victim does not preclude aggregation resulting in an offense of felony vandalism.” (*Carrasco, supra*, at p. 717.)

We remain persuaded by our analysis in *David, supra*, 52 Cal.App.4th 304. Each act of vandalism in this case represents a separate offense affecting a different victim. To convict appellant of only one count of vandalism in circumstances such as the one before us would not be commensurate with his culpability. Following and applying *David*, we conclude that appellant’s vandalism of the Camaro, the Tahoe and Oscar’s house each constitutes a separate crime. The *Bailey* rule does not apply to vandalism convictions involving multiple victims. Therefore, we reject appellant’s argument that the three vandalism counts must be aggregated into one felony vandalism conviction.

B. The court did not have a sua sponte duty to instruct on the *Bailey* rule; defense counsel was not ineffective because he did not request such an instruction.

Appellant argues that conviction of one count of vandalism is “for all logical, practical, and legal purposes, lesser-included within three counts of violation of the same statute.” Therefore, the trial court had a sua sponte duty to craft an instruction on the principle of aggregation.⁸ Appellant also argues that defense counsel’s failure to request an instruction on aggregation constitutes ineffective assistance. We are not convinced.

As we have explained, the *Bailey* rule does not apply in circumstances such as this case where appellant committed three acts of vandalism on property owned by different people. Even if this court were to have concluded that the *Bailey* rule was applicable, the theory that appellant should have been convicted of only one felony vandalism count is an affirmative defense. It is not a lesser included offense. Trial courts have a sua sponte duty to instruct on affirmative defenses “‘only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the

⁸ There is not a standard instruction on aggregation principles in vandalism cases.

defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 157.)

Here, appellant's defense was inconsistent with the theory that is advanced on appeal. Appellant testified that he broke the Camaro's windows after the car's occupants broke a window on his mother's house. He denied going to Oscar's house and testified that he did not break the Tahoe's windows or break a window at Oscar's house. Defense counsel's closing argument was consistent with appellant's testimony; he argued that appellant did not vandalize the Tahoe or Oscar's house. If defense counsel were to have requested an instruction on aggregation it would have directly conflicted with appellant's testimony and defense counsel's closing argument.⁹ Thus, even if the *Bailey* rule applied in this case, the trial court did not have a sua sponte obligation to instruct on aggregation. The ineffective assistance claim fails for the same reason. If defense counsel had requested an aggregation instruction it would have been inconsistent with the theory of the defense. (See *People v. Wader* (1993) 5 Cal.4th 610, 643 [ineffective assistance claim rejected where instruction would have been inconsistent with theory of the case].) Thus, neither instructional error nor ineffective assistance appears.

⁹ The law governing direct review of ineffective assistance claims is undisputed:

"... First, a defendant must show his or her counsel's performance was 'deficient' because counsel's 'representation fell below an objective standard of reasonableness [¶] ... under prevailing professional norms.' [Citations.] Second, he or she must then show prejudice flowing from counsel's act or omission. [Citations.] We will find prejudice when a defendant demonstrates a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.] 'Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.' [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611.)

C. Count 9 is supported by substantial evidence.

Subdivision (b)(1) of section 594 provides: “If the amount of defacement, damage, or destruction is four hundred dollars (\$400) or more, vandalism is punishable by imprisonment” “If the amount of defacement, damage, or destruction is less than four hundred dollars (\$400), vandalism is punishable by imprisonment in a county jail” (§ 594, subd. (b)(2)(A).)

Count 9 charged appellant with felony vandalism on the Camaro. Ruiz testified that he obtained an estimate of \$780 to replace the broken Camaro window. Instead, he replaced the broken window with a used window that cost \$250.

Appellant argues the conviction on count 9 must be reduced to the lesser-included crime of misdemeanor vandalism because the evidence does not prove that the damage to the Camaro met the \$400 threshold for felony vandalism. He reasons that the correct standard for valuing damage is the \$250 Ruiz spent on a used window.

Respondent argues that valuation for the crime of vandalism should be “the fair market value of replacing any damaged property.” Ruiz’s testimony that he obtained an estimate of \$780 to replace the window was sufficient to prove that the replacement cost of the broken window was more than \$400.

This issue arises by way of a challenge to the sufficiency of the evidence supporting the jury’s guilty verdict on count 9. In reviewing the sufficiency of the evidence, we apply the substantial evidence standard of review. Substantial evidence is that which is reasonable, credible and of solid value. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) The question on appeal is whether the record contains substantial evidence from which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of the charged crime beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) We examine the entire record, not merely ““isolated bits of evidence.”” (*People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) “In making this determination, we ““must view the evidence in a

light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonable deduce from the evidence.” [Citation.]” (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Matters pertaining to the credibility of witnesses and the weight of the evidence are “the exclusive province” of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) “The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable.” (*People v. Scott* (1978) 21 Cal.3d 284, 296.)

Section 594 does not contain any method for valuing damaged property. Published decisions involving vandalism convictions have not addressed this topic. *Arthur, supra*, 166 Cal.App.4th 61 set forth the ways that the crime of vandalism is similar to theft crimes. In theft cases, the value of stolen property is its fair market value.¹⁰ (*People v. Swanson* (1983) 142 Cal.App.3d 104, 107; *People v. Pena* (1977) 68 Cal.App.3d 100, 102-104.) Yet, the concept of fair market value is of little assistance where property has been damaged and repaired. Section 1202.4 addresses court-ordered restitution. It provides that the value of damaged property shall be the actual cost of repairing it when repair is possible. (§ 1202.4, subd. (f)(3)(A).)

In this case, the window is not a separate piece of property that is divisible from the Camaro. It is a component of the car. There is evidence from which a reasonable trier of fact could conclude that the actual cost of repair was \$780. Ruiz testified that he received an estimate in this amount to replace the window. This sum is the actual cost of repairing the damage to the vehicle. Appellant is not entitled to a windfall because Ruiz chose to replace the window with a used part. There is substantial evidence from which the jury could conclude beyond a reasonable doubt that the cost of repairing the damage

¹⁰ Fair market value is defined as “[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction.” (Black’s Law Dict. (8th ed. 2004) at p. 1587.)

to the Camaro is \$780. Therefore, we reject appellant's challenge to the sufficiency of the evidence supporting the guilty verdict in count 9.

II. The Great Bodily Injury Enhancements Attached To Counts 1 And 2 Are Supported By Substantial Evidence.

Appellant challenges the sufficiency of the evidence supporting the true findings on the great bodily injury enhancements attached to the attempted murder convictions (counts 1 and 2). He argues that the record lacks substantial evidence proving that appellant personally inflicted any of the injuries Diaz and Edgar sustained during the attack in the garage. This argument is not persuasive. Reasonable inferences that can be derived from the physical and testimonial evidence adequately support the jury's determination that appellant personally inflicted great bodily injury on Diaz and Edgar during the commission of the attempted murders.

As previously set forth, when the sufficiency of evidence is challenged the appellate court applies the substantial evidence standard of review. The appellate court views the evidence in the light most favorable to the judgment below to determine whether it contains substantial evidence from which the trier of fact could find the essential elements of the enhancement allegation proven beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) All inferences that can be reasonably drawn from the evidence are made in support of the judgment. The testimony of a single witness is sufficient to prove a disputed factual point. (*People v. Scott, supra*, 21 Cal.3d at p. 296.) We do not reweigh the evidence, resolve conflicts in the evidence or reevaluate the credibility of witnesses. (*People v. Mayberry* (1975) 15 Cal.3d 143, 150.)

Section 12022.7, subdivision (a) increases the sentence where the defendant personally inflicted great bodily injury on another, who is not his or her accomplice, during the commission of a felony. "To 'personally inflict' injury, the actor must do more than take some direct action which proximately causes injury. The defendant must directly, personally, himself inflict the injury." (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 349.) The plain language of section 12022.7 requires that the defendant

personally inflict great bodily injury on the victim. “The intent to inflict great bodily injury need not be proven by direct evidence. Such intent may be inferred or presumed.” (*In re Sergio R.* (1991) 228 Cal.App.3d 588, 601.)

Several courts have recognized an exception to this rule. “[W]hen a defendant participates in a group beating and when it is not possible to determine which assailant inflicted which injuries, the defendant may be punished with a great bodily injury enhancement if his conduct was of a nature that it could have caused the great bodily injury suffered.” (*People v. Corona* (1989) 213 Cal.App.3d 589, 594.) A great bodily injury enhancement is properly sustained when the defendant “directly applies force to the victim sufficient to inflict, or contribute to the infliction of, great bodily harm.” (*People v. Modiri* (2006) 39 Cal.4th 481, 486.) Nothing in the terms “‘personally’” or “‘inflicts’” as used in conjunction with “‘great bodily injury’” requires the defendant to act alone in causing the victim’s injuries. (*Id.* at p. 493.) “Nor is this terminology inconsistent with a group melee in which it cannot be determined which assailant, weapon, or blow had the prohibited effect.” (*Ibid.*) “[T]he defendant need not be the sole or definite cause of a specific injury.” (*Id.* at p. 486; see *People v. Banuelos* (2003) 106 Cal.App.4th 1332, 1336-1338 [enhancement proper when group attacked victim and struck about head, even though surgeon could not tell exactly which object caused injuries]; *In re Sergio R.*, *supra*, 228 Cal.App.3d at pp. 601-602 [enhancement proper where defendant was one of several assailants who fired guns into a group of people].)

Appellant asserts that the record does not contain evidence proving that he “inflicted *some* injury” on Edgar and Diaz. This claim is unconvincing. A review of the entire trial transcript and reasonable inferences that can be drawn from it reveals substantial evidence from which any reasonable jury could find that appellant actively participated in the group beating of Ruiz and Edgar during which they suffered lacerations and stab wounds. The evidence is sufficient to conclude that appellant’s

“conduct was of a nature that it could have caused the great bodily injury [that the victims] suffered.” (*People v. Corona, supra*, 213 Cal.App.3d at p. 594.)

Oscar testified that he heard people beating up Edgar and Diaz. Then he saw five assailants leave the garage. One of the assailants was bleeding heavily and had to be helped by the others. The assailants all fled from Oscar’s house using Lorena Avenue; another group of people, who had not been inside the garage, fled by way of a different street. A blood trail was discovered leading away from the outside door onto Lorena Avenue and ending at the house where appellant’s mother lived. Sergeant Bietz testified that he directed crime scene technicians to take two samples of blood deposited on the outside doorway because “I believe that I had two distinct different trails of blood that were left by two different people, and by taking the swab from each of those trails would identify the person who left those two samples behind.” A sample from blood found on the outside doorway was consistent with Nathaniel’s DNA profile. Two samples of the blood found outside the house where appellant’s mother lived were collected. One sample was consistent with appellant’s DNA profile. The other sample was consistent with Nathaniel’s DNA profile. The rest of the blood drops along the blood trails were not tested. From this evidence and inferences that can be derived from it a jury could reasonably conclude that appellant was one of the assailants who fled from the garage to his mother’s house.

Manuel testified that appellant was holding a “stick or a bat” when he returned to Oscar’s house after briefly leaving. Appellant smashed windows on the Tahoe and a window on the Camaro. Manuel’s testimony is corroborated by presence of blood consistent with appellant’s DNA profile was found on the Camaro’s trunk lid. Also, appellant had a laceration on his right middle finger. This is significant because police found two clubs made from tree branches, an aluminum bat and a kitchen knife inside the garage after Edgar and Ruiz were stabbed. Edgar and Ruiz suffered lacerations consistent with being beaten with a stick or bat and puncture wounds. This evidence and

reasonable inferences that can be derived from it supports a determination that appellant struck Edgar and Ruiz with one of the sticks or the bat or that he stabbed them.¹¹

Based on the foregoing, we hold that the true findings on the great bodily injury enhancements attached to the attempted murder counts (counts 1 and 2) are supported by substantial evidence from which a reasonable jury could find them true beyond a reasonable doubt and reject appellant's challenge to the sufficiency of the evidence.

III. The Trial Court Properly Included CALCRIM No. 416 In The Jury Charge.

The trial court gave a modified version of CALCRIM No. 416, which instructs on conspiracy as a theory of derivative liability.¹² Appellant contends the trial court

¹¹ DNA evidence recovered from the sticks, bat and knife was inconsistent with appellant's DNA profile. Yet this does not preclude the existence of sufficient support for the jury's verdict. A jury could reasonably conclude from evidence other than the DNA test results that appellant was one of the assailants in the garage, that he possessed a stick or bat, and that he personally used a stick, bat or knife during the attempted murders. If substantial evidence supports the verdict, "an appellate court is not warranted in reversing the judgment" because "the evidence may be susceptible of different inferences." (*People v. Jefferson* (1939) 31 Cal.App.2d 562, 566.) "The justices of an appellate court should not substitute their judgment for the conclusions of the jury and the trial judge and reverse a cause on the ground that the evidence of the prosecuting witness is inherently improbable, unless it is so clearly false and unbelievable that reasonable minds may not differ in that regard." (*Ibid.*)

¹² As given, CALCRIM No. 416 instructed:

"The People have presented evidence of a conspiracy. A member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy.

"To prove that a defendant was a member of a conspiracy in this case, the People must prove that:

"1. The defendant intended to agree and did agree with one or more of coconspirators to commit an assault with a deadly weapon, first degree burglary or vandalism[;]

“2. At the time of the agreement, the defendant and one or more of the other alleged members of the conspiracy intended that one or more of them would commit an assault with a deadly weapon, first degree burglary or vandalism;

“3[.] One of the defendants or one or more of the coconspirators committed at least one of the following overt acts to accomplish assault with a deadly weapon, first degree burglary and vandalism;

“1. Francisco Carmona, Nathaniel Carmona, Juan Alvarez and Andrew Mancilla went to [Oscar’s house] on or about January 3, 2010;

“2. Malaquias Guzman went to [Oscar’s house];

“3. Andrew Mancilla broke windows to the Chevrolet Tahoe at [Oscar’s house];

“4. Andrew Mancilla broke windows of the residence at [Oscar’s house;]

“5. Francisco Carmona and Nathaniel Carmona entered the residence at [Oscar’s house;]

“AND

“4. At least one of these overt acts was committed in California.

“To decide whether a defendant committed these overt acts, consider all of the evidence presented about the acts.

“To decide whether a defendant and one or more of the other alleged members of the conspiracy intended to commit an assault with a deadly weapon, first degree burglary or vandalism; please refer to the separate instructions that I have given you on those crimes.

“The People must prove that the members of the alleged conspiracy had an agreement and intent to commit an assault with a deadly weapon, first degree burglary or vandalism. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit one or more of those crimes. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

infringed his federal constitutional right to due process because it was a legally incorrect theory of criminal liability. He argues that “based on the language of Penal Code section 31, ... ‘conspiracy’ is not a statutory basis on which to impose derivative criminal liability” and “principals are limited to those who actually commit a crime and those who aid and abet in the commission of a crime, and not those who conspire to commit a crime.”¹³ Appellant properly recognizes that *People v. Mohamed* (2011) 201

“An overt act is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

“You must all agree that at least one overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.

“The People contend that the defendants conspired to commit one of the following crimes: assault with a deadly weapon, first degree burglary or vandalism. You may not find a defendant guilty under a conspiracy theory unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime he conspired to commit. You must also all agree on the degree of the crime.

“A member of a conspiracy does not have to personally know the identity or roles of all the other members.

“Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.

“Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.”

¹³ Although this argument was not raised at trial, the point was not forfeited. “The appellate court may ... review any instruction given, ... even though no objection was

Cal.App.4th 515 (*Mohamed*) rejected this same argument. We agree with the *Mohamed* decision's reasoning and reject appellant's argument for the reasons expressed in that decision.

“Under California law, a party to a crime is either a principal or an accessory. (§ 30.)” (*Mohamed, supra*, 201 Cal.App.4th at p. 523.) Section 31 provides:

“All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, or person who are mentally incapacitated, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.” (§ 31.)

The California Supreme Court has repeatedly held that conspirators are liable as principals for substantive crimes committed by another conspirator. “It is long and firmly established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator.” (*People v. Belmontes* (1988) 45 Cal.3d 744, 788; see also *People v. Kauffman* (1907) 152 Cal. 331; *People v. Creeks* (1915) 170 Cal. 368, 374-375; *People v. Harper* (1945) 25 Cal.2d 862, 871-873; *People v. Weiss* (1958) 50 Cal.2d 535, 563.) Most recently, in *In re Hardy* (2007) 41 Cal.4th 977 the Supreme Court wrote: “One who conspires with others to commit a felony is guilty as a principal. (§ 31.)” (*Id.* at p. 1025.) Appellant's criticism of this body of law as inconsistent with the express language of the Penal Code must fail because we are bound under the principle of *stare decisis* to follow the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) “Courts exercising inferior

made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” (*People v. Hudson* (2009) 175 Cal.App.4th 1025, 1028.)

jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.” (*Id.* at p. 455.)

In *Mohamed, supra*, 201 Cal.App.4th 515, Division One of the Fourth Appellate District upheld instruction on conspiracy as a theory of criminal liability. It explained that, independent of California Supreme Court decisions on this topic, conspiracy is a valid theory of derivative criminal liability. *Mohamed* is particularly well-reasoned and worthy of extended quotation:

“Even if we were reviewing the matter in the first instance, Mohamed’s arguments do not persuade us. The ‘all-persons concerned’ language in section 31 indicates the Legislature intended the definition of principal to apply broadly. [Citation.] A broad application of the language would necessarily include conspirators. As one appellate court explained, “‘All persons concerned in the commission of a crime ... are principals’ and, when two or more are “concerned,” they are bound by the acts and declarations of each other, when such acts and declarations are part of the “transaction” in which they are engaged, because they are “principals” and not because they are conspirators.... [C]onspiracy comprehends nothing that is not included in the definition of “who are principals.” Liability attaches to anyone “concerned,” however slight such concern may be, for the law establishes no degree of the concern required to fix liability as a principal.’ [Citations.]” (*Mohamed, supra*, 201 Cal.App.4th at p. 524.)

Further:

“... [W]e believe Mohamed misconstrues the language in section 31 clarifying that all persons concerned are principals regardless of ‘whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission ...’ This clarifying language reflects the elimination of the common law distinctions among principals in the first degree, principals in the second degree, and accessories before the fact. [Citations.] Thus, instead of demonstrating a legislative intent to impose limits on the class of persons who are principals, this clarifying language demonstrates a legislative intent to remove previously existing limits. This language, therefore, provides no support for Mohamed’s contention that conspiracy is an invalid theory of criminal liability under California law.” (*Mohamed, supra*, 201 Cal.App.4th at p. 524.)

For the reasons cogently set forth in *Mohamed, supra*, 201 Cal.App.4th 515, we hold that conspiracy is a valid theory of derivative liability and uphold inclusion of CALCRIM No. 416 in the jury charge.

IV. The Sentence Imposed For Count 2 In Case No. 09CM7180 Must Be Stayed.

A. Facts.

On March 29, 2009, appellant, together with two males and a female, chased an ice cream vendor. When the vendor abandoned his ice cream cart to evade them they stopped chasing him. Appellant stole an ice cream that fell from the cart. The vendor recognized the perpetrators because, two weeks before this incident, they chased him and stole \$25 and six ice cream bars.¹⁴

Appellant was charged with robbery (count 1) and active participation in a criminal street gang (count 2). Appellant pled no contest to one count of robbery and one count of active participation in a criminal street gang (the Nortenos). During the June 4, 2009, sentencing hearing, the court indicated that the robbery proved the underlying felonious conduct element of the street terrorism offense. Appellant was placed on felony probation for five years.

On October 19, 2010, the court found appellant violated his probation in that he failed to obey all laws and refrain from associating from gang members. He was sentenced to the mid-term of three years for count 1 and a consecutive term of eight months for count 2.

B. Section 654 claims may be raised for the first time on appeal.

“As relevant, section 654, subdivision (a), 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

¹⁴ Because appellant accepted a plea bargain, the facts are derived from the probation report filed on November 9, 2010.

shall the act or omission be punished under more than one provision.” (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

During the November 17, 2010, sentencing hearing defense counsel stated, “we intend to submit on probation’s recommendation and the analysis of the [section] 654 issues as well.” Although appellant did not specifically argue during the sentencing hearing that section 654 required the sentence imposed for count 2 in case No. 09CM7180 to be stayed, the forfeiture rule does not bar consideration of this sentencing challenge on appeal. “‘Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as errors on appeal.’ [Citation.]” (*People v. Hester* (2000) 22 Cal.4th 290, 295.) Yet, “on direct appeal the reviewing court is confined to the record. We cannot remand a case to the trial court for the purpose of trying an issue raised for the first time on appeal.” (*People v. Sparks* (1967) 257 Cal.App.2d 306, 311.)

C. Separate punishment may not be imposed for the street terrorism conviction.

Appellant argues that the sentence imposed for count 2 must be stayed pursuant to section 654. We agree.

Under subdivision (a) of section 186.22, it is a crime to actively participate in a criminal street gang with knowledge that the gang 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.

After completion of the briefing in this appeal our Supreme Court decided *Mesa*, *supra*, 54 Cal.4th 191. In *Mesa*, the California Supreme Court held that section 654 precludes imposition of separate punishment for street terrorism and the underlying felony used to prove the “‘felonious criminal conduct’” element of the offense. (*Mesa*, *supra*, at pp. 197-198.)

Appellant fits squarely within the legal and factual rubric presented in *Mesa*, *supra*, 54 Cal.4th 191. During the June 4, 2009, sentencing hearing, the court indicated

that the robbery proved the underlying felonious conduct element of the street terrorism offense. Therefore, *Mesa* applies in this case to preclude imposition of separate punishment both street terrorism and robbery. The proper remedy is for this court to stay the sentence imposed for count 2 in case No. 09CM7180. (*Id.* at p. 201; *People v. Lopez* (2004) 119 Cal.App.4th 132, 139.)

V. The Ineffective Assistance Claim Fails On Direct Appeal.

In a final claim, appellant argues that he received ineffective assistance of counsel because his attorney did not bring a motion to strike one of the prior convictions in the interest of justice. This claim fails on direct appeal and is properly pursued in a habeas corpus proceeding. (*People v. Pope* (1979) 23 Cal.3d 412, 426-428 (*Pope*).)

Appellant bears the burden of establishing inadequate assistance of counsel. (*Pope, supra*, 23 Cal.3d at p. 425.) To prevail, he must show both deficient performance and a reasonable probability of a more favorable outcome. (*People v. Duncan* (1991) 53 Cal.3d 955, 966 (*Duncan*).) When a defendant claims incompetence of counsel on direct appeal, he must overcome the presumption that, under the circumstances, the challenged error or omission might have been a strategic decision. Where the deficiency could have been a tactical choice, the claim is properly pursued in a petition for writ of habeas corpus. (*Pope, supra*, 23 Cal.3d at pp. 426-428.)

In reviewing counsel's performance we are "to be highly deferential.... '... Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy.'" (*Duncan, supra*, 53 Cal.3d at p. 966.) We "accord great deference to counsel's tactical decisions." (*People v. Lewis* (2001) 25 Cal.4th 610, 674.) Otherwise, it would be "all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and ... too easy for a court, examining counsel's defense after it has

proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) There are countless ways to provide effective assistance and even the best attorneys would not defend a client in the same way. (*Ibid.*) Counsel does not have a duty to make futile or frivolous objections. (*People v. Memro* (1995) 11 Cal.4th 786, 834.)

To resolve an ineffective assistance claim on direct appeal, the appellate record must clearly demonstrate that the alleged error was a "mistake beyond the range of reasonable competence." (*People v. Montiel* (1993) 5 Cal.4th 877, 911.) When the record does not illuminate the basis for the challenged act or omission and it is not necessarily an incompetent mistake, an ineffective assistance claim is more appropriately made in a petition for habeas corpus. Reviewing courts are not to become engaged "'in the perilous process of second-guessing.'" (*Pope, supra*, 23 Cal.3d at p. 426.) They will not run the risk of unnecessarily ordering reversal in a case "where there were, in fact, good reasons for the aspect of counsel's representation under attack. Indeed, such reasons might lead a new defense counsel on retrial to do exactly what the original counsel did, making manifest the waste of judicial resources caused by reversal on an incomplete record." (*Ibid.*)

After carefully reviewing the record in this case, we conclude that it is insufficient to allow us to determine whether defense counsel's failure to bring a motion to dismiss one of the prior strikes was an intentional tactical decision. Even if this court were to assume that appellant's two prior strikes arose out of the same act, this "provide[s] a factor for a trial court to consider, but do[es] not *mandate* striking a strike." (*People v. Scott* (2009) 179 Cal.App.4th 920, 931.) The nature of appellant's prior offenses is but one factor to be considered by the trial court when exercising its discretion to dismiss a

prior strike in the interests of justice. (*Ibid.*; *People v. Williams* (1998) 17 Cal.4th 148, 161.) As in *Scott, supra*, 179 Cal.App.4th at page 931, appellant “chose to reoffend, knowing he had two prior strike convictions.” Appellant’s current offenses are gang related and show a substantial increase in violence above and beyond the violence involved in the prior strikes. He was on felony probation when he committed these crimes. His criminal record spans his juvenile and adult years. He has not gone any appreciable amount of time free of crime and did not benefit from juvenile programs or grants of probation.

On the silent record before us, we cannot simply assume that defense counsel’s failure to file a motion to dismiss one of the prior strikes was an incompetent error. The omission could have resulted from a tactical decision that such a motion would not have been successful. (*People v. Diaz* (1992) 3 Cal.4th 495, 566.) Appellant failed to meet his burden of establishing ineffective assistance on direct appeal. Any further challenge in this regard must be pursued in a habeas corpus proceeding. (*Ibid.*; *People v. Cummings* (1993) 4 Cal.4th 1233, 1340.)

DISPOSITION

In Kings Superior Court case No. 09CM7180, the sentence imposed for count 2 is stayed. The superior court is directed to prepare an amended abstract of judgment reflecting this sentencing modification and transmit a copy of it to the parties and the California Department of Corrections and Rehabilitation. As modified, the judgments are affirmed.

LEVY, J.

WE CONCUR:

WISEMAN, Acting P.J.

POOCHIGIAN, J.