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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO ANTHONY VELEZ, Defendant and Appellant.	B228559 (Los Angeles County Super. Ct. No. KA073867)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Judge. Modified and affirmed with directions.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Guillermo Anthony Velez appeals from the judgment entered following a jury trial in which he was convicted of two counts of first degree murder and one count of possession of a firearm by a felon. Defendant contends that the trial court erred by admitting inflammatory crime scene and autopsy photos; one of his first degree murder convictions violated double jeopardy because, at his first trial, the jury convicted him of second degree murder pertaining to that victim; and his trial attorney rendered ineffective assistance of counsel by failing to enter a plea of once in jeopardy to that first degree murder charge. He also seeks correction of his presentence custody credits and asks that we strike an unsupported prohibition contained in the sentencing minute order. We modify one of defendant's murder convictions to be second degree murder, correct his credits, and strike the unsupported prohibition on the sentencing minute order, but otherwise affirm.

BACKGROUND

About 2:00 p.m. on June 27, 2005, defendant fatally shot John Vargas and Mauricio Venegas in the driveway of Gretchen Handley's home in Azusa. Earlier that day, as Handley, Venegas, and Vargas were driving back to Azusa from Mexico, defendant phoned Handley. After Handley spoke to defendant, she passed the phone to Vargas. Vargas suggested to defendant that he meet them at Handley's house and said, "We'll work it out, you know, straighten it out." Vargas seemed angry after speaking to defendant. As Handley drove past a liquor store on the way to her home about noon on June 27, she saw defendant at a liquor store. He got into his brother Chris's Tahoe and followed Handley, Vargas, and Venegas to Handley's home. Defendant seemed angry and had a weird look on his face. Handley went inside her house to get ready for work, while defendant, Chris Velez, Vargas, and Venegas remained outside. She heard the four men leave, and later return. Handley heard Vargas say that defendant had led them on a wild goose chase.

Handley heard a gunshot, looked out the screen door, and saw defendant near Chris's Tahoe, which was parked partially in front of the driveway, aiming a shotgun

toward her house. She heard Chris yell, "Anthony, don't do it." She saw Vargas standing in front of her father's pickup truck, which was parked on the driveway, and Venegas running between the pickup and another car parked farther away from the street on the driveway. Defendant pursued them, firing at them. She saw defendant moving back and forth near the tailgate of the pickup and thought he was "chasing" Venegas. Handley heard six or seven shots, all of which sounded the same.

Before law enforcement arrived, defendant phoned Handley and threatened that she and her children were "next" if she told the police anything. She subsequently met defendant at a motel in Hacienda Heights and still later drove to Las Vegas to see him and pick him up.

Robert Gehres and his wife Gloria lived three houses south of Handley, on the same side of the street. Robert testified he and Gloria were in their driveway when he heard a gunshot. He turned in the direction of the sound and saw a man walking slowly up the driveway, standing upright, and repeatedly firing a pump-action shotgun that may have had a pistol grip. The gunman was firing rapidly, but appeared to be calm and was walking and firing "casually." Robert heard three or four shots, all of which sounded the same. The driver of a black SUV parked on the street yelled, "Anthony, we need to get going." The gunman got into the SUV, which drove past the Gehres' house. Robert called 911, and while he was on the phone with the dispatcher, he walked up to Handley's house and saw a man who appeared to be dead lying between two vehicles parked in Handley's driveway. There was a revolver at his side, partly under his body. Gloria testified that she also turned after hearing the first gunshot and saw a man standing in the driveway of the house three doors down, firing a long gun. She also saw the black SUV drive down the street after the shooting.

Handley's next-door neighbor, Laura Oros, told a sheriff's deputy who responded to the scene that a black and white Tahoe had pulled into the driveway at her home around 2:00 p.m. Two men had gotten out and approached two other men who were standing outside Handley's house. The four men conversed and passed around a phone.

They seemed slightly angry. One of the men had numerous tattoos and was not wearing a shirt. He walked back to the Tahoe and pulled out a long gun, which he pointed and fired at a man standing between the two vehicles parked in the driveway of Handley's home. At trial, Oros denied seeing the shooting, the shooter, the gun, or the Tahoe, but admitted she still lived in the same house and was concerned for her safety.

Handley's neighbor on the other side, Jaime Santos, testified he heard a loud noise that he thought was "firework," followed by six "more shots" in rapid succession, then shouting. There was a gap of a "couple [of] seconds" between the first sound and the subsequent shots. Santos went outside and saw a man lying facedown in the driveway at Handley's house.

Vargas's body was found facedown between two vehicles parked in the driveway at Handley's house, 27 feet from the curb. There was a small .38-caliber revolver next to him, and his palm was atop it. Vargas suffered two fatal shotgun wounds: one that entered his neck and traveled downward into his chest, and one that entered his upper abdomen and also traveled downward. In addition, he had gunshot wounds to his right wrist and left ankle and facial abrasions. Shotgun wadding was found in the two fatal wounds. The deputy medical examiner opined that the wounds were caused by shells loaded with "fragmentor lead projectile[s]," that is, slugs, not pellets.

Venegas's body lay about 66 feet 5 inches from the curb, in a narrow space between the side of the house and a fence. He suffered shotgun wounds to his left forearm, lower right leg, and head. The head wound was massive and fatal. The deputy medical examiner recovered a slug from Venegas's head, which he believed also caused the forearm injury. This could occur if Venegas held his arm in front of his face. The wound to Venegas's leg shattered the bone and was disabling.

Sheriff's deputies recovered five expended shotgun shells and two lead projectiles. The revolver found next to Vargas contained four live rounds and one empty casing beneath the hammer. Deputies searched Venegas and the crime scene, but found no other weapons. The prosecution's firearms examiner testified that the magazine of a pump-

action shotgun commonly holds five shells. He determined that all five of the recovered shotgun shells were fired from the same shotgun. He further opined that the lead projectiles recovered at the scene and the fragments recovered from the victims' bodies during autopsy were consistent with shotgun slugs. The recovery of shotgun wadding from the victims' bodies indicated that shots were fired from a distance of no more than 15 feet.

Gunshot residue was found on Vargas's left hand. Many specific particles consistent with gunshot residue were found on both of Venegas's hands and Vargas's right hand. Gunshot residue particles can travel 10 to 14 feet forward from the muzzle of a gun, possibly farther from a shotgun or rifle, and 2.5 feet from the back, sides, top, and bottom of a gun.

Between the bodies of Vargas and Venegas, 40.5 feet from the curb, deputies recovered an athletic shoe that Handley testified belonged to defendant.

Dr. Lynne Herold, an expert on bloodstain patterns, testified that the blood on and around Vargas indicated he did not move from the area where he was shot and fell to the ground. A bloodstain on the back of Venegas's shirt was not caused by Venegas's own injuries, and thus indicated he must have been standing in front of Vargas when Vargas was shot in the arm or neck. Herold opined that blood found along the side of the house, on the walkway, wall, air conditioner, and window came from the wound to Venegas's left arm, meaning that injury had been inflicted a few seconds before he reached the place where the bloodstain pattern started.

The prosecution at the retrial introduced the testimony defendant gave at the original trial. Defendant testified at his first trial that his brother dropped him off at Handley's house on the day of the crimes because Vargas called him and asked to meet him there. Vargas shook hands with defendant and said, "'I just got off the phone with my brother Frank.'" Defendant knew Vargas's brother as "Frankie B.," a member of the Mexican Mafia who had "had a lot of people whacked."

Defendant further testified that while at the house, Handley said, "'I told you not to take my dope the night before.'" Defendant explained that he had fled a hotel with Handley's "dope" the night before. Vargas asked defendant to put him in touch with "Sleepy," and defendant offered to take Vargas to Sleepy's house. Defendant's brother returned, and defendant told Vargas to follow them. Venegas and Vargas got into their car and followed defendant, but defendant got lost, and they eventually stopped following him. Defendant returned to Handley's house. Vargas and Venegas were in the driveway. They angrily accused defendant of purposely misleading them. Defendant saw the handle of a gun sticking out of Vargas's waistband. Defendant apologized and told them he had Sleepy's phone number on an old cell phone, which he would retrieve. Defendant went home, found the phone, and placed his loaded pump-action, pistol-grip shotgun beneath some clothing in the backseat of his truck.

Defendant and his brother drove back to Handley's house, where Vargas and Venegas were still standing in the driveway. Defendant approached and gave them Sleepy's phone number. One of them announced that Frankie B. wanted to talk to defendant. Vargas made a phone call and handed defendant the phone. Frankie B. screamed at defendant and called defendant a punk. He insisted defendant meet with him that night, and defendant refused. When Vargas took the phone back, he told Frankie B. that defendant had angered him. Vargas then said, "'Okay. I'll take care of it. Don't worry about it.'" Defendant told Vargas and Venegas that he was not going to meet them that night and they could not come to his home.

Defendant testified that he walked back toward his truck, which was parked on the street, just past the driveway. Just as he reached the truck, he heard a gunshot fired from behind him. Defendant retrieved his shotgun and went back around his truck. Vargas and Venegas took cover between a pickup truck and a car that were parked in the driveway. The pickup truck was between defendant and the men, but defendant could see them through its windows. Defendant did not see a weapon, but he saw one of the men attempt to pick up a black object. Defendant was frightened and he "just started

shooting." He aimed at the driver's side window of the pickup truck and fired. He came around the passenger-side of the pickup truck, then kept on shooting. He continued to walk and fire at Vargas and Venegas as rapidly as he could chamber the next round. He was aiming at Vargas, who was "crouching down in a firing position," and at Venegas, who appeared to be reaching for something or trying to shield himself. Defendant did not see a gun in Venegas's possession that day. Venegas moved toward the back of Handley's house. Defendant testified that at the time he thought Venegas might attempt to jump the fence "and he would have been gone, unless he was planning to get in a position to shoot back or try to kill me." Defendant fired at Venegas. Venegas turned toward defendant while making a sweeping motion with his hand. Defendant fired until his gun was empty, then ran back to his truck and left. He discarded the shotgun in a dumpster.

Leo Duarte, an expert on prison gangs, testified that Frankie B. was a longtime, "made" member of the Mexican Mafia who controlled the Pomona and El Monte areas. Vargas and Venegas belonged to his "crew." Defendant was a member of the El Monte Flores gang, which made him a "Sureno" or associate of the Mexican Mafia. If Frankie B. had summoned a Sureno from the El Monte Flores gang to a meeting and that Sureno declined to attend, it would be considered a demonstration of disrespect, the potential repercussions of which included assault or death. If a Sureno disrespected Frankie B. and Vargas said he would take care of it, that would indicate a repercussion was forthcoming.

Chris Velez testified for the defense by means of a videotaped conditional examination that was played at trial. He testified that defendant woke him up on the morning of June 27 and asked for a ride to Handley's house, which was one block away. Chris drove defendant to Handley's house in the family Tahoe. Defendant spoke to a man outside Handley's house for about 30 minutes, then Chris and defendant drove to a liquor store to get drinks. They then returned to Handley's house. Chris remained in the vehicle playing the stereo while defendant stood outside the house, speaking to two men. They may have passed a mobile phone around. Chris looked up when he heard a loud

"pop" and saw one of the men pointing a gun at defendant, who was walking toward the Tahoe. Chris ducked, but he heard the back door of the Tahoe open. Chris then heard loud gunshots that went on about a minute. Then defendant got into the backseat of the Tahoe and Chris drove home by a circuitous route. Even though defendant had been arrested and tried for murder, and detectives had tried to interview Chris, Chris did not tell anyone about his observations until 2010.

In his initial 2007 trial of the charges, a jury acquitted defendant of first degree murder in the death of Vargas, but convicted defendant of second degree murder with respect to Vargas, first degree murder with respect to Venegas, and possession of a firearm by a felon. With respect to each murder, the jury found true a multiple-murder special circumstance and an allegation that during the commission of these offenses, defendant personally and intentionally discharged a firearm, causing death or great bodily injury (Pen. Code, § 12022.53, subd. (d); undesignated statutory references are to the Penal Code), and personally used a firearm (§ 12022.5, subd. (a)). Defendant admitted allegations he had suffered a prior serious or violent felony conviction and served a prior prison term, and he was sentenced to life without the possibility of parole, plus 85 years to life. He appealed, and we reversed the case in its entirety for instructional error and remanded the case to the trial court for retrial. (*People v. Velez* (Aug. 14, 2008, B199133) [nonpub. opn.].)

On retrial, the jury convicted defendant of two counts of first degree murder and one count of possession of a firearm by a felon. With respect to each murder, the jury found true a multiple-murder special circumstance and an allegation that during the commission of these offenses defendant personally and intentionally discharged a firearm, causing death or great bodily injury and personally used a firearm. The court found the prior conviction and prison term allegations not true and sentenced defendant to two consecutive terms of life without the possibility of parole, plus 50 years to life.

DISCUSSION

1. Admission of photographs

At the start of the retrial, defense counsel asked the court to "approach" the matter of the crime scene and autopsy photographs in its voir dire of prospective jurors. The court sua sponte undertook an examination of the prosecution's photographs and their admissibility under Evidence Code section 352. Defense counsel did not seek to exclude any particular photo or limit the number of photographs, but pointed out to the court that the defense conceded defendant fired a shotgun at the victims with intent to kill, but contended he acted in self-defense. After examining the photographs, reviewing the law, and considering the arguments for and against excluding the photographs, the court declined to exclude any photographs, explaining that it found them relevant to self-defense, intent, and illustrating how the crime had occurred. Defense counsel clarified that he had not requested the exclusion of any photographs, but merely wanted the court to voir dire prospective jurors on the topic.

On appeal, defendant contends the trial court erred by denying a request to exclude crime scene and autopsy photographs as unduly prejudicial, and that this error violated due process.

Arguably, defendant forfeited his claim by failing to seek exclusion of any of the photographs. But the purpose of the forfeiture rule is to provide the trial court with an opportunity to correct or avoid an error and safeguard the defendant's right to a fair trial. (*People v. Simon* (2001) 25 Cal.4th 1082, 1103.) Because the court undertook a sua sponte review of the admissibility of the photographs under Evidence Code section 352, no purpose would be served by finding a forfeiture.

A trial court has broad discretion to admit purportedly gruesome or inflammatory photographs of a victim, and the court's decision will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. (*People v. Mills* (2010) 48 Cal.4th 158, 191.) Photographs need not be excluded as cumulative simply because other evidence was introduced to prove the same facts.

(*People v. Crittenden* (1994) 9 Cal.4th 83, 134–135 (*Crittenden*).) "[A] prosecutor is not required to rely solely on oral testimony when a visual image would enhance the jury's understanding of the issues." (*People v. Cowan* (2010) 50 Cal.4th 401, 476.)

Our independent review of the original autopsy and crime scene photographs convinces us that, although some of the photographs are unpleasant, none of them is unduly gruesome or inflammatory. Victim photographs and other graphic items of evidence in murder cases always are disturbing. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 134.) The relevance of the photographs was not negated by defendant's failure to dispute matters such as his use of a shotgun or his intent to kill. (*Id.* at p. 132.) The photographs were used during the testimony of Robert Gehres, Deputy Jaime Rivera (the first officer on the scene), Detective Donna Cheek, Dr. Lynne Herold, and Deputy Medical Examiners Drs. Pedro Ortiz and Irwin Golden, and helped to illustrate their testimony. They served to illustrate the sequence of events once defendant began shooting and were highly relevant to assess the credibility of his self-defense theory. We conclude that the probative value of the photographs was not clearly outweighed by a substantial risk of undue prejudice, and thus the trial court did not abuse its discretion in admitting them.

We note that two of the photographs defendant argues should have been excluded depicted no bodies, blood, tissue, or body parts. Others show only the victims' bodies at a distance, without visible wounds, except, in some cases, a bloodstain.

We also reject defendant's due process claim. "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) The photographs were relevant, and they were not so gruesome or inflammatory that they made his trial fundamentally unfair. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1284.)

2. Double jeopardy

As noted, the jury in defendant's first trial acquitted him of first degree murder with respect to Vargas, and instead convicted him of second degree murder. We reversed

as to all counts for instructional error, thus permitting retrial on all counts. But the prior acquittal and double jeopardy principles precluded a first degree murder conviction with respect to Vargas. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717 [89 S.Ct. 2072], overruled on another ground in *Alabama v. Smith* (1989) 490 U.S. 794, 802 [109 S.Ct. 2201]; *Green v. United States* (1957) 355 U.S. 184, 190–191 [78 S.Ct. 221]; *People v. Anderson* (2009) 47 Cal.4th 92, 103–104.)

On retrial, the jury convicted him of first degree murder with respect to Vargas, but defendant never raised the double jeopardy bar. He thus forfeited the double jeopardy claim he asserts on appeal. (*In re Henry C.* (1984) 161 Cal.App.3d 646, 648–649.) But defendant contends, and the Attorney General aptly concedes, that defense counsel Grady Russell rendered ineffective assistance by failing to assert the double jeopardy claim in the trial court, and that the first degree murder conviction in count 1 must be reduced to the lesser included offense of second degree murder. Accordingly, we do so.

3. Presentence custody credits

Defendant contends, and the Attorney General aptly concedes, that the trial court's award of presentence custody credits should be increased from 1,329 to 1,933 days. We so modify the judgment.

4. Prohibition on weapon possession

Defendant contends, and the Attorney General aptly concedes, that the sentencing hearing minute order erroneously states that the trial court ordered that defendant "[n]ot own, use or possess any dangerous or deadly weapons, including any firearms, knives or other concealable weapons." Had the court granted defendant probation, such a restriction would have been permissible, but the court sentenced him to prison. Section 12021, subdivision (a) prohibits defendant from possessing a firearm, but no authority supported the remainder of the purported weapons restriction in the minute order. Accordingly, we direct correction of the minute order.

DISPOSITION

Defendant's conviction in count 1 is reduced from first degree murder to second degree murder. Defendant's award of actual presentence custody credit is modified to reflect 1,933 days of credit. The trial court is directed to (1) issue an amended abstract of judgment reflecting the reduction of count 1 and the corrected credit award, and (2) amend its October 26, 2010 minute order nunc pro tunc to eliminate the following: "Not own, use or possess any dangerous or deadly weapons, including any firearms, knives or other concealable weapons." The judgment is otherwise affirmed.

Pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), the clerk of this court is directed to send a certified copy of this opinion to the State Bar.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.