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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL GUERRERO, Defendant and Appellant.	B275571 (Los Angeles County Super. Ct. No. BA332015)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dorothy I. Shubin, Judge. Affirmed.

Edward Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Noah P. Hill, David W. Williams, Deputies Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Ryan Dasalla was fatally shot April 27, 2005. The jury convicted defendant and appellant Daniel Guerrero (defendant) of conspiracy to commit murder and first degree murder in the victim's death (Pen. Code, §§ 182, subd. (a)(1), 187[1]). For both counts, the jury found he personally used a firearm resulting in death (§ 12022.53, subd. (d)). The jury also found he committed the offenses "for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members" (§ 186.22, subd. (b)(1)(C)) and was a principal in offenses where a firearm was used. (§ 12022.53, subd. (e)(1).)

Defendant first challenges the sufficiency of the evidence to support the gang enhancement. He next contends the CALCRIM jury instructions concerning provocation misled the jury and, alternatively, defendant's trial counsel provided ineffective assistance by failing to request a pinpoint provocation instruction. Finally, in arguments defendant acknowledges are "raised in this Court in order to preserve his claims for subsequent [federal] review," he also contends imposition of the "super-weapons" enhancement to add the second term of 25 years to life violates California's "multiple conviction rule" and federal constitutional double jeopardy principles. We affirm.

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1 All statutory references are to the Penal Code.

PROCEDURAL BACKGROUND

A grand jury indicted three individuals in Dasalla's death: defendant, his brother Gabriel Guerrero (Gabriel)[2] and family friend Sarah Toledo (Toledo). Defendant fled from California after the shooting. In the meantime, Gabriel and Toledo were tried and convicted for Dasalla's murder. This court affirmed their convictions in unpublished opinions. (*People v. Toledo* (Oct. 16, 2013, B238488)*; People v. Guerrero* (May 15, 2012, B229330).)

Defendant was apprehended in Mexico in 2013. His trial began in 2016.

DEFENDANT'S TRIAL

Defendant's younger brother, David, testified and established the background for the killing: In the afternoon of April 26, 2005, then 16-year-old David engaged in a physical altercation outside a high school he did not attend with two teenagers who taunted him and his close friend, Toledo. The teenagers said they were from "TDS," a tagging crew. Police broke up the fight after David knocked one of the males unconscious. David asked police for a ride home, but the officer declined; and David telephoned defendant, one of his older brothers, for a ride to a friend's house.

Later that evening, David was "jumped" by a group of males, including one of the boys he fought with earlier, and another male he had never spoken with, but recognized from a

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[2] David and Gabriel Guerrero are defendant's brothers. We refer to them by their first names for clarity.

high school football team. This individual was the victim, Dasalla, who had red hair and freckles.

At trial, David testified he only learned of Dasalla's name during the course of the investigation. At the time of the attack and the following day, when police were investigating Dasalla's death, David did not know Dasalla's name and never described him to anyone, including defendant, his friend Toledo, or his other older brother, Gabriel.[3]

David sustained a dislocated shoulder, broken nose, two black eyes, and numerous cuts that required stitches. He spent hours in the hospital, where he was interviewed by police, and was released early the next morning.

The assailants also stole David's cell phone. Late in the same evening of David's assault, the Guerrero family received anonymous phone calls threatening David and the Guerrero family. According to his mother, defendant was present when these phone calls were received. Defendant's sister, Monica, testified neither defendant nor Gabriel was home when the calls were received. She never told anyone about the threatening phone calls until 2016, shortly before defendant's trial because "that was the first time anybody questioned [her]."

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[3] Dasalla's mother testified her son did not leave home the evening of April 26, 2005, and could not have participated in the assault on defendant.

David's trial testimony concerning Dasalla's participation in his beating was impeached by the investigating homicide officer, who testified David told him after the shooting that Dasalla had not been involved in either the after-school fight or the attack later the same evening.

David spent the next day, April 27, 2005, recovering at home. At some point, defendant, who lived in the family home as well, said goodbye to David and left the house.

On April 27, 2005, Gabriel was staying in an apartment with his girlfriend, Regina Zarate (Zarate), and others, including Flora Andrade (Andrade), Zarate's brother's girlfriend. Zarate and Andrade both testified and took up the narrative: That morning, Andrade, Gabriel, and Zarate shared methamphetamine. The three of them left in Zarate's mother's van to cash a check for Andrade. Before they left, Gabriel received a call on his cell phone that left him "a little agravat[ed,] a little upset."

Instead of going to the bank, they made two stops. After the second stop, at a residence, defendant and another man[4] got into the van; defendant was carrying a black rifle. Gabriel soon received another call on his cell phone and handed the device to defendant, who addressed the caller as "Sarah." As part of the conversation, defendant said they would be looking for a Caucasian male with red hair and freckles. They drove to the high school where David engaged in the fight the previous day.

There was yet another phone call with "Sarah." The group drove a short distance from the high school and stopped when they saw two males—one was Dasalla. Gabriel asked them if they had a gang affiliation. Dasalla announced he was "from TDS." The three men got out of the van. Gabriel and the other man started fighting with Dasalla. Defendant, still holding the rifle, stayed near the van. Defendant fired once and hit Gabriel.

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[4] This individual was not identified by name in any testimony, did not testify himself, and apparently was never charged in Dasalla's death.

Gabriel shouted to defendant to not worry about him, but to get Dasalla, who was no longer in view. The witnesses heard more shots.

Defendant, Gabriel, and the other man returned to the van and they all drove off. Defendant said in the van that he "got him." There was another phone call with "Sarah" and defendant repeated that he "got him."

Defendant and the friend were dropped back at the residence where they had been picked up. Gabriel and Zarate left Andrade at Zarate's apartment and drove off.

Three bullets struck Dasalla from behind. A fourth entered his midsection laterally. The wound to the back of the victim's head was fatal, and he died at the scene.

Gabriel was arrested hours later at the hospital where he had gone to have the gunshot wound treated. A search of his cell phone led police to Toledo. Police found the murder weapon at Zarate's apartment. Defendant was not apprehended.

Months later in Oklahoma, defendant met Deric Baser (Baser), a self-described "small time weed dealer." Baser testified defendant convinced him "high quality" weed was cheaper in California, so the two of them came here in October 2005 and stayed in a motel, where defendant's parents visited. Baser had never been to California before, so defendant took him to some tourist spots, but said his old neighborhood "was [too] hot" to visit. Defendant told Baser he was a Varrio Nuevo Estrada (VNE) gang member wanted for a gang murder.

On the return trip to Oklahoma, defendant and Baser were stopped in Texas for speeding. They were jailed after police found the marijuana and a gun in the car. The two of them were in a large holding cell with other inmates; defendant left the jail

first, advising Baser his father was bailing him out. That was the last time Baser saw defendant until the trial.

The prosecution called Gabriel and Toledo to the stand in defendant's trial. Each was questioned initially outside the jury's presence and refused to answer any questions, asserting their right not to incriminate themselves. The court granted the witnesses use immunity for their testimony in defendant's trial and advised they would be held in contempt if they refused to testify before the jury. Gabriel and Toledo each returned to the stand in front of the jury and refused to answer any questions.

Robert Gray, a detective sergeant with the Los Angeles County Sheriff's Department, testified as a gang expert. In the expert's opinion, the murder was 'in association with VNE and also [to] benefit VNE:" "There was a person that was close to the VNE gang that was assaulted. That can't go unchecked. It's—basically, they were disrespected. And they[, i.e., VNE] have to go now and seek retribution on this. If they don't they're going to appear soft, weak. . . . [¶] . . . So they have to go out there to keep their name up. And so in association with would be several members of VNE that come out and commit the crime." Gray added, if the victim was a member of TDS, but not involved in beating up defendant's brother, the shooting was "even more for the benefit of the gang because now they're sending the message that you don't have to get the person who actually disrespected us as long as we get one of theirs, making their gang more feared now. In other words, if someone from your gang messes with us, you're going to get it ten times worse."

In the expert's opinion, defendant's admission to Baser that he was wanted for a gang murder solidified the gang purpose behind the victim's shooting. Gabriel's and Toledo's refusal to

testify did so as well: "[I]t's not gang-like to assist and snitch on the other person . . . ."

As pertinent to this appeal, the trial court instructed the jury on first or second degree murder (CALCRIM No. 520), first degree murder (CALCRIM No. 521), provocation: effect on degree of murder (CALCRIM No. 522, modified)[5], and voluntary manslaughter: heat of passion—lesser included offense (CALCRIM No. 570, modified).[6]

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[5] At defense counsel's request and over the prosecutor's objection, the trial court modified CALCRIM No. 522 to add the final paragraph below. The jury was instructed as follows: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter. [¶] The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim, or be conduct reasonably believed by the defendant to have been engaged in by the victim."

[6] Also at the defense behest over a prosecution objection, the trial court modified CALCRIM No. 570 to add the same language in the antepenultimate paragraph: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to

The jury convicted defendant of both counts and found all the charged allegations to be true. On the first degree murder conviction, defendant was sentenced to 25 years to life and one consecutive 25-years-to-life term for his personal and intentional discharge of firearm in Dasalla's death. (§ 12022.53, subd. (d).)

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act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim, or be conduct reasonably believed by the defendant to have been engaged in by the victim. [¶] If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

Based on the gang enhancement, the court ordered that defendant serve a minimum of 15 years before being considered for parole. (§ 186.22, subd. (b)(4).) The sentence on the enhancement for use of a gun by a principal in that offense was stayed (§ 12022.53, subds. (e)(1), (f)), as were the sentences imposed for the conspiracy conviction and its two firearm enhancements. (§§ 654, 12022.53, subd. (f)).)

DISCUSSION

I. Sufficiency of the Evidence to Support the Gang Enhancement

Defendant does not deny his membership in the VNE gang.[7] He contends, however, no substantial evidence supports a finding that the shooting was in association with or for the benefit of VNE. Rather, he argues the shooting was motivated by the anger of two brothers whose younger sibling was attacked and whose family members were threatened.

The standard of review "[i]n considering a challenge to the sufficiency of the evidence to support an enhancement [is as follows:] [W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Wilson* (2008) 44 Cal.4th 758, 806 . . . .) We presume every fact in support of the judgment the trier of fact could have reasonably

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[7] In fact, defense counsel candidly told the jurors in closing argument, "I'm not going to walk in here and tell you that [defendant and Gabriel] are not gang members."

deduced from the evidence. (*Ibid.*) If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27 . . . .) 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

The substantial evidence standard was met here. A tagging crew, TDS, took credit for the assault on David. The evidence was that Daniel and Gabriel intended to, and did, work together to retaliate against TDS for the attack on their younger brother. There was no evidence of an intent to identify and harm the specific individuals who assaulted David. Daniel committed the crimes with Gabriel, also a VNE member; a non-family member who was never identified in court; and Toledo, who targeted Dasalla because she knew he was a member of TDS. Gabriel made sure the victim was connected to TDS before he launched the physical attack and defendant fired the rifle. During the time defendant was a fugitive, he told Baser he committed a gang murder.

As the Court of Appeal has recognized, "the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

The circumstances of the shooting and testimony by the gang expert and Baser provided evidence that was "reasonable, credible, and of solid value" to support the gang enhancement finding. (*Albillar, supra,* 51 Cal.4th at p. 60.) Defendant's

contention that the siblings' desire to work together to avenge the attack on David must supersede any gang association or benefit (see, e.g., *Albillar, supra,* 51 Cal.4th at p. 62) does not negate the substantial evidence supporting the gang enhancement.

Because we conclude substantial evidence supported the jury's finding that the murder was committed in association with or for the benefit of a gang, it is not necessary to address defendant's companion argument that double jeopardy precludes retrial on the gang enhancement.

II. CALCRIM Jury Instructions

Defendant next contends "the only instructional guidance on the subject of *provocation* appears in CALCRIM No. 570" and the combination of that instruction with CALCRIM No. 522 misled the jury and "effectively removed the issue of [defendant's] *subjective* mental state of sudden quarrel/heat of passion from the calculus for determining whether he premeditated and deliberated these killings."[8] We disagree.

First, the argument overlooks that the jury was also instructed with CALCRIM Nos. 520 and 521; and the four instructions together provide correct statements of the law. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332-1333 (*Hernandez*); see also *People v. Richardson* (2008) 43 Cal.4th 959, 1028 ["a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge"], internal quotation marks omitted.) Moreover, as defendant recognized, his contentions were considered and

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[8] See *People v. Valentine* (1946) 28 Cal.2d 121, 131-135; *People v. Padilla* (2002) 103 Cal.App.4th 675, 678; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.

rejected in *People v. Jones* (2014) 223 Cal.App.4th 995 (*Jones*) and *Hernandez, supra,* 183 Cal.App.4th 1327.

In *Jones,* the Court of Appeal noted, "Appellant argues "these pattern instructions were likely to have misled the jury into concluding that the objective test applies both for reduction of first to second degree murder as well as from murder to manslaughter. The argument fails on several levels. [¶] The first is that the instructions are correct. They accurately inform the jury what is required for first degree murder, and that if the defendant's action was in fact the result of provocation, that level of crime was not committed. CALCRIM Nos. 521 and 522, taken together, informed jurors that 'provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation.' [Citing *Hernandez, supra,* 183 Cal.App.4th at p. 1334.] As the jury also was instructed, a reduction of murder to voluntary manslaughter requires more. It is here, and only here, [i.e., CALCRIM No. 570,] that the jury is instructed that provocation alone is not enough for the reduction; the provocation must be sufficient to cause a person of average disposition in the same situation, knowing the same facts, to have reacted from passion rather than judgment." (*Jones, supra,* 223 Cal.App.4th at p. 1001.)

Hernandez, supra, 183 Cal.App.4th 1327 also began its analysis with CALCRIM No. 521, noting that instruction advised the jury "unless the defendant acted with premeditation and deliberation, he is guilty of second, not first, degree murder, and that a rash, impulsive decision to kill is not deliberate and premeditated. Based on CALCRIM No. 522, the jury was instructed that provocation may reduce the murder to second degree murder. [¶] . . . Considering CALCRIM Nos. 521 and 522

together, the jurors would have understood that provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation." (*Hernandez, supra,* 183 Cal.App.4th at p. 1334.)

Without one citation to the record, defendant further asserts, "there was an abundance of evidence to support a jury finding of sufficient provocation to negate the elements of premeditation and deliberation. Counsel so argued to the jury." A careful review of the record fails to support the contention. The prosecutor dismissed the notion of provocation in closing argument: "Provocation? There was no provocation." Defense counsel, who conceded defendant was the shooter, never used the words "provocation" or "provoked" in her closing argument (see, e.g., CALCRIM No. 522). Instead, she focused on the absence of a conspiracy and the lack of deliberation (CALCRIM No. 521). On the latter point, she argued, "You'll read the defendant acted deliberately if he carefully weighed the considerations for and against his choice, knowing the consequences, and decided to kill. There's nothing about anything you've heard here that anybody carefully weighed any considerations [or] thought about any consequences. This is rash and this is heated and foolish and tragic but not careful, not deliberate, and not calculated."

Because we reject defendant's argument that the CALCRIM instructions were misleading, there is no reason to consider whether trial counsel was ineffective for failing to request a pinpoint instruction. We note only that appellate counsel did not proffer a pinpoint instruction to cure the claimed error.

III. "Multiple Convictions Rule" and Double Jeopardy

Defendant was sentenced to an additional 25 years to life for the personal and intentional discharge of a firearm that proximately caused Dasalla's death, to be served consecutively to the sentence for first degree murder. (§ 12022.53, subds. (a)(1), (d).) Defendant contends the imposition of this enhancement violated California's "multiple conviction rule" and federal double jeopardy constitutional protections because the first degree murder conviction and the enhancement for using a firearm were both based on the victim's death.

The arguments that a sentencing enhancement must be viewed as an element of the substantive offense under the multiple convictions rule and constitutional protections against double jeopardy reprise those the California Supreme Court rejected a decade ago in *People v. Izaguirre* (2007) 42 Cal.4th 126 (*Izaguirre*) and *People v. Sloan* (2007) 42 Cal.4th 110 (*Sloan*). Defendant insists *Izaguirre* and *Sloan* "are flawed and clearly misapply . . . United States Supreme Court precedent," but acknowledges he is raising these contentions in this court only "to preserve his claims for subsequent review." But we are bound by these decisions. (*Auto Equity Sales, Inc. v. Superior* Court (1962) 57 Cal.2d 450.)

Defendant's citation to a more recent Ninth Circuit decision, *Smith v. Hedgpeth* (9th Cir. 2013) 706 F.3d 1099 (*Smith*), does not alter our analysis. Citing *Sloan, supra,* 42 Cal.4th 110, the Ninth Circuit explained the California Supreme Court recognizes that treating a sentencing enhancement as an element of the charged offense would "run afoul of the 'rule against multiple convictions.'" (*Smith, supra,* 706 F.3d at p. 1102.) For that reason, the Ninth Circuit acknowledges

California courts do not consider sentencing enhancements as elements of an offense. (*Smith, supra*, 706 F.3d at p. 1103.)

The Ninth Circuit then examined whether there is "clearly established federal law requiring sentencing enhancements to be considered as elements of an offense for purposes of the Double Jeopardy Clause." (*Smith, supra*, 706 F.3d at p. 1103.) After a discussion of key decisions, including several cited by defendant (e.g., *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101) and *Texas v. Cobb* (2001) 532 U.S. 162, the Ninth Circuit concluded there is no clearly established federal law on the question: "*Apprendi, Cobb,* and *Sattazahn*—whether considered individually or together—did not create 'clearly established Federal law' requiring a state court to consider sentencing enhancements as an element of an offense for purposes of the Double Jeopardy Clause. A state court cannot be expected—much less required—to refer to federal law which is *not* clearly established. Thus, we hold the state court's decision was not 'contrary to, or an unreasonable application of, clearly established Federal law.' The Supreme Court has not squarely addressed this issue and fairminded jurists could disagree as to the constitutional principle." (*Smith, supra,* 706 F.3d at p. 1106.)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.