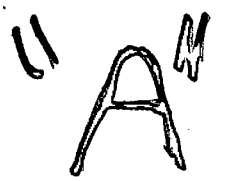
APPENDIX



Court of Appeal, Second Appellate District, Division Eight - No. B294752

S253663

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re RALPH ARTHUR DUARTE on Habeas Corpus.

The petition for review is denied on the merits. (See *Harrington v. Richter* (2011) 562 U.S. 86, citing *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803.

CANTIL-SAKAUYE
Chief Justice

APPENDIX

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Filed 7/27/10 P. v. Duarte CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RALPH ARTHUR DUARTE, Defendant and Appellant.	B214575 (Los Angeles County Super. Ct. No. KA083633)

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

Diana M. Teran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Ralph A. Duarte of one count of second degree robbery and one count of assault by means likely to produce great bodily injury. (Pen. Code, §§ 211, 245, subd. (a)(1).)[1] The jury also found true the further allegation that the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) In a bifurcated proceeding, Duarte admitted to two prior "strike" convictions, one prior serious felony conviction and three prior prison terms. (§§ 667, subds. (a)(1), 667.5, subd. (b), 1170.12, subds. (a)-(d).) On appeal, Duarte contends the court committed sentencing errors and there was insufficient evidence to prove the gang enhancement allegations. We affirm in part and reverse in part.

FACTS

On June 13, 2008, Adam Figueroa visited his daughter and her mother at the La Puente Villa Apartments. As he left at approximately 8:45 p.m., a man approached him and said, "you're from Puente." Interpreting the statement to mean whether he was from a gang called Barrio Puente, Figueroa said he lived in La Puente but was not a gang member and walked away. The man followed him, hit him on the head and knocked him to the ground. While Figueroa tried to get up, the man hit him in the face and jaw and grabbed his wallet. As they struggled, Figueroa was hit in the eye and jaw. The man hit Figueroa once more when Figueroa held on to his wallet. The man then left with the wallet. Figueroa's head was scratched and bruised, he had a sore jaw and one of his eyes was swollen as a result of the assault.

When the police arrived, Figueroa told them he recognized the man who took his wallet as Duarte, known as "Raton" and that he was a member of the Little Hill gang. Figueroa said he met Duarte at a bar in 2003 and saw him again at the bar sometime between 2005 and 2008. The day after the robbery, Figueroa identified Duarte in a photographic line-up. He identified him again at trial.

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[1] All further statutory reference are to the Penal Code, unless otherwise specified.

Adrienne Boyd told the police that she was coming home from the store when she saw someone who looked like Duarte run to a truck and jump in. Figueroa was inside the gate of the building and told her "Raton" had hit him and taken his wallet. She identified Duarte in a photographic line-up the next day. At trial, Boyd said she was not sure Duarte was the person who jumped into the truck because she did not see the man's face. She also testified that she identified Duarte in the photographic lineup because the detective asked her to identify the man known as Raton. Boyd and Duarte's son are friends and she knows Duarte is a member of the Little Hill Gang.

On July 17, 2008, Duarte was arrested as he ran out the backyard of a house when the police arrived. Duarte was charged with one count of second degree robbery and one count of assault by means likely to produce great bodily injury with a further allegation that the crimes were committed for the benefit of, at the direction of and in association with a criminal street gang. (§§ 186.22, subd. (b)(1)(C), 211, 245, subd. (a)(1), & 667.) It was further alleged that Duarte had incurred two prior serious felony "strike" convictions and one prior serious felony conviction and had served three prior prison terms. (§§ 667, subd. (a)(1), 667.5, subd. (b), 1170.12, subds. (a)-(d).)

At trial, Deputy Ron Duval of the Los Angeles Sheriff's Department testified for the prosecution as a gang expert. He explained that the Little Hill gang had been in existence since the 1970s and numbered approximately 200 members at the time of trial. They claimed specific borders within La Puente, including the La Puente Villa Apartments, and typically had tattoos with the words "Little Hill," "LH," or "LHG." Duval further testified that the primary activities of Hispanic gangs, including the Little Hill gang, are the sale and distribution of drugs but that they engage in burglaries to help run their drug operations. These gangs also commit murders, robberies, rapes and arson as well as intimidate witnesses. Duval identified the Puente gang as one of Little Hill's rivals.

Duval further testified that Duarte, otherwise known as "Raton" or "Racoon," was a member of the Little Hill gang. He had Little Hill tattoos, including "LHG" on his upper back and "LH" on his chest. Duval opined that if Duarte asked someone at the La

Puente Villa Apartments whether they were "from La Puente," it was intended to be a challenge since Puente was a rival gang of Little Hill. Duval also testified that he believed the assault and robbery was for the benefit of the Little Hill gang. By "hitting up" someone, even if that person was not a gang member, it was a challenge and indication that the person was in the gang's territory. Such an assault would instill fear and intimidation and increase Little Hill's reputation and increase respect for Duarte within the gang.

Elizabeth Ramirez, for whom Duarte performed yardwork and handyman services, told deputies that Duarte was at her house on June 13, 2008 when they came to serve a search warrant on July 17, 2008. Ramirez's daughter had dated Duarte's brother, a law enforcement officer who was killed on March 23, 2008. At trial, Ramirez and her daughter Ann Marie Martinez testified that Duarte was at Ramirez's house the night of the assault for a barbecue and bonfire. Duarte stayed until 2 or 3 in the morning.

The trial court bifurcated the trial on the prior convictions. Duarte was found guilty on both counts and the jury found true the gang enhancement allegations. At the sentencing hearing, Duarte admitted to having suffered all of the prior convictions alleged in the information and then moved to dismiss one of the strike priors under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. The motion was denied. He was sentenced to a total term of 30 years to life in state prison, consisting of 25 years to life on the robbery count due to the two prior strike convictions plus an additional five years for the prior serious felony conviction. A concurrent sentence of 25 years to life was imposed on the assault charge. The trial court also imposed one year for each of the three prior prison term prior convictions but stayed the sentence. Duarte appealed.

DISCUSSION

I. Gang Enhancement Allegations

Duarte argues the gang enhancement finding must be reversed because it is not supported by substantial evidence. According to Duarte, the robbery and assault were not gang-related in that : "(1) there was insufficient evidence to establish the crimes were committed for the benefit of, at the direction of, or in association with a criminal street

gang; and (2) there was insufficient evidence to establish appellant committed the crimes with the specific intent to promote, further, or assist in criminal conduct by gang members." Duarte further contends that there was insufficient evidence to prove the primary purpose of the Little Hill gang. We disagree.

The gang enhancement allegation charged against Duarte under section 186.22, subdivision (b)(4), imposes additional punishment for "[a]ny person who is convicted of [certain felonies] committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." To impose the additional sentence, both parts must be established -- (1) that the offense was " 'committed for the benefit of, at the direction of, or in association with any *criminal street gang*' " and (2) that the defendant committed the offense with " 'the specific intent to promote, further, or assist in any criminal conduct' by members of the street gang." (*People v. Gardeley* (1996) 14 Cal.4th 605, 615-616.)

"Criminal street gang" is defined as " 'any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more' criminal acts enumerated in subdivision (e) of the statute, and which has 'a common name or common identifying sign or symbol, [and] whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.' " (*Gardeley, supra,* 14 Cal.4th at p. 616, quoting § 186.22, subd. (f), italics & fn. omitted.) " '[P]attern of criminal gang activity' " is defined as " 'the commission, attempted commission, or solicitation of two or more' . . . of the offenses enumerated in [subdivision (e) of section 186.22] 'provided at least one of those offenses occurred after the effective date of this chapter [September 26, 1988,] and the last of those offenses occurred within three years after a prior offense, and the offenses are committed on separate occasions, or by two or more persons.' " (*Id.* at p. 616, quoting § 186.22, subd. (e), italics omitted.)

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ermine whether substantial evidence supports the judgment, we review the in the light most favorable to the judgment to determine whether it contains is credible and of solid value from which a rational trier or fact could have endant guilty beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th .) Applying this standard of review, we find that substantial evidence ury's true finding on the gang enhancement allegation.

imary Activities

l, the gang expert, Deputy Ron Duvall testified as follows:

> Now, what are the primary activities of this gang, Little Hill? With most of our Hispanic gangs, it's going to be the sales and distribution of narcotics and drugs. But to help run that operation and get that money, they engage in burglaries. They obtain jewelry, money, weapons. They use the weapons in their drive-by shootings to protect their turf. They commit murder, attempt murders. They commit robberies. They committed rapes, arson, witness intimidation."

ıds that Deputy Duvall testified generically to "most" Hispanic gangs rather e Hill gang in particular, making his testimony insufficient to establish that purpose of the Little Hill gang was to commit the crimes enumerated in 2. Hence, the crime of taking Figueroa's wallet was not established to have ɔn with the primary activities of the Little Hill gang."

ear that though Duvall referred to "most of our Hispanic gangs," he was ıut the Little Hill gang when the answer is taken in context. First, the ifically asked about the Little Hill gang. Second, the line of questioning ter this particular question involved the Little Hill gang rather than Hispanic ral. Duvall testified to the Little Hill gang's territory, number of members . Duval also testified about two members of Little Hill who had been carjacking, assault with a firearm, first degree robbery, false imprisonment nd witness intimidation.

Contrary to Duarte's contention, there is no requirement to link the underlying crimes to the primary activities of the criminal street gang and Duarte provides no support for the proposition. They are separate elements to the gang enhancement statute. In any event, Duvall testified that robberies were part of the primary activities of the Little Hill gang.

B. Crime Committed for the Benefit of a Criminal Street Gang

Duarte further contends that there was insufficient evidence to support a finding that the crime was committed to benefit the Little Hill gang. In support of his argument, Duarte highlights what the evidence did not show: there was no evidence he identified himself as a Little Hill gang member; he did not brandish any gang signs; the crime was not committed in concert with other gang members; it was not committed in a crowded place where spectators would be intimidated; Figueroa was not a rival gang member attempting to encroach on Little Hill's territory.

Our concern, however, is not with what the evidence does not show, but what it does show. At trial, Deputy Duvall testified that Duarte had "LHG" tattooed across his upper back and "LH" tattooed on his shoulder. Duarte also admitted to a police officer twice in 2008 that he was a member of the Little Hill gang. The record shows that the La Puente Villa Apartments were in territory claimed by the Little Hill gang. As a result, the statement, "you from Puente," would be a challenge because Barrio Puente was a rival gang.

Duvall also opined that the crime was committed for the benefit of the Little Hill gang because the crime served to instill fear and intimidate others. According to Duvall, "with most gang members, if you're in their area, what you have is theirs. You know, it's their right to take it from you. [¶] . . . It's his duty as a gang member to do that. And in doing so, it's letting you know that he's a gang member. And that instills fear within you. [¶] . . . If you're in the mall and you see someone that's dressed like a gangster, how do you feel? You look at them and you get scared. There's that fear and intimidation." By attacking and robbing Figueroa, Duarte was garnering more respect within the gang by building up his gang's reputation.

That the crime did not occur in front of a crowd of onlookers does not mean that it did not have the desired effect on the community. Indeed, Figueroa testified that his daughter's grandmother approached him soon after the incident and "a lot of people . . . came up to me and asked me what happened to me and stuff." Adrienne Boyd also learned of the crime soon afterwards. The record also shows that Boyd initially told police she believed she saw Duarte running from the building but later recanted this statement at trial. The jury could reasonably have inferred that Boyd was intimidated and feared for her family's safety. We find the above evidence sufficient to support the jury's finding that the gang enhancement allegations were true.

Numerous cases support our conclusion. An expert opinion that particular criminal conduct benefited a gang by, for example, enhancing its reputation, is sufficient to support a section 186.22 finding. (See, e.g., *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354 (*Vasquez*) [murder of non-gang member benefitted defendant's gang because "violent crimes like murder elevate the status of the gang within gang culture and intimidate neighborhood residents who are, as a result, 'fearful to come forward, assist law enforcement, testify in court, or even report crimes that they're victims of for fear that they may be the gang's next victim or at least retaliated on by that gang. . . .' " and such fear and intimidation "obviously, makes it easier for the gang to continue committing the crimes for which it is known, from graffiti to murder"]; *People v. Romero* (2006) 140 Cal.App.4th 15, 19 [gang allegation supported where shooting by Latino gang member occurred in African-American gang territory and expert testified that shootings of African-American men benefitted Latino gang by elevating status of shooters and their gang]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931 [expert's opinion that drug sale was for benefit of gang, supported by evidence that sale occurred in gang territory, that defendant had permission from gang to sell and that defendant was member of gang].)

Duarte's suggestion that the facts also support a finding that it was merely a run-of-the-mill robbery without any gang motivation does not negate our conclusion. It has long been held that whether the evidence also supports an alternate conclusion does not mandate reversal of the jury's finding. (*People v. Earp* (1999) 20 Cal.4th 826, 887-888.)

C. Intent to Promote the Gang

The gang enhancement statute also requires the prosecution prove that Duarte committed the crime "with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]" (§ 186.22, subd. (b)(1).) Relying on federal authority, Duarte asserts this element "requires proof that he acted with the specific intent to do more than commit the charged crime." (*Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1080 (*Briceno)*; *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103-1104 (*Garcia*).) Duarte explains, "Without any evidence to connect an individual's gang affiliation with a specific intent to promote future criminal conduct, the evidence does not support the second element of the gang allegation."

As noted in a number of opinions since *Garcia* and *Briceno*, California appellate courts have consistently disagreed with the holding in those cases and have declined to follow them. (*Vazquez, supra,* 178 Cal.App.4th at p. 353 (cases cited within).) We agree. "By its plain language, the statute requires a showing of specific intent to promote, further, or assist in '*any* criminal conduct by gang members,' rather than *other* criminal conduct. (§ 186.22, subd. (b)(1), italics added.)" (*People v. Romero, supra,* 140 Cal.App.4th at p. 19.) "There is no statutory requirement that this 'criminal conduct by gang members' be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing." (*Vazquez, supra*, 178 Cal.App.4th at p. 354.)

As discussed above, the evidence presented at trial established that Duarte was a member of the Little Hill gang, the robbery occurred in Little Hill territory and Figueroa was issued a gang challenge just before he was assaulted and robbed. Deputy Duvall testified that Little Hill gang members commit robberies to support their narcotics activities and to intimidate and instill fear in the community. Duvall opined that, given

these facts, the assault and robbery of Figueroa was intended to promote the Little Hill gang. We find that a reasonable inference.

II. Sentencing Issues

A. Sentence on Gang Finding

As previously noted, the jury found Duarte guilty in count 2 of a charge of assault by means likely to produce great bodily injury in violation of section 245, subdivision (a)(1) and found true the related gang enhancement allegation under section 186.22 subdivision (b)(1)(C). Duarte contends the trial court erred when it imposed and stayed a 10-year sentence on the gang enhancement finding. The People concede a 10-year term should not have been imposed on the gang enhancement, and request the matter be remanded to the trial court for resentencing so the appropriate term of the enhancement may be imposed. We agree with the People and order a remand for resentencing on the gang allegation.

The gang enhancement allegation provided for in Penal Code section 186.22 subdivision (b)(1) sets forth a series of terms of imprisonment which increase based upon the type of underlying crime for which a defendant is convicted. Subdivision (b)(1)(C) of section 186.22 provides an additional 10-year sentence applies if the underlying crime is a violent felony; subdivision (b)(1)(B) provides an additional five-year sentence if the underlying crime is a serious felony; and subdivision (b)(1)(A) provides a triad of two, three or four years for the conviction of an ordinary felony.

Here, defendant was convicted in count 2 of assault by means likely to produce great bodily injury, a crime which is not included in the list of violent or serious felonies. Therefore, the term of the enhancement should have been one selected by the trial court from the triad provided in subdivision (b)(1)(A). Accordingly, we strike the 10-year sentence imposed for the gang enhancement on the assault conviction and agree with the parties that the case should be remanded for resentencing under subdivision (b)(1)(A) of section 186.22 so that the trial court may exercise its discretion and select the appropriate term from the triad it provides.

The People request a further remand for resentencing on the gang enhancements. More specifically, the People contend that the trial court erred when it determined the gang enhancements on counts 1 and 2 were required to be stayed, relying on *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236-1239 (*Johnson*). We agree that the trial court misapprehended its sentencing discretion on the gang enhancements under the relevant case law.

The Court of Appeal in *Johnson* held that the enhancement provisions of section 186.22 subdivision (b)(1) may not be applied when the defendant is convicted of a crime which provides for an indeterminate sentence; instead, such a defendant becomes subject to a 15-year minimum parole term. (See also, *People v. Lopez* (2005) 34 Cal.4th 1002.) While the sentences imposed on counts 1 and 2 were for indeterminate terms, it was only due to the application of the Three Strikes law. The proscription in *Johnson* only applies to felonies which by their own terms provide for a life sentence. (*People v. Montes* (2003) 31 Cal.4th 350, 352.) The trial court thus erred in determining it was required to stay the gang enhancements.

If this were the sole issue for which remand for resentencing were required, we would decline to do so, finding it would be an idle act in light of the trial court's statements at sentencing. Indeed, the trial court clearly stated at sentencing: "I think a 30-year state minimum parole eligibility term for Mr. Duarte is more than appropriate given the underlying circumstances of the offense, even though I think under the law I could impose consecutive sentencing and add an additional 25 years to life on top of that. I don't think I'm inclined to do so given that it was one innocent, one victim, one act that resulted in two separate crimes during the commission of that crime." However, because we must remand this matter to the trial court for it to reconsider the appropriate term of the gang enhancement on count 2 in any event, we direct the trial court to also consider whether staying the enhancements on counts 1 and 2 is the choice it would make, now armed with the knowledge it has discretion to impose them if it should so choose.

B. Concurrent Sentence

Duarte further contends the imposition of a concurrent 25-year sentence on count 2 (assault by means likely to produce great bodily injury) violates the prohibition against multiple punishment for a single course of conduct under section 654. Duarte argues that the assault was the means of committing the robbery of Figueroa. The People argue that Duarte had a separate intent and objective for each crime—he intended to physically harm Figueroa when he assaulted him and then had the separate intent of financial gain when he took his wallet. The trial court at the sentencing hearing reasoned as follows:

> "The amount of force that was used to perpetrate the robbery was also the same force that was used to perpetrate the crime charged in count 2 for which Mr. Duarte stands convicted. I'm going to exercise my discretion. I don't think it's quite a 654 issue where I'd have to stay the offense. I think an argument can be made they were distinct in some respect but I feel that the offenses occurred out of the same set of operative facts. So I think concurrent sentencing is legally appropriate."

Here, Figueroa testified that Duarte knocked him to the ground and hit him as they struggled for his wallet. Duarte hit him in the eye when Figueroa would not let go of his wallet. We agree with the trial court that the uncontradicted evidence in this matter shows the force used to perpetrate the robbery was the same force used to perpetrate the assault. "Where the force relied upon to establish the robbery is the same as that required to prove the assault the accused cannot be punished for both acts without violating section 654 of the Penal Code." (*People v. Aldridge* (1961) 197 Cal.App.2d 555, 558-559.)

People v. Ridley (1965) 63 Cal.2d 671, 678 (*Ridley*), and *People v. Medina* (1972) 26 Cal.App.3d 809, 824 (*Medina*), involving robberies with incidental assaults, are instructive. In *Ridley*, the assault occurred when one of the victims tried to resist; the court found that the assault was the means of perpetrating the robbery. (*Ridley, supra*, at pp. 673, 678.) In *Medina*, while the robbery victim was being bound and gagged, he was hit with something hard. (*Medina*, *supra*, at p. 824.) The court found the assault to be

"merely incidental to the primary object of robbing [the victim]." (*Ibid.*) We reach the same conclusion here and find the concurrent sentence for the assault violates section 654. We therefore modify the judgment to stay the sentence imposed upon the less serious offense in count 2 until the sentence imposed on the robbery in count 1 is served.

C. Striking a Prior Conviction

During the sentencing hearing, Duarte admitted to prior convictions for possession for sale of narcotics in 1989 and in 2004 and a prior conviction for possession of narcotics in 1997. Duarte also admitted to a prior conviction of one count of second degree robbery and one count of felony assault with a broken bottle in 1992. These latter two prior convictions were the alleged strike offenses. The probation report[2] indicates that in the commission of those offenses, Duarte stabbed the victim in the stomach and the chest with a broken bottle after he rejected an offer to buy drugs from Duarte and his companion. The companion took $220 from the victim. During an interview, Duarte told the authorities that he was in jail because of "some bullshit robbery, the guy wouldn't cooperate so I broke a bottle and stuck him." Pursuant to a plea agreement, Duarte was convicted and sentenced to four years in prison.

At sentencing, Duarte moved to strike one of the prior convictions related to the 1992 robbery and assault. The trial court denied his motion. We review the trial court's decision for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.)

Duarte relies on *People v. Burgos* (2004) 117 Cal.App.4th 1209 (*Burgos*). In that case, the defendant admitted prior strike convictions for attempted robbery and attempted carjacking, both of which "arose from a single criminal act, where appellant and two companions approached a man at a gas station and appellant demanded the victim's car while one of the companions told the victim that he had a gun." (*Id.* at p. 1212, fn. 3.) The trial court refused to strike one of the prior convictions arising from the robbery and

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[2] We take judicial notice of the Request for Court Record dated July 29, 2008, the abstract of judgment and probation report on Case No. KA012792 relating to Duarte's prior conviction for assault with a deadly weapon and second degree robbery in 1992. (Evid. Code, § 452.) These documents reflect the circumstances under which Duarte was convicted and sentenced.

carjacking. (*Id.* at p. 1213.) On appeal, our colleagues in Division Two of this court focused on *People v. Benson* (1998) 18 Cal.4th 24, 36, footnote 8, where the Supreme Court stated, "Because the proper exercise of a trial court's discretion under section 1385 necessarily relates to the circumstances of a particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct—that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors."

Interpreting the Supreme Court's language in footnote 8 in *Benson* to "strongly indicate[] that where the two priors were so closely connected as to have arisen from a single act, it would necessarily constitute an abuse of discretion to refuse to strike one of the priors[,]" the *Burgos* court found the trial court's failure to strike one of the prior convictions "must be deemed an abuse of discretion." (*Burgos, supra,* 117 Cal.App.4th at pp. 1215-1216.)[3] The court further noted the defendant's other previous convictions had been misdemeanors with the exception of one felony conviction for sale of a substance in lieu of a controlled substance, not "the worst of crimes." (*Id.* at p. 1216.) Further, that there were no other circumstances indicating that the defendant deserved to be sentenced as a third strike offender as opposed to a second strike offender subject to a 20 year term. (*Id.* at pp. 1216-1217.) Though the record before us is unclear, it appears that sentence on one of the prior convictions was in fact stayed pursuant to section 654. However, unlike *Burgos*, it does not appear that the crimes arose out of a single act by

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[3] Duarte argues that Burgos stands for the proposition that where a single criminal act resulted in two prior strikes, a trial court is required to strike one of the strikes. We note, however, that the Third District in *People v. Scott* (2009) 179 Cal.App.4th 920, 923, cert. denied (Mar. 10, 2010) 2010 Cal. LEXIS 2719, reads *Burgos* to mean "that the connection between the two strikes is but one factor a trial court must consider in conducting a traditional *Romero* analysis (*People v. Superior Court (Romero)* [supra] 13 Cal.4th 497." For purposes of our analysis, we need not reach the question of whether this is an accurate interpretation of *Burgos* or a correct statement of the law.

Duarte as distinguished from multiple acts committed in an indivisible course of conduct. The facts taken from the probation report demonstrate that Duarte formed the intent to assault the victim with a broken bottle only after he refused to cooperate during the robbery. Moreover, Duarte's companion, not Duarte himself, took the money from the victim's wallet. Given the separate nature of these offenses, combined with Duarte's continued criminal conduct even while on parole, we find no abuse of discretion in the trial court's decision not to strike one of the two prior strike convictions. (*People v. Superior Court, supra,* 13 Cal.4th 497; *People v. Williams* (1998) 17 Cal.4th 148, 161.)

DISPOSITION

The judgment is reversed insofar as it imposes an additional 10-year sentence on the gang enhancement in count 2 and insofar as it imposes a concurrent sentence for count 2. The matter is remanded to the trial court for it to choose the appropriate term of the gang enhancement on count 2 as set forth in Penal Code section 186.22, subdivision (b)(1)(A) and to then determine whether it finds it appropriate to impose or stay the gang enhancements on counts 1 and 2. After it makes those determinations, the sentence on count 2 must be ordered stayed pursuant to Penal Code section 654, until the sentence imposed on count 1 is served. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.