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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESSE GARCIA, Defendant and Appellant.	B268497 (Los Angeles County Super. Ct. No. VA130691)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed in part, reversed in part, and remanded.

Dwyer + Kim and John P. Dwyer, 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, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jesse Garcia of first–degree murder (Pen. Code § 187, subd. (a); count 1),[1] with a true finding on the allegation that he intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (c) & (d)), and of assault by means likely to cause great bodily injury (§ 245, subd. (a); count 4).[2] In a bifurcated proceeding, the court found the gang enhancement (§ 186.22, subds. (b)(1)(C), (b)(4)) true as to the murder count, but not as to the assault count. The court sentenced defendant to an aggregate prison sentence of 50 years to life.

On appeal from the judgment of conviction, defendant contends that his trial counsel provided ineffective representation by failing to object when, during closing argument, the prosecutor misstated the law governing voluntary manslaughter based on provocation. We conclude that it is not reasonably likely defendant would have received a more favorable outcome absent counsel's failure to object. Defendant, who was fifteen-years-old when he committed his crimes, also contends that the case must be remanded so that he can make a record of information relevant to his eventual youthful offender parole hearing. Consistent with *People v. Franklin* (2016) 63 Cal.4th 261, 284 (*Franklin*), we remand this matter to the trial court for the purpose of determining

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[1] Statutory references are to the Penal Code.

[2] The jury acquitted him of attempted murder (§§ 664/187, subd. (a); count 2), and assault with a firearm (§ 245, subd. (a)(2)).

whether defendant was afforded sufficient opportunity to make a record of youth–related characteristics and circumstances at the time his offenses were committed so there is a sufficient record of relevant information at his future youth-offender parole hearing.

Finally, the parties and we agree that we must vacate the unauthorized sentence on count 4 imposed for the gang allegation found not true, and that we must modify the court's calculation of custody credits. We order the court to prepare a corrected abstract of judgment vacating the unauthorized sentence and reflecting the proper amount of custody credit (1,202 days). In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

The Prosecution Evidence

1. *Robert Ramirez Assault*

On the afternoon of July 12, 2012, Robert Ramirez[3] was walking home from summer school. He saw some members of the Carmelas Varrios Locos (Carmelas) street gang hanging out in the park by his house. Robert recognized some of the gang members, including then 15–year–old defendant.

Accompanied by another member of Carmelas, defendant ran toward Robert, referred to an older member of Carmelas from whom

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[3] Three members of the Ramirez family were involved here. For clarity, we will refer to each by his or her first name.

defendant claimed Robert had stolen, and angrily suggested they head into the park to "handle some shit." Robert knew "something bad [would] happen" if he went in the park, and kept heading home and through a gate into his own front yard.

Defendant followed Robert into the yard and punched him twice "pretty hard" on the back of his head. Several other men assisted, while yelling "Carmelas." They punched Robert, knocked him to the ground, and kicked him in the head, ribs, face and jaw. As a result of this assault, Robert suffered bruising to his arms, ribs, knees and abdomen, and his tongue was split and required stitches.

2. *Aldair Ramirez Murder*

Before he left for the hospital to get stitches in his tongue, Robert told his 19–year–old brother Aldair Ramirez about the attack. Aldair called his friend, Geovonnie Hawkins, over to his house, and Robert's and Aldair's sister, Adaly Ramirez, arrived soon thereafter with her friend, Leandria Cordero. Robert's siblings were angry about the assault.

Adaly went to the park and demanded that the Carmelas tell her who attacked Robert. She confronted and punched defendant, and was pulled away from him by Cordero and a gang member. Adaly returned home angrier than when she left, and told Aldair she and defendant had gotten into a "little fight." Aldair became upset and left to confront defendant himself. He took a pocketknife with him for protection

because he was afraid that some older Carmelas might try to "jump him."

Aldair, Hawkins, Adaly and Cordero went to the park where they found about 12 gang members, including defendant, at the handball courts. Although the two were then friends, Aldair angrily pushed defendant and challenged him and others to fight. Other gang members surrounded Aldair, "trapp[ing]" him in a corner. He pulled out the pocketknife and pointed it at anyone who came close. A group of older Carmelas approached, and the gang members who had surrounded Aldair stepped away. The older Carmelas were angry and aggressive and said Aldair had disrespected the gang by pointing the knife. Aldair told them he was not looking for problems, and only wanted to confront defendant after he attacked his brother.

Aldair and his companions were told to leave. They ran and were chased by several gang members, including defendant. Cordero overheard one gang member tell another to "get the toys," which she understood (and the prosecution gang expert confirmed) was an order to retrieve guns. After a while, the gang members stopped chasing Aldair. Aldair and Hawkins stopped running as they neared the Ramirez home, but Aldair remained angry, and Hawkins talked to him, trying to calm him down. As they stood talking, Aldair and Hawkins saw defendant walking toward them from across the street.

Aldair put the pocketknife away and walked toward defendant, who had reached the middle of the street. Aldair loudly announced he had been looking for defendant and wanted to fight him "one on one."

As Aldair stepped into the street, defendant pulled out a gun and fired several shots, striking Aldair. Defendant then walked over, stood directly above Aldair and shot him several times as he lay on the ground. Defendant then turned and tried to fire the now–empty revolver at Hawkins. Defendant ran off. As he ran, the gun fell out of his pocket. Aldair was shot five times, and died as a result of multiple gunshot wounds.

3. *Gang Evidence*

Detective Ivania Farias, the prosecution gang expert, testified as to the background of the Carmelas criminal street gang. It was undisputed that defendant is a member of the Carmelas. The detective explained that gang protocol requires that, once disrespected, a younger gang member must commit an act of violence in order to show he is not weak. Based on a hypothetical question tailored to these facts, the detective opined that defendant committed the assault and the shooting on behalf of the Carmelas gang.

Defense Evidence

Defendant testified that he had confronted Robert, after hearing that Robert said negative things about him, and challenged him to a fight. Defendant threw the first punch. Defendant is a member of the Carmelas, but did not yell "Carmelas" during the fight. Defendant's friends did join the fight, but he had not asked them to do so.

Afterward, Adaly came to the park demanding to know who attacked Robert. She began hitting defendant and had to be pulled away. Aldair showed up about 10 minutes after Adaly left. He was mad, and also demanded to know who had attacked his brother. He challenged defendant to a fight. When other men came over, Aldair pulled out a pocketknife. Aldair was told to leave and began running, chased by about 10 people, including defendant.

Defendant, who remained angry about the confrontation in the park even after running for a few minutes, headed home to "cool down," and took a short cut through a parking lot across from his house. He was carrying a gun he had bought earlier that day. As defendant emerged from the parking lot he saw Aldair, who started to walk fast and aggressively toward him from across the street. Defendant was afraid of Aldair, who was "a big guy." He saw Aldair reach into his pocket, and thought he was pulling out a knife. Defendant saw "red" (i.e., the anger he had experienced during the confrontation at the park "boil[ed] up again"), pulled the gun from his pocket and fired. He did not remember shooting Aldair, or how many times he shot him. Defendant did not remember shooting Aldair while he lay on the ground. Defendant had not wanted to kill Aldair, nor had he pointed the gun at anyone else. He ran away and, at some point while he was running, he lost the gun after jumping a fence.

4. *Bifurcated Trial on the Gang Allegations*

The prosecution introduced evidence of two predicate crimes committed by gang members and, using a hypothetical, elicited evidence that the murder and assault were committed for the benefit of, in association with, and at the direction of a criminal street gang. Based on that evidence, and evidence from the jury trial, the court found the gang allegation true as to the murder count, and not true as to the assault count.

DISCUSSION

1. *Prosecutorial Misconduct/Ineffective Assistance of Counsel*

Defendant contends the prosecutor committed misconduct by misstating the law governing voluntary manslaughter based on provocation in his closing and rebuttal arguments. Defendant contends that his attorney's failure to object constituted ineffective assistance of counsel.

To establish a claim of ineffective assistance of counsel, defendant must first demonstrate that his trial counsel's performance was deficient "because it 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) In evaluating counsel's actions, unless defendant makes a contrary showing, we "shall presume that 'counsel's performance fell within the wide range of professional competence . . . .' [Citation.]" (*Id.* at p. 746.) Second, a defendant who can satisfy this initial burden must also demonstrate that he suffered

prejudice as a result, i.e., that but for his attorney's unprofessional errors, he would have obtained a more favorable result. (*Ibid*; *People v. Neely* (2009) 176 Cal.App.4th 787, 796 (*Neely*); *Strickland v. Washington* (1984) 466 U.S. 668, 691–694 (*Strickland*).)

In conducting our review, we need not "determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland, supra,* 466 U.S. at p. 697.) On this record, we conclude that, assuming defendant's trial counsel lacked a valid tactical reason for failing to object to the prosecutor's misstatement of law, defendant has not demonstrated that he was prejudiced as a result, i.e., that it is reasonably likely he would have received a more favorable verdict absent the error.

Before closing argument, the court read its instructions to the jury, explaining that the "purpose of [the] instructions [was] to provide [jurors] with the applicable law." The jury received CALJIC No. 8.42, which states in clear, unambiguous language, conditions under which provocation may reduce the degree of murder or reduce murder to manslaughter: "The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances." The court explicitly instructed the jury that the burden rested squarely with the prosecution to prove beyond a reasonable doubt "each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden

quarrel." (CALJIC No. 8.50.) The jury was informed that it had a duty to "accept and follow the law" only as stated by the court. The court explained that, to the extent "anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflict[ed] with [the court's] instructions on the law, [the jury] must follow [the court's] instructions." A copy of the written instructions was provided to the jury to consult while deliberating.

In closing argument, the prosecutor made the following comments concerning voluntary manslaughter on a provocation theory:

> "This is the provocation that we're talking about, the pulling of the knife at the park. That's what sets him off where he's no longer acting with judgment. He's telling you he's acting rashly without deliberation and reflection. And is that the case here?
>
> "Let's look at this provocation. This provocation he says happens here in the park. But what is this provocation? This provocation is what? [Aldair] coming in and saying, let's get down one on one. And the provocation then is, well, the group surrounds [Aldair], including [defendant]. And then what happens? Aldair is forced to pull out this knife to hold them at bay. A defensive act, not an aggressive act. And certainly [defendant] said that was not an aggressive act. So the pulling of a knife in a defensive situation is what provokes you so much that you're seeing red and you have to go and execute this guy? That is your provocation. And does that make any sense?
>
> "The assailant must act under the influence of that sudden quarrel or passion. . . . [T]he passion must be that which naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. So what are we looking at here is the ordinarily reasonable person. *Is a reasonable person going to act in such a way where a knife that is*

pulled in a defensive situation is going to cause a reasonable person to all of a sudden say I've got to go kill that person? Right?

"[A] defendant cannot set up his own standard of conduct. Meaning we're not looking at the reasonable gangster conduct. That's not the prism we're looking through this. We're looking at the reasonable person conduct. We're not looking at it through the eyes of someone who gets easily angry, because that's what he testified to yesterday. Do you get angry often? Yes. That's not the prism, because that's looking at it at someone who just gets angry all the time.

"If you're just an angry person, does that excuse you to go out and murder whoever the heck you want? No. The reasonable person conduct. And I would submit to you, ladies and gentlemen, that that is not the case here. *Because that type of provocation isn't going to set off a reasonable person to go out and see red and all of a sudden just murder someone."* (Italics added.)

During rebuttal the prosecutor reiterated this theme, stating:

"*[A] reasonable person, ladies and gentlemen, is not going to go and attack and kill someone based on someone taking a knife out in a defensive position, especially when you're surrounded by 15 other guys who are supporting you*. If you're going to attack, you're going to attack there at the park. It's not going to happen. . . . That's when your heat of passion is. But as [defendant] testified, he made many decisions thereafter that were of judgment. He made decision to chase, to turn right, to turn left, to pick up a gun, to go through [a particular street], to go through this parking lot and then to go down [a different street].

"So the heat of passion, ladies and gentlemen, just falls flat, because these decisions were made based on judgment not on rashness." (Italics added.)

Appellant asserts that the prosecutor misstated the law by arguing that, in order for heat of passion to apply, the jury had to find the provocation sufficient to cause a reasonable person to commit homicide, and that the prosecution significantly lessened its burden of proof by telling jurors that to act rashly meant to commit homicide. (Cf., *People v. Rio*s (2000) 23 Cal.4th 450, 469 [in some murder cases, prosecution must prove the absence of provocation].) Our Supreme Court explained the legal standard of provocation in *People v. Beltran* (2013) 56 Cal.4th 935 (*Beltran*). In *Beltran*, the Court observed that "a standard requiring such provocation that the ordinary person of average disposition would be moved to *kill* focuses on the wrong thing. The proper focus is on defendant's state of mind, not on his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection. . . . [T]he anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene. . . . [P]rovocation is not evaluated by whether the average person would *act* in a certain way: to kill. Instead, the question is whether the average person would *react* in a certain way: with his reason and judgment obscured." (*Id.* at p. 949.) Here, defendant maintains that, because the prosecutor argued the provocation had to be so extreme as to drive a person of average disposition to kill, it effectively told the jury that it was legally permissible to reach a verdict of voluntary manslaughter only in a very rare case. We conclude that defendant has failed to establish ineffective

assistance, because it is not reasonably probable that, had his counsel objected, a different result would have been reached.

As noted above, the court properly instructed on the law of provocation and the prosecution's burden of proof, and explicitly admonished the jury to abide solely by its instructions and that, in the event it believed there was a conflict between those instructions and an attorney's description of the law, the instructions must obtain.[4] We presume the jury understood and followed the court's instructions, not the attorneys' arguments, in convicting defendant. (*People v. Brady* (2010) 50 Cal.4th 547, 566, fn. 9.) Further, the jury's verdict of first degree murder finds ample evidentiary support, while evidence of voluntary manslaughter is weak. (*People v. Najera* (2006) 138 Cal.App.4th 212, 225–226 [counsel's failure to object to prosecutor's misstatement of law was harmless error where facts did not support a manslaughter defense].) By returning a murder conviction, the jury necessarily rejected defendant's theory of provocation, and found he committed a premeditated, deliberate killing. Such a "state of mind . . . is manifestly inconsistent with having acted under the heat of passion—even if that state of mind was achieved after a considerable period of provocatory conduct—and clearly demonstrates that defendant was not prejudiced" by any prosecutorial misstatement. (*People v. Wharton* (1991) 53 Cal.3d 522, 572 (*Wharton*).)

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[4] During closing argument defendant's attorney also reminded jurors of their duty to follow *the court's* recitation on the law.

Strong evidence supports the first degree murder conviction. The confrontations between the Ramirezes in the park made defendant–who carried a gun at the time–so mad he saw "red." He chose to chase Aldair. However, still angry after chasing Aldair for several blocks, defendant chose to head home so he could "cool down." Several minutes after the confrontation, defendant saw Aldair again across the street, walking toward him with a hand in his pocket. Defendant pulled out a loaded revolver and fired several shots at Aldair. After his first shots felled Aldair, defendant walked over to stand above Aldair and shot him several more times. Detective Farias opined that defendant had a motive to kill Aldair because Aldair had disrespected him at the park, and defendant had to regain status with the Carmelas. Given the significant amount of evidence supporting the jury's verdict of first degree murder, viewed against weak evidence of provocation, defendant failed to show a reasonable probability that he would have been convicted of anything less than first degree murder. (See *Wharton, supra,* 53 Cal.3d at p. 572.)

2. *Abstract of Judgment Requires Correction to Strike Gang Allegation and Modify Custody Credits*

A. *Unauthorized Sentence*

The court found the gang allegation not true as to the assault conviction (count 4). However, it imposed a three-year concurrent sentence for the gang allegation, with a three-year concurrent sentence for the underlying assault. The three-year concurrent sentence imposed

here for the gang allegation is unauthorized and requires vacation. (See *People v. Zackery* (2007) 147 Cal.App.4th 380, 386.) "It is elementary that a defendant should not be punished for a crime of which he was not convicted." (*People v. Torres* (2011) 198 Cal.App.4th 1131, 1148.)

B. *Miscalculation of Presentence Credits*

Garcia was awarded 1,182 days of custody credit at sentencing. Respondent properly concedes that defendant should have been awarded credits of 1,202 days.[5]

3. *Limited Remand is Required to Determine Whether Defendant was Afforded an Adequate Opportunity to Establish a Record of Factors Relevant to Youth Offender Parole Hearing and, If Not, to Conduct Such a Hearing*

While this appeal was pending, we granted defendant's request to submit a supplemental brief regarding the impact of *Franklin, supra,* 63 Cal.4th 261 on this case, and have considered that unopposed supplemental brief. (Cal. Rules of Court, rule 8.50.)

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[5] This Court may order both the unauthorized sentence stricken and the abstract corrected to reflect the appropriate custody credits, notwithstanding defense counsel's failure to object to either error below. (See *People v. Smith* (2001) 24 Cal.4th 849, 854 [unauthorized sentence may be corrected at any time regardless of whether there was an objection]; *People v. Taylor* (2004) 119 Cal.App.4th 628, 647 [same as to correction of credits]; see also *People v. Acosta* (1996) 48 Cal.App.4th 411, 427 [§ 1237.1 motion not required if correction of custody credits is not the sole issue on appeal.)

In July 2015, defendant was a just shy of his 16th birthday when he was convicted of first-degree murder with a true finding on the allegation that he intentionally discharged a firearm causing death, resulting in a mandatory prison sentence of 50 years to life in prison. Defendant argues that, under *Franklin*, which was decided after he was sentenced, he should be afforded a limited remand so the trial court can determine whether he was afforded an adequate opportunity to make a record of information relevant to his eventual youth offender parole hearing. We agree.

In *Franklin, supra*, 63 Cal.4th 261, the defendant received a mandatory sentence of 50 years to life for offenses committed at age 16. (*Id.* at p. 268.) The Supreme Court rejected the argument that the sentence constituted cruel and unusual punishment; that argument was made moot by new provisions in sections 3051 and 4801, effective in 2014, that provided for the possibility of parole after 25 years. (*Id.* at pp. 276–277; §§ 3051, subd. (b)(3); 4801, subd. (c).)

Although no resentencing was required, *Franklin* concluded that a remand was in order to determine whether the defendant received sufficient opportunity "to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing," i.e., hallmark "youth-related factors, such as [the defendant's] cognitive ability, character, and social and family background at the time of the offense," considered in light of "any subsequent growth and increased maturity." (*Franklin, supra*, 63 Cal.4th at pp. 269, 277, 284; accord, §§ 3051, subd. (f)(1), (f)(2), 4801, subd. (c).) If, on remand, the

trial court determines the defendant was denied a sufficient opportunity, he "may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates [his] culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Id.* at p. 284; see *People v. Jones* (2017) 7 Cal.App.5th 787, 819–820 (*Jones*).) "The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Franklin, supra*, 63 Cal.4th at p. 284.)

Here, at the sentencing hearing, defendant's counsel did not submit a sentencing memorandum addressing factors that *Franklin* later identified as pivotal in such a hearing. Trial counsel did note that defendant was just 15 when he committed the crimes, but also acknowledged that the trial court was "obligated" to sentence defendant "without regard to [his] age and level of maturity and ability to make the decisions that are required to commit the crimes," even though the mandatory sentence was effectively "a sentence of life without possibility of parole." Defendant's counsel understood that defendant's age and level of maturity would have been relevant, had the court had

any discretion as to the sentence. However, because the sentencing hearing predated *Franklin*, it is unlikely that counsel fully appreciated the need to make an adequate record for the youth parole hearing defendant would receive after 25 years in prison. Defendant's counsel did not present any information regarding environmental, social or psychological factors that were or may have been impacting defendant before or at the time of the offenses.

A very similar issue arose in *Jones, supra*, 7 Cal.App.5th 787, in which the court explained:

> "Prior to *Franklin,* . . . there was no clear indication that a juvenile's sentencing hearing would be the primary mechanism for creating the record of information required for a youth offender parole hearing 25 years in the future. *Franklin* made clear that the sentencing hearing has newfound import in providing the juvenile with an opportunity to place on the record the kinds of information that 'will be relevant to the [parole board] as it fulfills its statutory obligations under sections 3051 and 4801.'" (*Jones, supra*, 7 Cal.App.5th at p. 819, citing *Franklin, supra*, 63 Cal.4th at p. 287.)

As in *Jones*, this record yields no indication that defendant's counsel understood the importance of, or contemplated "the need and the opportunity to develop the type of record contemplated by *Franklin*." (*Jones, supra*, 7 Cal.App.5th at p. 820.) Accordingly, we remand the matter to the trial court to conduct a hearing to determine whether defendant had a sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing and, if not, to conduct a hearing at which the parties may address and submit evidence bearing on relevant youth–related factors for

defendant's eventual parole hearing. (*Franklin, supra,* 63 Cal.4th at pp. 284, 286–287.)

DISPOSITION

The matter is remanded to the superior court with instructions to prepare an amended abstract of judgment (1) vacating the concurrent three–year sentence for the gang allegation as to count 4, and (2) awarding conduct credit of 1,202 days. The clerk shall send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. We further remand the matter for the court to determine whether defendant had a sufficient opportunity to make an accurate record of youth–related characteristics and circumstances at the time his offenses were committed and, if not, to conduct a hearing to make a record of youth–related factors relevant to his eventual parole hearing. (*Franklin, supra*, 63 Cal.4th at p. 284.) We otherwise affirm.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. MANELLA, J.