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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL GUERRERO, Defendant and Appellant.	B229330 (Los Angeles County Super. Ct. No. BA332015)

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

Sharon M. Jones, 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, Assistant Attorney General, Herbert S. Tetef and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following a jury trial, defendant and appellant Gabriel Guerrero (defendant) was convicted of conspiracy to commit murder and murder. On appeal, he contends that the trial court abused its discretion when it allowed the gang expert to answer an improper hypothetical question and that, in any event, there was insufficient evidence to support the true finding on the gang allegation. Defendant also contends that the trial court erred when it refused to instruct the jury on heat of passion and the lesser included offense of voluntary manslaughter. In addition, defendant contends that his sentence under Penal Code section 12022.53, subdivisions (d) and (e)(1)[1] violated equal protection and that the trial court abused its discretion when it denied his postverdict *Marsden*[2] motion.

We hold that the challenged hypothetical question to the gang expert was proper and that there was substantial evidence to support the true finding on the gang allegation. We further hold that the trial court properly determined that the evidence did not support a jury instruction on voluntary manslaughter based on heat of passion. And, we hold that defendant's sentence under section 12022.53, subdivisions (d) and (e)(1) did not violate equal protection and that the trial court did not abuse its discretion in denying the *Marsden* motion. We therefore affirm the judgment of conviction.

FACTUAL BACKGROUND

A. April 26 Assault on David Guerrero

In April 2005, David Guerrero lived in Rosemead with his family, including his older brothers, defendant and Daniel. During the afternoon of April 26, 2005, David had two physical altercations with an African American male and a Hispanic male who said

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

they were members of the TDS tagging crew. At around 9:00 or 10:00 p.m. that evening, David was waiting by himself at a bus stop when he was "jumped" by approximately six males, including the victim, Ryan Dasalla.[3] He heard Dasalla telling the group of assailants, "Hit him with the club, hit him with the club." David was "hit in the head a lot" with a golf club. He was taken by ambulance to the hospital where he received "a lot of stitches" in his head and was treated for a dislocated shoulder. David denied telling his brothers the identity of his assailants, but later acknowledged that his brothers knew he had been assaulted.

Jonathan Jimenez knew codefendant Sarah Toledo because they were classmates at San Gabrielino High School. They were not friends, but Toledo was friends with Jimenez's girlfriend. Late in the evening on April 26, 2005, Toledo called Jimenez on his cell phone, which he found "kind of odd . . . ." She asked Jimenez whether he knew anyone from the TDS tagging crew other than "Milky"[4] and George. Jimenez told Toledo he did not know any other members of TDS. Based on the nature of the telephone call, Jimenez understood that someone was going to be "beat up or something [was] going to happen . . . ." But he did not recall Toledo telling him that the people who assaulted David earlier that day were going to die.[5]

Several months after the shooting, Los Angeles County Sheriff's Detective David Carver interviewed codefendant Toledo at her parents' house. But when he and his partner, Detective Okada, tried to interview Toledo, her stepfather became "intimidating, boisterous, telling [them they] shouldn't be there, that [they] couldn't talk to [Toledo], that she didn't need to talk to [them] . . . ." Toledo nevertheless told the detectives that

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3 David admitted that other than his parents, he had never told anyone that Dasalla was one of his assailants. Dasalla's mother testified that on the evening David was assaulted, Dasalla was either at home or across the street at a friend's house.

4 Dasalla's nickname was Milky.

5 Jimenez told detectives in May and September 2005 that Toledo informed him during the phone call that the people who assaulted David were going to die for it.

she knew that David had been "beat up on April 26, 2005," that his cell phone had been stolen during the beating, and that she, his brother Daniel, and his sister Monica began calling David's cell phone. At some point, someone answered David's cell phone and used profanity, which upset them. She thereafter called Jimenez to ask about members of TDS. She told Jimenez she knew about Dasalla and George, but wanted more information about TDS. After Jimenez told her he did not have any further information, Toledo told him that somebody from TDS was going to get their ass kicked or beat up . . . ."

Based on the behavior of Toledo's stepfather, the detectives relocated the interview to the Sheriff's station. During that interview, which was videotaped, Toledo provided the detectives with the following information. She knew Dasalla from high school and knew his nickname was Milky. She was "cool with him" and they were "okay together."

Her brother, Jason Toledo, was in a "common-law marriage" with defendant's sister Monica and they had two children. Toledo considered herself a sister-in-law to defendant, Daniel, and David.

Toledo did not see David on April 26, 2005, the day he was assaulted, but she knew he had been "beat up pretty badly." Toledo had been informed that, on the day of the assault, while David was picking up his girlfriend from school, he fought with a "black guy" from TDS named Duck. Afterward, David called Daniel who picked him up and dropped him at a friend's house. When David left the friend's house to take the bus home, "[a] carload of people . . . [with whom he had been in] the argument earlier, beat him up." He went to the hospital and received stitches.

Toledo, Daniel, and Monica knew David's cell phone had been taken, so they began to call that number on the evening of April 26. Eventually, Daniel and Monica contacted someone at that number who began "talking shit to them." The person who answered David's cell phone said something like, "so what[,] fuckin' who cares" and called David "a son of a bitch and stuff . . . ." That "just triggered Daniel even more." According to Toledo, Daniel "had a temper" and he was "dumb."

Later that night, Toledo called Jimenez and inquired about TDS. She told Jimenez she already knew about Milky and George, but wanted information about other members of TDS. But Jimenez did not give Toledo any further information. Toledo then told Jimenez that "somebody might get their ass kicked over this," but did not remember telling him "someone's gonna die tomorrow."

B. April 27 Shooting of Dasalla

The next day, April 27, 2005, at about 2:00 p.m., Joshua Navarro was walking with Dasalla near San Gabrielino High School toward the corner of Gladys Avenue and Scott Street. That location near the high school was where students would "meet up to get rides [home] and hang out with their friends." When they reached the corner, Navarro saw a maroon SUV approach Dasalla who was standing about five feet away from Navarro. The vehicle stopped and the driver asked Dasalla, "Do you write"? A group of three or four Hispanic males then exited the vehicle and began to fight with Dasalla. The group surrounded Dasalla and hit him with their fists. Navarro observed that one of the males who exited the vehicle had what appeared to be a paintball gun.[6] Navarro remembered someone saying "you shot me," but he did not know who said it. Navarro began to run back toward the high school. As he was running, Navarro heard gunshots. He turned around and saw Dasalla running, but then fall onto the sidewalk. Navarro encountered one of his friends and they returned to Dasalla's location where he saw someone tending to Dasalla. He also saw an ambulance and the police arrive. Dasalla died at the scene.

On April 27, 2005, Marcelino Garza was at his father-in-law's house which was located about a block and a half from San Gabrielino High School. He was out on the front lawn of the house at about 3:00 p.m. He noticed a "commotion" to his left down the

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[6] Navarro recalled telling detectives who interviewed him after the shooting that the male had a black rifle and he struck Dasalla with the butt of it, causing the magazine to fall to the street.

street on Gladys Avenue, about one hundred yards from his location.[7] He heard yelling, looked in that direction, saw "three guys" standing on the corner, and then saw a light-colored, "brownish" minivan "pull up." Two persons exited the minivan and attacked one of the persons standing on the sidewalk. Then someone exited the driver's side of the minivan and started shooting. He believed the man had a rifle because of the way he was pointing it. Garza heard the shooter yell, "I got him," and saw him run back to the minivan. The two other persons who had exited the minivan also ran back to it, and then the minivan drove off.

Flora Andrade moved to California from Las Vegas with her boyfriend around April 24, 2005. Her boyfriend's sister, Regina Zarate, was dating defendant. Andrade and her boyfriend made plans to stay with Zarate at Zarate's mother's apartment. While Andrade was spending time around her boyfriend and defendant at the apartment, she heard them talk about gangs.

On April 27, 2005, Andrade made plans with defendant and Zarate to cash Andrade's check. She and her boyfriend walked to a nearby auto repair shop and picked up Zarate's mother's burgundy van. When Andrade returned to the apartment, she saw defendant talking on a cell phone. During the call, defendant appeared angry.

After the cell phone call, Andrade entered the van with defendant and Zarate. Defendant drove the van, Zarate sat in the front passenger seat, and Andrade sat behind defendant in the back seat. Andrade was under the impression that they were driving to a location where she could cash her check, but they "ended up pulling up to a residence." Defendant entered the residence and returned to the van carrying some clothes. They then drove to another location less than five minutes away. During the drive, Andrade observed defendant speaking to someone on his cell phone. They arrived at a residence and two men who Andrade did not know entered the van. One of the men was carrying a black rifle. The man with the rifle sat next to the passenger side sliding door, and the

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[7] After further examination and a clarification by the trial court, Garza estimated that he was "two times the length of the courtroom" from the commotion, or approximately 72 feet away from it.

other man sat next to Andrade. Andrade heard the man with the rifle conversing with defendant "about getting back at some gang, [or] some kids."

Defendant then received a call on his cell phone, and passed the phone to the man with the rifle who said the name "Sarah." The man with the rifle told defendant and the man next to Andrade that it "was some gang and that it was some high school and they had—he had red hair and freckles."

At some point, the group in the van arrived at a high school. Because classes were still in session, the group drove a block away and parked. When they observed students begin to leave the school, they drove back to the high school. The men were looking for a person who fit the "red hair and freckles" description that the man with the rifle had relayed to defendant. The group "ended up leaving the high school" and proceeded a short distance "up the street" from the school.

The van stopped near two males between the age of 16 and 18 who were standing outside the van. One of those males fit the "red hair and freckles" description, and Andrade identified that male as Dasalla from a photograph. Defendant asked the two males "if they were with some gang." Dasalla replied with the name of a "gang or clique." The three men in the van exited the van and approached the two males on the street. The men started "punching each other." Andrade saw defendant holding Dasalla in a "bear hug." Andrade next observed the man with the gun fire a shot and heard defendant say, "You shot me." Andrade saw that defendant was no longer holding Dasalla, and heard defendant say, "It's okay." . . . "Don't worry about me," . . ."get him." Four or five seconds later, Andrade heard more gunshots. Defendant and the other two men returned to the van and the group left the scene.

As they drove away, Andrade heard an incoming call that defendant answered. Defendant again passed the cell phone to the man with the rifle, and that man again mentioned the name "Sarah." The man with the rifle told the caller that "They had got him. Don't worry about it."

Defendant dropped off the other two men who left the rifle in the van. Defendant, Zarate, and Andrade then returned to Zarate's mother's apartment and dropped off Andrade. Andrade returned to Nevada within a week or two after the shooting.

In April 2005, Regina Zarate had been dating defendant for about two months. Two days before the April 27 shooting, her brother, Gilbert Cabrera, and his girlfriend, Andrade, came to stay with Zarate and her family. Defendant lived at his mother's house in Rosemead, but he sometimes stayed at Zarate's apartment. Zarate knew that defendant was a member of the VNE[8] gang because he had a gang tattoo. She knew defendant's brothers, Daniel and David, but did not know if they belonged to either a gang or tagging crew.

On the morning of April 27, 2005, Zarate made plans with defendant to take Andrade to "a check-cas[h]ing place." They decided to borrow Zarate's mother's "reddish-maroonish" minivan to run the check-cashing errand. Prior to leaving on the errand, Zarate saw defendant become upset while he was looking at his cell phone. She knew defendant had been talking on the phone with someone, but she did not know with whom.[9] At some point after the phone call, Zarate left the apartment with defendant and Andrade and entered her mother's van believing the group was going to cash a check. Defendant drove, Zarate occupied the front passenger seat, and Andrade sat behind defendant. Zarate recalled telling detectives who interviewed her that while they were driving in the van, defendant called Jason Toledo's apartment and spoke to Daniel. Defendant, Zarate, and Andrade then drove to Jason Toledo's apartment. They parked in front of the apartment and defendant honked the horn. Daniel came out of the apartment, followed by a Hispanic male whom Zarate did not recognize. Zarate did not see anything in Daniel's hand at the time. Both men entered the backseat of the van, with Daniel sitting closest to the passenger side sliding door. Zarate assumed the Hispanic male who

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8 The gang expert testified that VNE stood for Varrio Nuevo Estrada and that defendant was an active member of that gang at the time of the shooting.

9 Zarate acknowledged that she told detectives after the shooting that defendant had received a call from his brother Daniel that morning.

entered the van with Daniel was Daniel's friend. She was surprised that they had picked up Daniel and his friend because she did not know the two men were coming with them to cash the check.

Zarate recalled that she told detectives who interviewed her after the shooting that while the group was driving, Daniel and defendant discussed finding the males that assaulted their brother, David. Zarate also recalled telling detectives that defendant and Daniel discussed the involvement of TDS in the assault on David. And Zarate recalled telling detectives that defendant and Daniel wanted to retaliate for the assault on David.

Defendant drove the van to a high school. During the drive to the high school, Zarate saw defendant talking on his cell phone. After defendant finished the phone call, either defendant or Daniel described one of the males for whom they were searching as "a medium-built guy with freckles and braces." Zarate recalled telling detectives that defendant and Daniel were looking for someone with light hair.

Once the group arrived at the high school, they drove around the school parking lot. It appeared to Zarate that school was "just letting out" because "all the students were walking out." The group then left the parking lot and drove to a location "down the street" from the high school. As they drove past two Hispanic males, the van slowed down and stopped. Defendant asked them, "Where you from?" One of the males responded that he was "from nowhere." But the other male said he was from TDS. Defendant put the van in park, and he, Daniel, and Daniel's friend exited the van and approached the two Hispanic males.[10] Zarate saw defendant wrestling with the Hispanic male who said he was from TDS and, shortly after that, she saw Daniel with a gun. The other Hispanic male ran from the scene. Zarate then heard a gunshot and saw defendant holding his side.[11] The shot came from the gun Daniel was holding. When Zarate heard the gunshot, she started screaming, "telling [defendant] to come back to the van." Zarate

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[10] Zarate could not recall telling detectives that she saw defendant approach the male who said TDS.

[11] Just before the gunshot, Zarate saw Daniel "messing around with the gun." He was "holding [the gun], trying to do something to it."

saw defendant's pants drop and saw him "[pick] them up, . . . [while] he was still holding on to his side." She saw the Hispanic male with whom defendant had been struggling run toward the back of the van. Zarate then heard more than two additional gunshots.

After defendant pulled up his pants, he came back to the van and entered the driver's seat. Then Daniel, who was carrying a gun, and his friend came back to the van. Zarate recalled telling detectives who interviewed her in October 2005 that Daniel apologized to defendant for shooting him. She also saw defendant making a call on his cell phone.

The group drove to defendant's mother's house where Daniel and his friend exited the van. Defendant, Zarate, and Andrade then returned to Zarate's mother's apartment. The three exited the van, and Zarate and Andrade went upstairs to tell Zarate's mother that defendant had been shot. Defendant waited at the bottom of the stairs. Zarate and Andrade came back downstairs and drove defendant to the hospital. When they arrived at the hospital, defendant told Zarate to tell the police that "he got shot by somebody in a black car while getting food from a Wiener-Schnitzel across the street from Zarate's mother's apartment in Pomona." Zarate thereafter lied to the police at the hospital as defendant had asked. She was "scared about what had happened" and "did not want to get in trouble for something she didn't do, [or] wasn't involved with" so she "just went with what [defendant] told her to say."

Later that night, police came to Zarate's mother's apartment, searched it, and showed her a gun and clothes they had found. The gun was stuffed in a pair of jeans and placed in a recycling bin on the balcony. It was the same gun she had seen Daniel holding.

On October 18, 2005, Zarate was interviewed by Los Angeles County Sheriff's Detective David Carver. She told the detective that defendant was angry about his younger brother David being "beaten up" the night before the shooting. She also told him that before the shooting, defendant and Daniel were talking about looking for "a guy that had beat up David." They did not name any specific person, but mentioned TDS. In addition, Zarate told the detective that after defendant was shot, his pants fell down, he

was holding his side, and he said to Daniel, "you stupid, you shot me." And Zarate told the detective that after defendant pulled up his pants and the victim had run off, defendant said, "Get that fool."

Zarate admitted that she was "doing crystal meth" on the morning of the shooting. But she maintained that she was not "high" at the time of the shooting.

On April 27, 2005, codefendant Toledo did not go to school. At 1:27 p.m., she received a call from Daniel who told her he was going to San Gabrielino High School, but did not tell her why. Nonetheless, Toledo "figured . . . he was gonna kick somebody's ass." About a half hour later, Toledo called defendant's cell phone, but he did not want to talk to her. Ten to 15 minutes later, Toledo received a call from Daniel informing her that he had shot somebody. She told her brother Jason, and then turned on a television news broadcast which was reporting on the shooting of Dasalla.

Toledo knew that David belonged to the KOL tagging crew. She also knew defendant and Daniel were members of the VNE street gang because they had VNE tattoos "all [over] their bod[ies]."

C. Investigation

On April 27, 2005, Detective Carver was assigned to investigate the murder of Dasalla. He arrived at the scene, which was 75 to 100 yards from San Gabrielino High School, at approximately 3:00 p.m. Upon learning that one of the suspects had been shot, Detective Carver put out a medical alert to local hospitals advising that the Sheriff's Department was looking for someone fitting the suspect's description who was seeking medical treatment for a gunshot wound.

At the crime scene, investigating deputies recovered three expended .22 caliber shell casings around Dasalla's body. They also recovered a live .22 caliber round near the body. In addition, they located a bullet strike mark on a house west of where Dasalla was shot that appeared to contain a bullet.

During his visit to the crime scene, Detective Carver received information that there was a person with a small caliber gunshot wound at Pomona Valley Medical

Center. He went there and saw defendant in the emergency room being treated for a gunshot wound to his left flank. He subsequently contacted Zarate at the medical center and attempted to investigate an incident about which she told him. He then contacted Zarate's mother at her apartment and conducted an investigation at that location. He noticed a red or burgundy minivan at that location and had it impounded as evidence.

Sheriff's deputies executed a search warrant on Zarate's mother's apartment on the night of April 27, 2005. They recovered a .22 caliber rifle and two ammunition magazines wrapped in a black pair of jeans inside a recycling bin on the balcony of the apartment. There were also two white t-shirts in the bin. The two magazines were loaded—one contained 24 rounds and the other contained 19 rounds.

The night of April 27, 2005, Los Angeles County Sheriff's Detective Gene Okada executed a search warrant at defendant's parents' house in Rosemead. Detective Okada and other officers searched defendant's bedroom and found a shoebox containing photographs with gang writing on them and "some miscellaneous paperwork." The shoebox also had gang writing on the top and sides. Among the papers recovered, there was a list of handwritten telephone numbers with "Gabriel's phone numbers" written at the top, insurance papers, phone bills, and earning statements.

A forensic firearms expert examined: the .22 caliber rifle and magazines recovered from Zarate's mother's apartment; the three .22 caliber casings and the one live round recovered from the scene; and the two groups of bullet fragments recovered from Dasalla's body by the coroner. The three casings from the scene and the bullet fragments recovered from Dasalla's body appeared to have been fired from the .22 caliber rifle recovered from Zarate's mother's apartment.

The medical examiner who conducted the autopsy on Dasalla confirmed that he had received four gunshot wounds—a nonfatal "through and through" wound to the left side of his abdomen; a nonfatal wound to the back of the right thigh with no exit wound; a nonfatal wound to his lower left leg that exited on the inner side of that leg; and a fatal wound to the back of his head with no exit wound.

D. Gang Evidence

Los Angeles County Sheriff's Sergeant Robert Gray testified as a gang expert. According to Sergeant Gray, the VNE gang originated in Boyle Heights and expanded over time into parts of East Los Angeles, Montebello, and Lancaster. The common sign or symbol for the gang are the initials VNE. Members of VNE had been involved in crimes such as murders, robberies, assaults with deadly weapons, attempted murders, narcotics sales, weapons possessions, and car thefts. The gang committed the violent crimes to create "an atmosphere of fear and intimidation within the community . . . ." That atmosphere allowed them to claim and control an area or territory. Once they controlled a territory, it became a "safe haven" from rival gangs and allowed them to sell narcotics for income without competition.

In Sergeant Gray's opinion, defendant and his brother Daniel were active VNE gang members in April 2005. Sergeant Gray based his opinion that defendant was a VNE gang member on: (i) a 1999 photograph of defendant showing TLS—a clique of VNE—tattooed on his right bicep; (ii) a 2004 New Year's Eve photograph showing defendant—identified on the photograph as "Gabriel/Stomper"[12]—and two other males throwing gang signs; (iii) an April 2005, photograph of defendant showing "VNE" tattooed on his left tricep, which tattoo defendant would not have had if he was not an active VNE gang member; (iv) the shoe box recovered from defendant's bedroom that was covered in VNE graffiti; and (v) the list of telephone numbers recovered from defendant's bedroom showing the moniker, telephone number, and gang affiliation of several gang members, which list defendant would not have possessed unless he was an active gang member in communication with other gang members. Sergeant Gray based his opinion that Daniel was an active VNE gang member on: certain photographs he viewed; Daniel's VNE tattoos; and Daniel's admission to other police officers of VNE gang membership.[13]

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[12] Defendant's nickname or moniker was Stomper.

[13] Daniel's nickname or moniker was Lil Stomper.

Sergeant Gray also explained that tagging crews were like gangs, but they did not have "backup from a higher source . . . ." Using a baseball analogy, the sergeant compared tagging crews to the "minor leagues" and gangs to the "major leagues." According to Sergeant Gray, "if a tagging crew . . . beat up . . . [a] gang member," and the gang did nothing about it, the gang would be "perceived weak at that point . . . ."

Toward the end of direct examination, the prosecutor asked Sergeant Gray a series of hypothetical questions that assumed facts substantially similar to the facts presented by the prosecution at trial. Based on those questions, Sergeant Gray opined that the oldest brother in the hypotheticals, who was the driver of the minivan, "was definitely [involved in the shooting of the victim] in association with and for the benefit and furtherance of that gang, the VNE gang." He based his opinion on a gang's demand for "respect and fear." According to Sergeant Gray, if anyone "crosse[d] anybody associated with VNE," the gang members involved could not "let that go" because they would "be perceived as weak." When asked if his opinion would change if none of the persons involved in the shooting mentioned VNE during the incident, Sergeant Gray said, "No." He explained that while mentioning the name of the gang might benefit the gang and increase its status in the community, it would also help identify the gang members involved.

Sergeant Gray added that the fact the killing took place in broad daylight would also benefit the gang by increasing its status. In the Sergeant's opinion, the "more people [in the community] that fear [the gang], the better for [the gang]."

Sergeant Gray further explained that if, during the assault on the victim, one of the gang members actually shot another and then pursued the fleeing victim and killed him, those facts would also tend to show that the killing was "done in association with, for the benefit [of] and [in] furtherance of the gang." According to Sergeant Gray, Once the two gang member brothers "confronted [the victim and became] . . . physical with him and [an] accident happen[ed] where [one of the brothers] accidentally [shot] one of [his] own people and the [victim was] getting away, if [the victim] were to get away, that whole gang would look like a bunch of bumbling idiots, and their status would decrease again.

So now [the gang member brother must] . . . make things right with [his] gang and take care of business, so that [the victim] cannot get away."

E. Defense Case

Defendant did not testify on his own behalf, but he called a psychology professor as an expert witness who testified about a person's ability to recall events accurately and the effect that an investigator's questions may have on the accuracy of a person's recollection of an event.

PROCEDURAL BACKGROUND

In an indictment, a County of Los Angeles grand jury charged defendant in count 1 with conspiracy to commit a crime in violation of section 182, subdivision (a)(1); in count 2 with murder in violation of section 187, subdivision (a); and in count 3 with possession of a firearm by a felon in violation of section 12021, subdivision (a)(1). The indictment alleged that the crimes in counts 1 and 2 were committed for the benefit of, at the direction of, and in association with criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1)(C). The indictment also alleged as to counts 1 and 2 that a principal personally and intentionally discharged a firearm, a rifle, which proximately caused great bodily injury and death to Dasalla within the meaning of section 12022.53, subdivisions (d) and (e)(1). The indictment alleged as to all three counts that defendant had suffered a prior conviction of a serious felony within the meaning of section 667, subdivision (a)(1) and suffered a prior conviction of a serious or violent felony within the meaning of section 667, subdivisions (b) through (i).

Defendant pleaded not guilty and denied the special allegations. Prior to trial, defendant withdrew his not guilty plea to count 3 and pleaded nolo contendere. He also admitted the special allegation under section 667, subdivisions (b) through (i).

The matter proceeded to a jury trial.[14] The jury found defendant guilty of conspiracy to commit murder and murder. The jury also found true the gun use and gang allegations.

Following the verdict, the trial court denied defendant's *Marsden* motion and his trial counsel's request for motion for leave to withdraw as counsel. The trial court also denied defendant's motion for new trial and motion to strike the prior strike.

The trial court imposed but stayed sentence on count 1 pursuant to section 654. On count 2, the trial court imposed a 25-years-to-life sentence, doubled to 50 years to life pursuant to section 667, subdivisions (b) through (i), plus an additional consecutive sentence of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1) and an additional consecutive five-year sentence pursuant to section 667, subdivision (a)(1). The trial court also imposed a consecutive four-year sentence on count 3 for an aggregate sentence of 84 years to life.

DISCUSSION

A. Gang Enhancement

1. Hypothetical Question

Relying on *People v. Killebrew* (2002) 103 Cal.App.4th 644, defendant argues that the trial court should have excluded the gang expert's testimony in response to a hypothetical question because the facts assumed in the question mirrored too closely the facts of this case. Because the parties briefed this issue prior to the Supreme Court's decision in *People v. Vang* (2011) 52 Cal.4th 1038, we asked the parties to submit letter briefs addressing whether the decision in *Vang* resolves this issue against defendant. In

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14 Defendant and codefendant Toledo were tried together, but, during the trial, the trial court granted Toledo's motion for mistrial.

their letter briefs, the parties appear to agree that the decision in *Vang* controls the determination of this issue.[15]

In response to the contention that an expert's opinion on whether a crime is gang related is inadmissible if the facts assumed in the hypothetical question too closely track the facts of the case, the court in *People v. Vang, supra*, 52 Cal.4th 1038, 1041 explained: "[In this case, an] expert witness testified about whether a crime was gang related. The Court of Appeal held that the trial court erred in permitting the expert to respond to hypothetical questions the prosecutor asked because the questions closely tracked the evidence in a manner that was only thinly disguised. We disagree that the trial court erred. It is required, not prohibited, that hypothetical questions be based on the evidence. The questioner is not required to disguise the fact the questions are based on that evidence." Based on the majority opinion in *Vang*, we conclude that the trial court did not err in allowing the gang expert to answer the challenged hypothetical question in this case.

2. Substantial Evidence

Defendant contends that there was insufficient evidence to support the jury's true finding on the gang enhancement.[16] According to defendant, Sergeant Gray's opinion

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15 In his letter brief, defendant suggests that we should follow Justice Werdegar's concurring opinion in *People v. Vang, supra*, 52 Cal.4th 1038 and conclude that the gang expert's opinion was inadmissible because it effectively directed the jurors how to resolve the issue of defendant's motive. Because we are bound by the majority opinion in *Vang* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we decline defendant's invitation to disregard that opinion and follow the concurring opinion.

16 "The gang enhancement in section 186.22, subdivision (b)(1), imposes additional punishment when a defendant commits a felony 'for the benefit of, at the direction of, or

that the shooting of Dasalla was done for the benefit of a criminal street gang "was not coupled with sufficient evidence" to support it.

"'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]' (*People v. Bolin* (1998) 18 Cal.4th 297, 331 [75 Cal.Rptr.2d 412, 956 P.2d 374].) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358 [43 Cal.Rptr.2d 135].) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139 [109 Cal.Rptr.2d 31, 26 P.3d 357].) It also applies when determining whether the evidence is sufficient to sustain a jury finding on a gang enhancement. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1456-1457 [119 Cal.Rptr.2d 272]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322 [51 Cal.Rptr.3d 678].) Reversal is unwarranted unless "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra*, at p. 331.)" (*People v. Mendez, supra,* 188 Cal.App.4th at p. 56.)

The evidence in this case supported a reasonable inference that defendant and Daniel were active VNE gang members in April 2005 when their younger brother David was beaten by members of the TDS tagging crew. Both defendant and Daniel had VNE gang tattoos, defendant had photographs and documents in his bedroom that pointed to current gang membership, and Daniel admitted VNE gang membership to other officers. Based on that evidence, Sergeant Gray opined that defendant and Daniel, as active members of VNE, would have been compelled to retaliate against TDS because, if they

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in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .' (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047 [16 Cal.Rptr.3d 880, 94 P.3d 1080].) It applies when a crime is gang related. (*People v. Castenada* (2000) 23 Cal.4th 743, 745 [97 Cal.Rptr.2d 906, 3 P.3d 278].)" (*People v. Mendez* (2010) 188 Cal.App.4th 47, 56.)

failed to react, both they and their gang would lose respect and power within the community. As Sergeant Gray explained, in the gang hierarchy, the TDS tagging crew was "minor leagues" compared to a "major league" gang like VNE. Therefore, allowing TDS taggers to assault the brother of two VNE gang members without retaliation would have made VNE and the two members appear weak, and both the gang and the two individual members would have lost status and respect in the community as a result.

Consistent with that explanation, defendant and Daniel sought information from Toledo about the identities of TDS members. Toledo, in turn, called Jimenez to inquire about members of TDS, other than Dasalla and George whom she already knew to be TDS members. The next day, defendant picked up David—who was armed with a rifle and two loaded magazines—and a companion and drove to the high school presumably in search of TDS members. Along the way, Toledo provided defendant and Daniel a description of Dasalla, one of the two TDS members known to her. When defendant and Daniel arrived at the high school, they searched for and eventually located Dasalla. Prior to their attack on Dasalla, defendant asked Dasalla whether he was from a gang or crew, and witnesses heard Dasalla respond with the name of a tagging crew or gang.[17]

Because David testified that he never told his two brothers that Dasalla attacked him, and because Dasalla's mother testified that Dasalla was home on the night of the assault on David, it was reasonable for the jury to infer from the foregoing evidence that defendant and Daniel targeted Dasalla, not because they believed he had participated in the assault on David, but merely because he was known to be a member of the tagging crew that attacked David. Moreover, as Sergeant Gray confirmed, defendant and Daniel attacked Dasalla in broad daylight in front of witnesses, which also supported an inference that the shooting was intended to benefit the VNE gang by demonstrating to the community that assaults on its members or their families would result in an immediate, cold blooded, and vicious response toward anyone affiliated with the assailants. As Toledo testified, details of the shooting were already being reported on television news

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17 Zarate heard Dasalla respond with the name TDS.

broadcasts by the time Daniel told her he had shot someone, a fact which also supported an inference that the shooting was committed for the benefit of a gang, because the fact of the shooting became immediately and widely known within the community, i.e., Los Angeles County, including the territories VNE controlled.

Under the applicable standard of review, we are required to view the evidence in a light most favorable to the true finding on the gang enhancement, resolving all conflicts in favor of the finding and indulging every reasonable inference the jury could have drawn. We therefore conclude based on the foregoing facts and inferences, that there was substantial evidence to support the true finding on the gang enhancement.

B. Refusal to Instruct on Heat of Passion

Defendant maintains that the trial court erred when it refused his request for a jury instruction on the lesser included offense of voluntary manslaughter based on heat of passion. He argues that the evidence showed that he and Daniel were extremely upset and angry that their younger brother had been assaulted and, therefore, that their conduct in searching for and shooting Dasalla was undertaken in the heat of passion. As defendant views the evidence, the requested jury instruction on voluntary manslaughter was warranted.

"'[I]t is the "court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed." [Citation.]' (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826 [89 Cal.Rptr.3d 225, 200 P.3d 847]; see *Beck v. Alabama* (1980) 447 U.S. 625, 637 [65 L.Ed.2d 392, 100 S.Ct. 2382].) 'Conversely, even on request, the court "has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction" [Citation.]' ([*People v.*] *Cole* [(2004)] 33 Cal.4th [1158,] 1215.) Substantial evidence 'is not merely "*any* evidence . . . no matter how weak" [citation], but rather "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater,

was committed. [Citations.]' (*People v. Cruz* (2008) 44 Cal.4th 636, 664 [80 Cal.Rptr.3d 126, 187 P.3d 970].) '"On appeal, we review independently the question whether the court failed to instruct on a lesser included offense." [Citation.]' (*People v. Avila* (2009) 46 Cal.4th 680, 705 [94 Cal.Rptr.3d 699, 208 P.3d 634].)" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1327-1328.)

"[V]oluntary manslaughter based upon sudden quarrel or heat of passion requires a showing of adequate provocation, which has both a subjective and an objective component. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252 [120 Cal.Rptr.2d 432, 47 P.3d 225].) The defendant must actually and subjectively kill under the heat of passion, but the circumstances giving rise to the heat of passion are also viewed objectively to determine whether the '"circumstances were sufficient to arouse the passion of the ordinarily reasonable man."' (*Id.* at pp. 1252-1253.)" (*People v. Gonzales and Solis* (2011) 52 Cal.4th 254, 301.)

"More importantly, a passion for revenge cannot satisfy the objective requirement for provocation. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144 [124 Cal.Rptr.2d 373, 52 P.3d 572].) As we explained long ago, 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' (*People v. Logan* (1917) 175 Cal. 45, 49 [164 P. 1121]; see also *Gutierrez*, at pp. 1143-1144.)" (*People v. Gonzales and Solis, supra*, 52 Cal.4th at p. 301.)

Here, the evidence supported a reasonable inference that defendant and his brother Daniel plotted Dasalla's murder in a rational and calculating manner, not in the heat of passion. As discussed, when they learned of David's beating by members of the TDS tagging crew, they attempted to gather information about the identities of members of that crew, and were eventually provided a physical description of Dasalla. Daniel armed himself with a loaded rifle and defendant drove him to the high school where, based on the description they had received, they searched for and ultimately located Dasalla. Before they attacked Dasalla, defendant "hit him up," a traditional gang signal that an

assault is imminent. Based on their conduct following the April 26 assault on David, it was evident that defendant and Daniel reflected and decided upon a preplanned course of conduct in response to that assault. The passage of time between the assault and the killing in this case is inconsistent with any heat of passion. Thus, the evidence did not support a reasonable inference that defendant and Daniel acted in the heat of passion.

Moreover, to the extent defendant and Daniel were motivated by a desire for revenge, the record suggests that they were seeking revenge against the TDS tagging crew on behalf of and for the benefit of their gang, as opposed to a desire for *personal* revenge against Dasalla for his participation in David's beating. As noted, David never told defendant or Daniel that Dasalla was one of his assailants, and the testimony of Dasalla's mother supported a reasonable inference that Dasalla did not participate in the assault on David. In addition, the gang expert's testimony supported a reasonable inference that Dasalla was shot for the benefit of the VNE gang in retaliation for a tagging crew's assault on the brother of two VNE gang members. Thus, there was insufficient evidence that defendant and Daniel were motivated by a desire for *personal* revenge.

Even assuming arguendo that defendant and Daniel searched for and shot Dasalla in the heat of the moment, because they were angry about the assault on David and wanted revenge, passion for revenge cannot satisfy the objective requirement for provocation. An ordinarily reasonable man in defendant's position would not aid and abet the broad daylight shooting of a victim in the back four times in retaliation for an assault on the man's younger brother, particularly when that man had no information that the victim was directly involved in the assault. Such behavior is beyond the scope of conduct that may be considered objectively reasonable.[18]

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18 Defendant argues that, at a minimum, the trial court should have instructed with CALCRIM No. 522 relating provocation to premeditation so that the jury could have considered whether the crime was first or second degree murder. But because defendant did not request that instruction in the trial court, the contention has been forfeited. (See *People v. Rogers* (2006) 39 Cal.4th 826, 878-879 [CALJIC No. 8.73—which like CALCRIM No. 522 relates provocation to premeditation—is a pinpoint instruction that

C. Constitutionality of Section 12022.53, Subdivisions (d) and (e)(1)

Defendant contends that the 25-years-to-life sentence imposed pursuant to section 12022.53, subdivisions (d) and (e)(1) violated his equal protection rights. He argues that the statute treats aiders and abettors of gang related shootings differently than aiders and abettors of shootings that are not gang related.

"Section 12022.53, subdivisions (d) and (e)(1)(B) when read together require the trial court to impose a consecutive 25-years-to-life sentence enhancement when a defendant is convicted of murder for the benefit of a criminal street gang and '[*a*]*ny* principal in the offense' 'personally and intentionally discharges a firearm and . . . causes . . . death, to any person other than an accomplice.' (Footnote omitted.) (Italics added.) Under this sentencing regime an aider and abettor who is found guilty of murder is subject to the 25 years to life enhancement even though he or she did not personally and intentionally discharge a firearm causing death if the murder was committed for the benefit of a criminal street gang and 'any principal' in the offense personally and intentionally discharged a firearm causing death. (Footnote omitted.) In all other killings subject to section 12022.53, subdivision (d)—that is, killings not for the benefit of a criminal street gang—a principal, including an aider and abettor, is only subject to the 25-year enhancement if he or she personally and intentionally discharged a firearm causing death." (*People v. Hernandez* (2005) 134 Cal.App.4th 474, 480; see also *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12-13.)

Defendant acknowledges that the court in *People v. Hernandez, supra*, 134 Cal.App.4th 474 "addressed and rejected a constitutional challenge to . . . section 12022.53, subdivision (e), based on equal protection and due process grounds." Nevertheless, defendant urges us not to follow the decision in *Hernandez* because that

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the trial court has no sua sponte duty to give]; *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333 [an instruction on provocation for second degree murder is a pinpoint instruction that need not be given sua sponte by the trial court].) Moreover, as discussed, the facts did not support a provocation defense, i.e., defendant did not act rashly and under intense emotion that obscured his reasoning or judgment.

decision erroneously applied a rational basis standard of review, when the liberty interest at issue in that case required a strict scrutiny standard. Because we conclude that the analysis and holding in *Hernandez* relating to this issue are sound, we reject defendant's challenge to his sentence under section 12022.53, subdivisions (d) and (e) on equal protection grounds. (See *The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529 ["We, of course, are not bound by the decision of a sister Court of Appeal. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 498, pp. 558-559.) But '[w]e respect stare decisis, however, which serves the important goals of stability in the law and predictability of decision. Thus, we ordinarily follow the decisions of other districts without good reason to disagree.' (*Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 485 [231 Cal.Rptr. 702])"].)

D. *Marsden* Motion

Defendant asserts that the trial court abused its discretion when it denied his postverdict *Marsden* motion. From defendant's perspective, the evidence relating to that motion demonstrated that an irreconcilable conflict had arisen between defendant and his trial counsel based on statements trial counsel made to defendant's father, which conflict warranted substitution of a new trial counsel.

A criminal defendant is entitled to competent representation at all stages of trial. (*People v. Smith* (1993) 6 Cal.4th 684, 690.) When a defendant seeks substitution of appointed counsel, the trial court must allow the defendant to explain the basis of his or her contention and to relate specific instances of inadequate performance. The defendant has an absolute right to substitute appointed counsel if the record clearly shows that counsel is not providing competent representation or that the defendant and counsel are embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*People v. Taylor* (2010) 48 Cal.4th 574, 599.)

"We review the denial of a *Marsden* motion for abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085 [74 Cal.Rptr.2d 121, 954 P.2d 384].) Denial is not an abuse of discretion 'unless the defendant has shown that a failure to replace counsel

would substantially impair the defendant's right to assistance of counsel.' (*People v. Smith* [(2003)] 30 Cal.4th [581,] 604.)" (*People v. Taylor, supra*, 48 Cal.4th at p. 599.) We test the trial court's erroneous denial for prejudice under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *Marsden*, *supra*, 2 Cal.3d at p. 126.)

Assuming, without deciding, that the trial court abused its discretion in denying defendant's *Marsden* motion and trial counsel's request for leave to withdraw as counsel, defendant has failed to demonstrate that he was prejudiced by those rulings. Defendant makes no attempt to show how his conflict with trial counsel adversely affected any of the postverdict proceedings, such as, for example, his motion for new trial, his motion to strike the prior strike conviction, or his sentence. Under the authorities discussed above, absent such a showing of prejudice, there is no basis upon which to reverse the judgment.

DISPOSITION

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.