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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. BRENDA F. BOWERS et al., Defendants and Appellants.	B215679 (Los Angeles County Super. Ct. No. BA318031)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charlaine F. Olmedo, Judge. Affirmed in part, reversed in part, and remanded with directions.

Alan Stern, under appointment by the Court of Appeal, for Defendant and Appellant Brenda F. Bowers.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant Corey Jamal Johnson.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Corey Jamal Johnson and Brenda Bowers appeal from the judgments following their convictions for multiple gang related offenses. We affirm as to Johnson. We affirm in part and reverse in part as to Bowers and remand for resentencing.

FACTS AND PROCEEDINGS

1. Crimes Outside the Saints and Sinners Bar

Around the time of "last call" at 2:00 a.m. on January 26, 2007, appellants Corey Johnson and Brenda Bowers and two unnamed women got out of their car near the Saints and Sinners bar in Culver City. Bar patrons Vanessa Castro and Melvin Alegria were walking to their parked car. Descending on Alegria and Castro, Bowers demanded at gunpoint that Alegria and Castro give them "everything" they had while Bowers's accomplice forced them up against a wall. Castro surrendered her driver's license and ATM bank card, and Alegria turned over his wallet, keys, and cell phone.

In the meantime, appellant Johnson, joined shortly thereafter by one of Bowers's accomplices, approached Mark Huddleston and Katherine Crawley about 200 feet from Alegria and Castro. As Huddleston walked to the driver's side of his parked car and Crawley approached the car's front passenger door, Johnson moved toward Crawley and demanded her purse. Crawley refused, telling Johnson to "fuck off." Huddleston came around from his side of the car and asked Johnson what he wanted. Johnson replied Crawley "needs to do what I tell her," to which Huddleston answered, "leave her alone." Pushing Johnson away, Huddleston stepped between Johnson and Crawley. Johnson said, "I'll take care of you." Stepping back, Johnson shot Huddleston, inflicting injuries for which Huddleston required surgery and two weeks hospitalization. Johnson took a wallet containing about $200 from the injured Huddleston and then hit Crawley on the side of her head with his gun, injuring her ear and causing "barrel trauma" which left her temporarily deaf for three months. Following the shooting, Bowers and her accomplice ran from Castro and Alegria toward Johnson. One of the three women grabbed Crawley's neck and called her a "stupid fucking bitch" for refusing to give up her purse,

and another woman punched Crawley in the face. The women then fled with Crawley's purse containing credit cards, a cell phone, and about $100. Johnson, Bowers, and their two accomplices then returned to their car and fled the scene.

2. Crimes Inside Hollywood Erotique

The evening of January 11, 2007, Hisaki Shimizu was working at Hollywood Erotique in Mar Vista. A man and woman entered the store. At gunpoint, they took items on display, including videos and lingerie, and cash from the register. Several hours after the robbery, police found appellant Johnson's fingerprints on the counter near the cash register; Johnson testified at trial he could not explain why his fingerprints were on the counter because he had never been inside the store. Three nights after the January 11 robbery, four robbers – one male, three females – entered the store. Store clerk Shimizu recognized the male robber as the same male who had robbed the store three nights earlier. A customer inside the store during the second robbery positively identified the male robber as appellant Johnson.

3. Robbery of Sung Cho

The night of February 13, 2007, Sung Cho was walking in Hollywood when Bowers and two male accomplices robbed him at gunpoint. We discuss the details of this crime and related conviction for receiving stolen SIM cell phone cards later in this opinion.

4. Trial, Conviction, and Sentencing

Bowers and Johnson were tried together by jury. The jury convicted Johnson of:

- Robbery and attempted premeditated murder of Mark Huddleston and robbery and assault with a firearm of Katherine Crawley. The jury found Johnson

personally used a handgun within the meaning of Penal Code section 12022.53, subdivision (b) for his crimes against Crawley and Huddleston.[1]

- Robberies of Melvin Alegria and Vanessa Castro. The jury found a principal personally used a handgun within the meaning of section 12022.53, subdivisions (b) and (e)(1) during those crimes.

- Robberies of Hollywood Erotique and store clerk Hisaki Shimizu. The jury found Johnson personally used a handgun within the meaning of section 12022.53, subdivision (b) and a principal personally used a handgun within the meaning of section 12022.53, subdivisions (b) and (e)(1).

- Finally, the jury found Johnson committed all of his offenses for the benefit of a criminal street gang.

The jury convicted Bowers of:

- Robberies of Melvin Alegria and Vanessa Castro. The jury found Bowers personally used a handgun within the meaning of section 12022.53, subdivision (b) during the robberies.

- Robbery and attempted murder of Mark Huddleston and robbery and assault with a firearm of Katherine Crawley. The jury found a principal personally used a handgun within the meaning of section 12022.53, subdivisions (b) and (e)(1).

- Robbery of Sung Cho and receiving stolen property. The jury found Bowers personally used a handgun within the meaning of section 12022.53, subdivision (b), and a principal personally used a handgun within the meaning of section 12022.53, subdivisions (b) and (e)(1) during the robbery.

- Finally, the jury found Bowers committed all of her offenses for the benefit of a criminal street gang.

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[1] All further undesignated section references are to the Penal Code.

The court sentenced Johnson to prison for a determinate term of 61 years and 4 months, plus a consecutive indeterminate term of 15 years to life for attempted murder plus 10 years under section 12022.53, subdivision (b).

The court sentenced Bowers to a determinate term of 61 years plus a consecutive indeterminate term of 15 years to life for attempted murder plus 10 years under section 12022.53, subdivision (b). This appeal followed.

DISCUSSION

Johnson's Contentions on Appeal[2]

1. GANG EVIDENCE

A. Sufficiency of Gang Evidence

Penal Code section 186.22 imposes sentence enhancements for crimes committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).) Based on the jury's finding that Johnson committed his crimes outside the Saints and Sinners bar and the Hollywood Erotique shop to benefit a gang, the court imposed a gang enhancement for each of his crimes.

Johnson contends the evidence did not support the gang enhancements. Noting that not all crimes a gang member commits are necessarily gang-related (see e.g. *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103-1104), he asserts he committed the robberies only for personal gain, not to benefit a gang. According to him, the evidence showed, at most, that he had belonged to the Black P. Stones gang for about 10 years between 1990 and 2000, when he claims to have left the gang at age 23. The evidence further showed that as a legacy of his gang membership he sported gang tattoos on his chest, stomach, left and right arms, neck, and behind his left and right ears. The gang

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2 Johnson and Bowers join on appeal in the issues each raises on his or her own behalf. Our discussion of Johnson's and Bowers's contentions is made with those joinders in mind.

enhancement requires, he argues, more than what he asserts the evidence shows – he once belonged to a gang and committed gang crimes in the past. (*People v. Gardeley* (1996) 14 Cal.4th 605, 623 (*Gardeley*); *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1195; *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1078.) It requires that he have committed his current offenses to benefit a gang to which he currently belonged.

We find the record permitted the jury to find Johnson continued to belong to a gang and had committed his crimes to benefit that gang. Los Angeles Police Department gang officer Cedric Washington testified that Johnson, whose gang moniker was "Bosco" or "Little Killer," was an active member, along with appellant Bowers, of the Black P. Stones gang. Washington was familiar with the Black P. Stones from his work as a gang suppression officer in the lower Baldwin Hills area, where the gang, which had 750 to 800 documented members, was active. Washington opined Johnson belonged to the Black P. Stones gang because Johnson had admitted his membership to Washington in the course of Washington's half dozen contacts with him, Johnson had gang tattoos, and Johnson associated with known gang members. Washington testified that the Black P. Stones' primary activities were robbery and selling drugs, the proceeds of which gang members used to buy guns, narcotics, personal items, and to make payments to incarcerated fellow gang members. (See *In re Jose P.* (2003) 106 Cal.App.4th 458, 466-468 [evidence sufficient to support gang enhancement where defendant had numerous gang related contacts with police, wore gang colors, admitted gang membership, and was in the company of other gang members while committing charged offense].)

Johnson's contention that there was insufficient evidence that the robberies outside the Saints and Sinners bar were for the benefit of his gang ignores that he worked in concert with fellow gang member Bowers to execute the robberies. Arriving on the scene in one car, they descended on their victims in tandem. When they completed the robberies, they fled in the same car in which they had arrived. Johnson's contention also ignores that the spent casing from the bullet he fired at Huddleston matched the gun discovered in the car in which he was riding when he was arrested with three other Black P. Stones gang members. Similar reasoning applies to Johnson's robbery of Hollywood

Erotique and store clerk Hisaki Shimizu. Johnson's two robberies of that store of cash and other items in concert with others showed Johnson and his gang were a force to be reckoned with in their showing no fear in returning to a scene of a crime. Working in concert with other gang members reflects gang activity. Citing coordination among gang members, the gang expert in *People v. Morales* (2003) 112 Cal.App.4th 1176, explained that the gang crimes in that case "involved three gang members acting in association with each other. The gang provided 'a ready-made manpower pool . . . .' That is, one gang member would choose to commit a crime in association with other gang members because he could count on their loyalty. They would 'watch his back . . . .' In addition, the very presence of multiple gang members would be intimidating. The crime would benefit the individual gang members with notoriety among the gang, and the gang with notoriety among rival gang members and the general public." (*Id.* at p. 1197.)[3] Sufficient evidence permitted the jury to find Johnson committed his crimes to benefit his gang.

B. Officer Washington's Gang Expert Qualifications

Johnson contends Washington's duties as a gang suppression officer so deeply infected his opinions about gangs with bias to render him unqualified to testify as a gang expert. Johnson writes:

> "Because Washington's primary job with the Gang Enforcement Unit of the Los Angeles Police Department is to monitor, gather intelligence, and *suppress* the criminal activity of criminal street gangs . . . his testimony is biased and unreliable as lacking any neutrality. [] Hence, the trial court abused its discretion in permitting Washington to testify as an expert witness on gangs." (Italics original.)

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[3] Bowers joins in Johnson's contention of insufficiency of gang evidence. She offers no separate argument concerning the robbery of Sung Cho, a crime for which Johnson was not tried and which he does not address. We therefore deem Bowers to have waived any contention of insufficiency of gang evidence as to that crime. She does offer separate argument about the sufficiency of gang evidence for her conviction of receiving stolen property, which we discuss in Section 11, *post*.

Johnson's theory attacking the expert qualifications of gang officers is novel, a point he implicitly concedes. After noting courts frequently permit officers to testify as gang experts, Johnson asserts:

> "It is time that California's courts recognize that the unscientific, unverifiable, and highly subjective nature of gang expert testimony rendered by police officers whose primary job is to arrest, convict and incarcerate gang members is not a reliable means of proving an accused's . . . given crime has met requirements of [the gang enhancement]."

We do not doubt that gang culture and activities are properly a subject of expert testimony. "It is well settled that a trier of fact may rely on expert testimony about gang culture and habits to reach a finding on a gang allegation. [Citation.] California law permits a person with " 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness [citation] and give testimony in the form of an opinion [citation]." [Citation.] However, Evidence Code section 801 limits this testimony to that related to a subject ' "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." ' [Citation.] The subject matter of the culture and habits of criminal street gangs . . . meets this criterion. [Citations.]" (*In re Frank S., supra,* 141 Cal.App.4th at pp. 1196-1197; *Gardeley, supra,* 14 Cal.4th at p. 617.) It is also well-established that appropriately trained and experienced officers may testify as gang experts. (See e.g. *People v. Gutierrez* (2009) 45 Cal.4th 789, 820 (*Gutierrez*) [admitted officer's expert testimony regarding defendant's gang affiliation, gang's prior crimes, and defendant's writings for limited purpose of assisting jury in determining whether murder and attempted murder were committed for benefit of gang]; *Gardeley, supra,* at p. 617; *People v. Valdez* (1997) 58 Cal.App.4th 494, 507-509; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965 disapproved on another point by *Gardeley, supra,* at p. 624 fn. 10; *U.S. v. Hankey* (9th Cir. 2000) 203 F.3d 1160, 1167-1170.) Moreover, as experts, gang officers may rely on hearsay testimony in forming their opinions. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208, 1210 [hearsay evidence of gang expert's conversations with other gang members identifying defendant

as gang member]; *People v. Valdez*, at pp. 509-511.) Indeed, Johnson recognizes as much in writing: "For more than a decade California has allowed police officers to testify as to customs and activities of criminal street gangs [], and, based on their hearsay-reliant opinions, that conduct was gang-related." In short, we decline Johnson's invitation to depart from well-settled California law and courtroom practice. Thus, we reject his contention that the trial court erred in permitting gang officer Washington to testify as a gang expert.

C. Officer Washington's Opinion About Ultimate Issues

Washington opined that Johnson's and Bowers's crimes were in furtherance of gang activity, an element of the gang enhancement. By expressing his opinion about an ultimate issue, Washington's opinion, according to Johnson, improperly invaded the jury's province. We disagree. An expert may opine about an ultimate issue. (Evid. Code, § 805; see also *Briceno v. Scribner*, *supra*, 555 F.3d at pp. 1077-1078; *Moses v. Payne* (9th Cir. 2009) 555 F.3d 742, 761.) The court therefore did not err in allowing Washington's opinion into evidence.

Johnson's reliance on *People v. Killebrew* (2002) 103 Cal.App.4th 644 is misplaced. There, the court erred in allowing a gang expert to testify that when one defendant gang member possesses a gun, every other gang member accompanying the defendant constructively possesses the gun because each companion necessarily knows of the gun's presence. (*Id.* at p. 652.) The appellate court held the testimony was error because it went to the subjective awareness and knowledge of the defendant's companions. Here, in contrast, Washington testified not about what Johnson and Bowers subjectively knew, but instead about gang culture and practices, which *Killebrew* found admissible. (*Id.* at p. 654.)

D. Prejudicial Effect of Gang Evidence Did Not Outweigh Its Probative Value

Johnson contends the amount of gang evidence the People offered amounted to "overkill." Given the quantity of evidence, he asserts its prejudicial value outweighed its

probative value, making his trial unfair. (See *People v. Garcia* (2008) 168 Cal.App.4th 261, 275 ["To prevail on his argument that he was denied a fair trial and due process of law by the admission of gang evidence, [the defendant] must show that the admission of the evidence was erroneous, and that the error was so prejudicial that it rendered his trial fundamentally unfair."].) He complains particularly about Washington's testimony that (1) all four robbers who descended on their victims outside the Saints and Sinners bar were gang members when the identities of the two female accomplices who accompanied Johnson and Bowers were not known; (2) Johnson was a high-ranking "shot caller"; and (3) the Black P. Stones gang committed violent crimes besides robbery, such as murder.

In support, Johnson cites *People v. Albarran* (2007) 149 Cal.App.4th 214. That decision held that extensive gang evidence going to a defendant's motive and intent violated due process because there was insufficient evidence the crimes were gang related, making purported gang motive and intent irrelevant. (*Id.* at pp. 223, 225-227.) The *Albarran* court concluded that if little evidence exists to suggest a crime was committed to benefit a gang, gang evidence serves only to inflame the jury against the defendant as someone who has the propensity to commit crime. (*Id.* at p. 223.) *Albarran* is inapt, however, when the record contains evidence that a gang benefitted from a crime. In that circumstance, extensive gang evidence is not inherently prejudicial. As *People v. Hernandez* (2004) 33 Cal.4th 1040 (*Hernandez*), explained, "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation – including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like – can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (Italics added.) (*Id.* at p. 1049.) Accordingly, Johnson's contention that the gang evidence violated his right to due process by being unduly prejudicial is unavailing.

E. No Ineffective Assistance of Counsel

Johnson contends his trial counsel provided ineffective assistance by not objecting to Washington's gang expert testimony. Johnson acknowledges that "such objections might have been futile under current California law." As we have noted, expert testimony about gangs is admissible (*Gutierrez, supra,* 45 Cal.4th at p. 820; *Hernandez, supra,* 33 Cal.4th at pp. 1047-1048), and an expert may testify about ultimate issues (Evid. Code, § 805). An attorney does not breach his professional standard of care by failing to make an objection that has little, if any likelihood, of being sustained. (*People v. Anderson* (2001) 25 Cal.4th 543, 587; *People v. Zavala* (2008) 168 Cal.App.4th 772, 780.) Accordingly, defense counsel did not render ineffective assistance in not objecting to admission of Washington's testimony as a gang expert.

2. *SUFFICIENCY OF EVIDENCE OF PREMEDITATION AND DELIBERATION*

Johnson contends the evidence was insufficient to support the jury's finding that he premeditated and deliberated his attempted murder of Mark Huddleston. Johnson grounds his contention in three factors identified by *People v. Anderson* (1968) 70 Cal.2d 15: planning activity, motive, and manner of killing. *Anderson* identified these factors to help guide an appellate court's review of the sufficiency of evidence of premeditation and deliberation. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32, disapproved on another point by *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22.) As for planning, Johnson asserts the evidence showed he planned to rob his victims that night. But, according to him, no evidence existed that he set out that evening intending to kill someone; at most, his firing at Huddleston was an impulsive shooting triggered by Crawley's resistance during the robbery and Huddleston's interference. As for motive, Johnson asserts no evidence showed he held any particular motive or animus toward Huddleston. Huddleston was a stranger shot in a chance encounter. Finally, looking to the manner of the attempted killing, Johnson asserts nothing about the shooting suggested a preconceived plan to kill.

Johnson's contention fails because *Anderson's* factors are appellate aids; they are not elements or prerequisites that a jury must uncover to find premeditation and deliberation. (*People v. Sanchez, supra*, 12 Cal.4th at p. 32; *People v. Perez* (1992) 2 Cal.4th 1117, 1125.) Premeditation and deliberation occur when a defendant weighs and considers the attempted killing and proceeds nevertheless. (*People v. Prieto* (2003) 30 Cal.4th 226, 253; *People v. Wright* (1985) 39 Cal.3d 576, 588; *People v. Steger* (1976) 16 Cal.3d 539, 545.) Here, Johnson's words and acts permitted the jury to find he shot Huddleston after thinking about whether to do so. Before firing, Johnson said "I'll take care of you." He then stepped back and shot from close range.

It does not matter that Johnson's encounter with Huddleston was by chance and relatively brief. Deliberation and premeditation require no set amount of time, for any amount is sufficient if the evidence permits the trier of fact to conclude Johnson reflected and deliberated. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) Johnson quarrels with the principle that no set amount of time is required. In support, he cites scholarly articles which argue that permitting deliberation for any amount of time, no matter how brief, to be enough to support premeditation and deliberation collapses the distinction between ordinary first degree murder – requiring an intent to kill reached by deliberation and premeditation – and ordinary second-degree murder, which requires merely the intent to kill. Scholarly criticisms of case law are not authority, however, and California law reiterates that no fixed amount of time is required. Accordingly, his contention fails.

3. *MULTIPLE PUNISHMENT FOR ROBBERY AND ATTEMPTED MURDER OF HUDDLESTON*

Johnson asserts his attempted murder and robbery of Huddleston manifested a single criminal objective, which was to rob Huddleston. Johnson maintains he shot Huddleston only to overcome his resistance to his robbery. Citing the prohibition against multiple punishments for the same offense at Penal Code section 654, he contends the trial court ought to have stayed his sentence for robbery of Huddleston and imposed only the longer sentence for attempted murder.

Section 654 bars multiple punishments when a defendant acting with a single criminal intent violates multiple penal statutes during an indivisible course of criminal conduct. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Section 654, subdivision (a) states:

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Johnson's intent is a factual question. (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.) The trial court determines whether Johnson acted with a single, or multiple, criminal intents. (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1309-1310; *People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 815.) We review the trial court's findings for substantial evidence. (*People v. Stringham* (1988) 206 Cal.App.3d 184, 202; *Ratcliffe,* at p. 816.)

Johnson's contention fails because the evidence permitted the trial court to reasonably conclude Johnson harbored two separate criminal objectives during his robbery and attempted murder of Huddleston. The first criminal intent which the court could have found manifested itself when Johnson set out that evening to rob those patrons leaving the Saints and Sinners bar around closing time. The second intent the court could have found manifested itself when Huddleston's resistance to Johnson's robbery of Crawley triggered Johnson's vengeful gunfire, an intent aimed at more than merely robbing Huddleston but to rebuke Huddleston for challenging his authority. Because the evidence permitted the trial court to find Johnson harbored separate criminal intents, section 654 did not prohibit the trial court from imposing sentences on Johnson for robbery and attempted murder of Huddleston.

4. *MULTIPLE PUNISHMENT FOR ASSAULT WITH A FIREARM AND ROBBERY OF CRAWLEY*

Johnson contends his striking Crawley with his gun was part of an indivisible course of conduct aimed toward completing his robbery of her. Initially, Crawley refused to hand over her purse. After Johnson struck the side of her head with his gun, his female accomplices took Crawley's purse and fled. His use of force, according to Johnson, was thus no more than was needed to overcome her resistance to the robbery. (Contrast *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190-191 [shooting robbery victim who offered no resistance and complied with robbers' demands "constituted an example of gratuitous violence against a helpless and unresisting victim which has traditionally been viewed as not 'incidental' to robbery for purposes of section 654."].)

Johnson's contention is unavailing because the trial court could reasonably find Johnson harbored more than one criminal intent toward Crawley. Johnson did not strike Crawley so that *he* could take her purse; instead others took Crawley's purse, which Johnson left behind when he ran toward the car to make his escape. Johnson's seeming indifference to the purse permitted the court to find he struck Crawley in the same spirit in which he had shot Huddleston – to punish them for their resistance. Such punishment being more than was needed to accomplish Crawley's robbery, the court did not err in imposing separate punishments on Johnson for assaulting Crawley with a firearm and robbing her.

5. *SUFFICIENCY OF EVIDENCE OF AIDING AND ABETTING BOWERS'S ROBBERY OF ALEGRIA AND CASTRO*

Johnson contends no evidence showed he aided and abetted Bowers's robberies of Castro and Alegria. The court instructed the jury that a defendant aids and abets a crime if he "specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate" the principal's commission of the crime. Johnson correctly notes that his mere presence at the scene of a crime and knowledge of its perpetration do not, by themselves, constitute aiding and abetting. (*People v. Durham* (1969) 70 Cal.2d 171.) He notes the

evidence showed he was about 200 feet away robbing Crawley and Huddleston while Bowers and her accomplice robbed Alegria and Castro. He asserts that from that distance he could not physically restrain Alegria and Castro, and was too busy himself to act as a lookout for Bowers.

Johnson's contention fails, however, because he ignores other evidence that permitted the jury to conclude he aided and abetted the robberies of Castro and Alegria. Johnson, Bowers, and their accomplices drove together to the crime scene. Johnson and Bowers belonged to the same gang, both were armed, and they and their accomplices wore headwear to partially mask their identity. The four of them got out of their car together and fanned out as they descended on their victims. (Accord *People v. Hill* (1998) 17 Cal.4th 800, 850-853 [three robbers standing together in parking lot "spread out" to opposite sides of the car as they approached occupants of car they intended to rob].) A jury could reasonably infer from multiple robbers simultaneously robbing multiple victims that the robbers were pursuing a coordinated strategy of shock and awe to overwhelm their victims. After completing the robberies, the four fled together in the same car in which they had arrived. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5 ["Among the factors which may be considered in determining aiding and abetting are: presence at the crime scene, companionship, and conduct before and after the offense."]; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [same].) Based on the foregoing, the jury had sufficient evidence to find Johnson aided and abetted Bowers's robberies of Alegria and Castro.

6. *SUFFICIENCY OF EVIDENCE OF PERSONAL USE OF A GUN DURING ROBBERIES OF ALEGRIA AND CASTRO*

Johnson contends that, although armed, he did not "use" his gun during the robberies of Alegria and Castro, which occurred about 200 feet away from him as he robbed Huddleston and Crawley. The jury could reasonably find otherwise. Whether or not Alegria or Castro could see his gun, or even were initially aware of its existence, they heard it when he shot Huddleston. From that moment, they likely understood the

potential danger they faced from their assailants were they to resist. They did not need to see Johnson's gun, nor did he need to point it at them, for his discharge to send the unmistakable message of Johnson's malign intent as he aided and abetted his two more proximate accomplices. Johnson thus "used" his gun against Alegria and Castro.

Bowers's Contentions on Appeal

7. *NO JURY FINDING OF DELIBERATION AND PREMEDITATION OF HUDDLESTON'S ATTEMPTED MURDER*

The jury convicted Bowers of the attempted murder of Huddleston as a natural and probable consequence of the crime she intended to aid and abet, namely Johnson's armed robbery of Huddleston. The verdict form did not ask the jury to find whether Bowers premeditated and deliberated the attempted murder of Huddleston. For the offense, the court sentenced Bowers to life in prison with the possibility of parole, the sentence for attempted premeditated murder. (§ 664, subd. (a).)

Bowers contends the sentence was error without a jury finding that she premeditated and deliberated. Section 664, subdivision (a) provides that a life sentence is proper for attempted murder only if the trier of fact finds the attempted murder was deliberate and premeditated. Otherwise, the sentence is five, seven, or nine years. (§ 664, subd. (a).) Based on our Supreme Court's decision in *People v. Seel* (2004) 34 Cal.4th 535, 540-541, the Attorney General agrees that Bowers is correct. Accordingly, the matter is to be remanded for resentencing of Bowers for the attempted murder of Huddleston without a finding of premeditation and deliberation.[4]

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[4] Bowers alternatively argues the trial court misinstructed the jury on the principles governing the different mental states for attempted murder and attempted *premeditated* murder as the natural and probable consequences of a target crime such as robbery. Were we to reverse for jury misinstruction, the appropriate remedy might be retrial of the attempted murder charge. (Compare *People v. Hart* (2009) 176 Cal.App.4th 662, 670, 674-675 [retrial where jury convicted defendant of aiding and abetting attempted premeditated murder as natural and probable consequence of robbery when jury instructions permitted jury to render such a conviction if it found mere attempted murder,

8. *IMPOSITION OF BOTH GUN USE AND GANG ENHANCEMENTS FOR ROBBERIES OF HUDDLESTON AND CRAWLEY*

The jury convicted Bowers as an aider and abettor in the robberies of Huddleston and Crawley. The jury found true that a *principal* personally used a handgun during the offenses within the meaning of section 12022.53, subdivisions (b) and (e)(1), and that they were committed for the benefit of a street gang; the jury did not find that Bowers personally used a gun during those robberies. In sentencing Bowers for the robberies, the trial court imposed both the gun use and gang enhancements.[5] Bowers contends the court may impose *both* the gun *and* gang enhancement only upon a gang member who *personally* uses a gun. She cites subdivision (e)(2) of the gun use statute section 12022.53, which states: "An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense." Bowers is correct. (*People v. Brookfield* (2009) 47 Cal.4th 583, 590; *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1424-1427; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1280-1282.) Hence, we shall direct that imposition of the gang enhancement be stayed.

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as opposed to premeditated attempted murder, was a natural and probable consequence of the robbery] with *People v. Seel* at pp. 540-541 [remand for resentencing and not retrial where evidence insufficient to support finding of premeditation and deliberation of attempted murder].) The Attorney General yields, however, to Bowers's contention that *Seel* requires resentencing. In yielding to *Seel's* application here, the Attorney General passes on defending the court's jury instructions that underlie Bowers's alternative assertion of error. From that passing, we deem the Attorney General to have acknowledged that retrial, rather than resentencing, is the appropriate remedy.

5 For the robbery of Huddleston, the court imposed a base term of three years plus ten years for the gun use enhancement and ten years for the gang enhancement. For the robbery of Crawley, the court imposed a term of one year plus three years and four months for the gun use enhancement and four years and three months for the gang enhancement.

The Attorney General does not dispute the legal rule Bowers cites. Instead, the Attorney General asserts the jury could have reasonably found that Bowers "personally used" a gun during the robberies of Huddleston and Crawley. The Attorney General writes that Bowers personally used her gun by "displaying it in a menacing manner as Johnson robbed Huddleston and Crawley after Bowers had already taken property from Alegria and Castro" before she and Johnson fled in the car together. The Attorney General's suggestion is, as we read his brief, that Bowers may have displayed her gun as she ran past Huddleston and Crawley.[6]

We decline the Attorney General's interpretation of the evidence, however, because it ignores the jury's careful parsing of the gun use allegations in the verdicts the jury returned.[7] The jury found that "the defendant, BRENDA BOWERS, personally used" a gun during the robberies in which she was the principal – Castro and Alegria. But in convicting Bowers of the robberies of Huddleston and Crawley carried out by Johnson, the jury found merely that a "principal personally" used a gun. Rounding out the circle, the jury found that "the defendant . . . Johnson personally used" a gun during the robberies of Crawley and Huddleston, but in his involvement in aiding and abetting the robberies of Castro and Alegria, only a "principal" (namely, Bowers) personally used a gun. The jury's finding that Bowers personally used a gun in robbing Alegria and Castro, but the jury's failure to make a similar finding of personal use in her involvement as an aider and abettor in the robbery of Huddleston and Crawley, precludes us and the trial court from adopting the Attorney General's interpretation of the gun use evidence

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[6] An alternative reading is that Bowers's aiming her gun at Alegria and Castro constituted "personal use" against all four robbery victims outside the bar, including Huddleston and Crawley, during the simultaneous robberies, essentially the converse of deeming Johnson's use of his gun directly at Huddleston and Crawley as also constituting its use against Alegria and Castro. (See Section 6, *ante*.)

[7] Were it not for the jury's careful findings undercutting the Attorney General's assertion, we agree the assertion is a reasonable inference from the record sufficient to have supported a personal gun use finding against Bowers if the jury had been so inclined.

even though, had the jury found personal use in this context, substantial evidence would have supported it. Accordingly, the trial court erred in imposing both the gang and gun use enhancements for Bowers's robberies of Huddleston and Crawley.

9. *STAYING SENTENCE UNDER SECTION 654 FOR ROBBERY OF HUDDLESTON*

The jury convicted Bowers of aiding and abetting Johnson's robbery of Huddleston, for which the court imposed a 23 year sentence on her. The jury also convicted Bowers of the attempted murder of Huddleston as a natural and probable consequence of Johnson's robbery of him, for which the court erroneously imposed on Bowers an indeterminate term of life with possibility of parole, instead of five, seven, or nine years. (See, Section 7, *ante*.) Bowers does not challenge the two convictions concerning Huddleston. Instead, she asserts that section 654 demands that the court impose only the greater of the two punishments for those two offenses and stay the lesser punishment. She contends section 654 applies because her criminal intent as to Huddleston was the single intent of aiding and abetting his robbery. The record proves she is correct.

At trial, the People did not try Bowers on the theory that she intended Johnson's shooting of Huddleston. Rather, the People tried her on the theory that the shooting was a natural and probable consequence of the crime she did intend, the robbery. The Attorney General cites no evidence that Bowers intended the shooting before it happened, and, indeed, Bowers's robbery victim, Vanessa Castro, testified that Johnson's gunfire surprised Bowers. In closing argument, the prosecutor told the jury:

> "Let's assume for the sake of argument that you believe that Corey Johnson committed attempted murder when he shot an unarmed Mark Huddleston. [¶] The question is, how is Brenda Bowers responsible for that crime? Because she didn't shoot Mark Huddleston. And as a matter of fact, you might recall one of the witnesses testified that she seemed a little surprised herself when she heard the gunshot. [¶] Well, in the law, what the law is is that Miss Bowers or anybody who assists in a crime such as armed robbery isn't just responsible for armed robbery but may be responsible for any other crimes that result from an armed robbery, as

> long as those crimes are a logical extension of an armed robbery. [¶] So to prove Miss Bowers guilty of attempted murder, we have to show that she participated in a robbery and she was holding Alegria Castro against the wall at gunpoint. During the commission of the robbery, the crime of attempted murder was committed. That is Mr. Johnson shooting Mark Huddleston. [¶] Under all the circumstances, a reasonable person in the defendant's position would have known that the commission of attempted murder was a natural and probable consequence of the commission of the robbery. [¶] . . . [¶] And that's our theory of how Miss Bowers is responsible for attempted murder."

In support of section 654's application here, Bowers cites *People v. Bradley* (2003) 111 Cal.App.4th 765 (*Bradley*). In *Bradley*, the defendant's intent was the single objective of aiding and abetting the robbery of her intended victim. The defendant approached the inebriated victim in a casino and enticed him to leave the casino with her to "party," whereupon her accomplices robbed him after he and the defendant drove from the casino; in *Bradley's* words, she was the "bait" to lure the victim into the trap she and her accomplices had set. (*Bradley* at p. 767.) During the robbery, one of the accomplices shot the victim. The defendant was tried and convicted of both the victim's robbery and attempted murder. Making an argument on appeal echoing Bowers, the defendant urged staying of her lesser sentence under section 654. Noting that the defendant's liability for the shooting rested solely on the natural and probable consequences doctrine, the *Bradley* court agreed. (*Id.* at p. 768.) It explained:

> "In order to authorize consecutive sentencing for both the robbery and attempted murder offenses, Penal Code 654 tells us [the defendant] must have had a dual rather than single objective. This defendant . . . must personally have had the objective of committing both the robbery and the attempted murder. . . . Instead the jurors predicated [the defendant's] guilt of the attempted murder count solely on the theory the prosecution tendered, [an aiding and abetting] theory only requiring [the defendant] to entertain a single objective – to rob that victim. [¶] In our view, the trial court cannot countermand the jury and make the contrary finding [the defendant] in fact *personally* had both objectives. . . . In our view, without a finding [the defendant] at some point entertained as an independent objective the goal of attempting to murder [her robbery victim], Penal Code 654 denies the trial court discretion to impose consecutive sentences on [the defendant] for the robbery and attempted murder convictions." (*Id.* at p. 770.)

The Attorney General asserts Bowers's reliance on *Bradley* is misplaced. He notes that *Bradley* did not involve gang members and Bowers played a greater role during the robberies outside the Saints and Sinners bar than mere "bait." The distinctions the Attorney General draws do not address, however, whether Bowers harbored one, or multiple, criminal objectives upon which application of section 654 turns. Nor does the Attorney General explain how those distinctions are relevant or undermine *Bradley's* holding, which prohibits multiple punishment of an aider and abettor for robbery and attempted murder when the aider and abettor's liability for the attempted murder rests solely on the natural and probable consequences doctrine. Accordingly, we shall remand for resentencing of Bowers under section 654 by which the court shall impose the greater sentence of her offenses for robbery and attempted murder of Huddleston, and stay the lesser sentence.

10. *ROBBERY OF VANESSA CASTRO*

Bowers's robbery victim, Vanessa Castro, testified on direct that she gave her robbers her ATM card and driver's license after Bowers and her accomplices told Castro "to give them everything we had, which we did." She testified:

"Q. What specifically did you give?
A. I had an I.D. and an ATM card.
Q. What kind of I.D.?
A. My driver's license.
Q. Was that all the property that they got from you?
A. From me, yes."

On cross-examination, Castro expanded on her testimony. She testified:

"Q. Was your ATM card taken?
A. No.

Q. Did you give them to the people?

A. I showed them what I had and they didn't want it, so –

Q. They gave it back to you?

A. Yes."

Bowers notes that the elements of robbery include, among other things, taking property with the intent, at the time of the taking, to permanently deprive the owner of the property. Because Castro's testimony established that Bowers did not permanently deprive Castro of her property, Bowers contends the robbery of Castro was merely an attempted robbery. Bowers's contention fails because she cites no authority that a robber's intent must be sustained and unvarying. The intent at the time the robber takes the property is determinative; nothing says a robber cannot change her mind about keeping the victim's property after taking it. (See CALCRIM 1600 Robbery ["The defendant's intent to take the property must have been formed before or during the time he used force or fear."].) Bowers's returning the license and ATM card did not preclude the jury from finding that Bowers initially intended permanently to deprive Castro of her property, thus constituting robbery.

Bowers further contends her robbery of Castro was incomplete because she did not move the property sufficiently to constitute asportation of the property. According to Bowers, even if she initially took the cards with the requisite intent of permanently depriving Castro of them, she did not move them any distance before returning them to Castro. We are unpersuaded. When, as here, a robber points a gun at a victim, seizes the victim's property, examines it, and then returns it, we have no trouble concluding that sufficient movement of the property occurred to permit a jury to find a robbery took place.

11. *GANG ENHANCEMENT FOR POSSESSION OF STOLEN SIM CARD*

Several weeks after the robberies outside the Saints and Sinners bar, Sung Cho was walking in Hollywood while talking on his cell phone. Bowers and two male

accomplices stopped Cho. While Bowers held a gun to Cho's head, the men took Cho's phone, credit cards, and wallet containing cash. The jury found this robbery was for the benefit of a gang, a finding Bowers has not challenged. (See footnote 2, *ante*.)

About six weeks later, police arrested Bowers. Searching Bowers, police found four cell phone SIM cards on her. One of the cards belonged to Karina Gutierrez. At trial, Gutierrez testified someone had robbed her of her cell phone containing her SIM card. (Bowers was tried but acquitted of being that robber.) Following the robbery, Gutierrez had her cell phone service provider disconnect her cell phone, which made the SIM card inside her cell phone useless for operating a cell phone because the phone number attached to a SIM card is unalterable.

Bowers contends there was insufficient evidence to support the jury's finding that she received Guterriez's stolen SIM card to benefit a gang because her gang could derive no benefit from an inoperable card. Bowers's contention ignores, however, that even though Guterriez's SIM card could not operate a cell phone, it still had value because it could continue to hold personal information such as passwords, text messages, and emails. The card was therefore not devoid of any value. Indeed, Bowers's retention of Guterriez's stolen SIM cards and of three others reasonably permitted the jury to infer such cards have value regardless of whether their phone numbers have been disconnected. Furthermore, Bowers's pattern of working with other gang members to rob her victims of their cell phones (Alegria outside Saints and Sinners, and Cho in Hollywood) indicates a gang purpose in stealing the phones and keeping each phone's SIM card. Accordingly, sufficient evidence supported the jury's finding that Bowers's receipt of stolen property benefitted a gang.

DISPOSITION

As to appellant Corey Jamal Johnson, the judgment is affirmed.

As to appellant Brenda Bowers the matter is remanded for resentencing of her conviction for attempted murder of Mark Huddleston without deliberation and premeditation; for resentencing for her convictions of robberies of Mark Huddleston and

Katherine Crawley in which the court is to stay the gang enhancement; and, for resentencing under section 654 of her convictions for robbery and attempted murder of Mark Huddleston in which the court shall impose the greater punishment for those convictions and stay the lesser. In all other respects, the judgment is affirmed as to Brenda Bowers.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.