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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**WILLIAM DELGADILLO et al.,**

**Defendants and Appellants.**

**A129750**

**(Alameda County  
Super. Ct. No. H45927)**

Defendants William Delgadillo and Wendell Kris Laupati appeal their convictions by jury trial of assault on a peace officer with force likely to produce great bodily injury (Pen. Code, § 245, subd. (c))<sup>1</sup> and the jury’s true findings on the enhancement allegations that defendants personally inflicted great bodily injury (§ 12022.7, subd. (a)) and committed the assault for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)).<sup>2</sup> At a bifurcated court trial on defendants’ prior convictions, the court found they each suffered three prior prison terms (§ 667.5, subd. (b)).<sup>3</sup> On appeal defendants contend the court erroneously denied their *Pitchess*

<sup>1</sup> All undesignated section references are to the Penal Code.

<sup>2</sup> After the jury deadlocked, a mistrial was declared on the attempted first degree murder charges against defendants.

<sup>3</sup> Delgadillo was sentenced to 18 years in state prison; Laupati was sentenced to 20 years in state prison.

motions,<sup>4</sup> the court erred in failing to give a unanimity instruction on the gang enhancement, the great bodily injury enhancements were not supported by substantial evidence, and the court erroneously imposed sentence on their great bodily injury enhancements.<sup>5</sup> Delgadillo also contends the finding that he served three prior prison terms was not supported by substantial evidence.

#### BACKGROUND

On the afternoon of June 20, 2007, Hayward police officers unsuccessfully pursued a car driven by Lotu Elika. Subsequently, Elika approached the Hayward home of off-duty San Leandro Police Officer Ali Khan; Khan shot and killed Elika in self-defense. Elika was a member of the gang “Don’t Give a Fuck” (DGF) and was Laupati’s cousin and/or close friend.

On June 20, 2007, defendants were cellmates in cell A-10 at Santa Rita Jail (Santa Rita). That evening, Laupati made several telephone calls to friends and learned that Elika had been killed by a police officer. Laupati told Delgadillo that he was going to “get off,” meaning fight, “with the cops.” Laupati told Delgadillo that Delgadillo did not have to get involved. Delgadillo agreed to help, saying, “I’m from Hayward.”

Alameda County Sheriff’s Deputy Glenn Tafolla was on duty in defendants’ housing unit on the night of June 20, 2007. At approximately 10:30 p.m., as Tafolla was conducting the “count,” he noticed what appeared to be a sealed bag of chips outside of defendants’ cell door. Tafolla approached the cell and Laupati motioned to the bag of chips. When Tafolla began to open the cell door, Laupati swung at him. The punch grazed Tafolla’s shoulder and hit the back of his head. Laupati then punched Tafolla in the mouth, splitting his lip. Tafolla was backed up against the railing of the tier as Laupati punched him again in the face and upper body. Delgadillo came out of the cell and began hitting Tafolla in the ribs and back. As Tafolla attempted to defend himself,

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<sup>4</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

<sup>5</sup> Delgadillo has informed the court that he joins in each of Laupati’s arguments that apply to him.

Laupati said to Delgadillo, “Grab his legs, pick up his legs.” Delgadillo put Tafolla’s right thigh in a “bear-hug” and Delgadillo started “thrashing his body.” Tafolla tried to avoid being picked up; he did not want to be thrown over the tier railing. Laupati’s left arm was pushing against Tafolla’s upper body and his right arm was trying to strike Tafolla’s face. At one point Tafolla was able to kick Delgadillo off his right leg, but Delgadillo immediately bear-hugged Tafolla’s right thigh with his arms. While Delgadillo had his arms wrapped around Tafolla’s thigh, Tafolla was up against the railing and felt a backward pushing sensation and a feeling of upward movement. Tafolla was trying to get away from the railing. He estimated he was hit by Laupati about 15 times, mostly near his head. He estimated he was hit by Delgadillo about eight to 10 times, mostly in his back and rib area.

Alameda County Sheriff’s Deputy Leo Montero saw Tafolla being assaulted by two inmates. Alameda County Sheriff’s Deputy Ross Clippinger approached and saw Tafolla and Laupati fighting each other while Delgadillo’s arms were wrapped around Tafolla’s leg. Tafolla was about one or two feet from the railing. Fearing for Tafolla’s life, Clippinger hit Delgadillo with his flashlight; Delgadillo let go of Tafolla. Tafolla pushed Laupati to the ground and they continued to fight; Clippinger handcuffed Delgadillo and then helped Tafolla gain control of and handcuff Laupati. As the officers walked Laupati to the isolation cell, he angrily said, “You shot my cousin, DGF, nigga.”

As a result of the assault, Tafolla suffered cuts to both lips, a strain of the anterior and posterior cruciate ligaments in his left knee, and a torn labrum in his right shoulder that required surgical repair. Tafolla’s treating orthopedic surgeon, Dr. John Casey, Jr., testified that in order to strain both knee ligaments there had to be “some significant force.” He described the ligament strain as a “mild injury” to both ligaments. Dr. Casey explained that Tafolla’s labrum got damaged when substantial force caused his shoulder to internally sublunate. The injury made Tafolla more susceptible to anterior subluxation dislocation of his right shoulder. Dr. Casey opined that the injuries to Tafolla’s shoulder and knee were consistent with an assault, “specifically if two individuals had tried to throw . . . Tafolla over a railing or tried to punch and hit him.”

Tafolla returned to light duty work in August and September 2007; following his shoulder surgery, he returned to light duty work in January or February 2008 and full duty in April 2008.

### *Gang Evidence*

#### John Lage

Hayward Police Inspector John Lage and Alameda County Sheriff's Lieutenant Colby Staysa testified as gang experts. Lage said DGF is a Hayward gang that subordinates itself and has allegiance to the Norteños. Lage described the Norteños as "a wide alliance, a movement of criminal street gang members that identify with the Nuestra Familia and Nuestra Raza prison gangs." DGF also belongs to the "umbrella" gang South Side Hayward (SSH). DGF and SSH claim South Hayward as their territory. The primary activities of DGF are murder, attempted murder, assault, drive-by shootings, fire bombings, witness intimidation, terrorist threats, robbery, drug trafficking, drug sales, auto theft, vandalism, battery, and nuisance crimes.

Lage also testified that A Street is a Hayward gang under the umbrella gang North Side Hayward (NSH). A Street and NSH claim North Hayward as their territory and claim allegiance to the Norteños. The primary activities of A Street include murder, attempted murder, assault, drug sales, drive-by shootings, fire bombing, robbery, auto theft, witness intimidation, and terrorist threats.

Lage said that in custody, Norteños are expected to cooperate with one another and put their street rivalries aside. He explained that since the 1990's SSH and NSH do not attack each other and, instead, attack other Norteño rivals and Sureños. Now it is common for Norteños from different gangs to commit crimes together. Lage said that, in 2005, two DGF members and one A Street member committed a drive-by shooting of three Sureño members, killing one and wounding another. On cross-examination Lage stated the Norteños and Sureños "are the two princip[al] gangs in our area," and "Norteño refers to a group of gangs," and is a "descriptive or umbrella term for the various Norteño gangs." Lage said, when someone identifies as Norteño, they also belong to a specific

gang like DGF or A Street. Lage stated that, in jail, inmates identify themselves as Norteños or Sureños.

Lage opined that Laupati was a DGF member based on his admission of gang membership, association with known gang members, gang tattoos, and participation in crimes with other gang members. Lage said Laupati's yelling at Tafolla, "DGF. You shot my cousin," indicates Laupati's loyalty to Elika based on their shared DGF membership.

#### Colby Staysa

Staysa testified that A Street and DGF are Norteño gangs. He explained that Norteño is an "umbrella designation of gangs," and DGF is one of multiple gangs that "claim Norteño." DGF and Norteños share many gang signs and symbols, and DGF has its own signs and symbols. A Street also shares symbols with all Norteño gangs. DGF and A Street claim geographic areas within Hayward.

Staysa opined that on June 20, 2007, Laupati was a Norteño DGF member and Delgadillo was an A Street Norteño gang member.

When asked how the "subset" Norteño gangs such as A Street and DGF interact inside Santa Rita, Staysa explained that Norteño gang members from different "sets"<sup>6</sup> who arrive at the jail are often housed together and "basically form one large gang." "They work together and they just fall under the banner of 'Norteños.'" He said inside Santa Rita the gang with the largest population is the Norteños. He also said inside Santa Rita the Norteños unite to join forces to combat their common enemies. Staysa explained, in custody, Norteños no longer "have clique and street alliances, they are Norteños as a whole, . . . they will work towards their criminal ventures together."

In response to a hypothetical, Staysa opined that an attack on a police officer by two Norteño gang members—one a DGF member and the other an A Street member—following a police shooting of a DGF gang member earlier that day, would be an attack committed for the benefit of, at the direction of, and in association with, the Norteño

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<sup>6</sup> In the context of the question posed to Staysa, we assume, "sets" refers to "subsets."

gang. Staysa explained, “you have two Norteño gang members working together in association with one another. The motivation for attack is retaliation for the law enforcement killing of a DGF gang member . . . or of a Norteño gang member out in the community.”

### *The Defense*

Laupati testified he is a member of DGF. He admitted being upset after he learned that Elika had just died, deciding to fight with a police officer, and hitting Tafolla. Laupati also said, thereafter, Delgadillo came out of their cell and hit Tafolla. Laupati denied trying to kill Tafolla and said he just wanted to “beat[ Tafolla] up.” He said he promised his friends and other gang members that he was going to fight the police in retaliation for the police killing of Elika.

The thrust of Laupati’s closing argument was that he did not commit attempted murder and his assault on Tafolla was not committed for the benefit of a criminal street gang. The thrust of Delgadillo’s closing argument was that, at most, he was guilty of misdemeanor assault on a police officer and did not try to promote any gang activity.

## DISCUSSION

### I. *Pitchess Motions*

Prior to trial, defendants filed *Pitchess* motions seeking Alameda County Sheriff’s Department records related to evidence or complaints of fabrication of charges and/or evidence, unnecessary force, racist remarks, false arrest, false statements in reports, false claims of probable cause, or dishonesty by Tafolla and Clippinger. Delgadillo’s motion also sought evidence of racial prejudice by Tafolla. The supporting declaration by Laupati’s counsel stated that Tafolla fabricated the story of Laupati “requesting food outside his cell” and used this ruse as an excuse to attack Laupati, a suspected gang member. The supporting declaration by Delgadillo’s counsel stated that Delgadillo did not attempt to lift Tafolla off the ground in order to throw him over the tier railing or lift Tafolla off the floor at all. Delgadillo’s counsel asserted that a material, substantial issue at trial would be the officers’ character, habits, customs, and credibility.

At the May 8, 2009 hearing, the court stated it would deny the *Pitchess* motions as to racial discrimination, but grant them as to unnecessary force by and the veracity of Tafolla and Clippinger. Thereafter, at an in camera hearing, the court stated that Sergeant Kelly Martinez had been previously sworn as custodian of records for the Alameda County Sheriff's Office. Martinez said he had made a full examination of the internal affairs files of Tafolla and Clippinger regarding the issues of excessive force and veracity and found no responsive complaints. Kathleen Pacheco of the County Counsel's Office stated on behalf of the Alameda County Sheriff's Office that she had also fully examined the internal affairs files for Tafolla and Clippinger and found no responsive complaints. Thereafter, the court ordered the transcript sealed.

A. *Racial Bias*

Defendants first argue the trial court erred in denying their request for an in camera review of records evidencing racial bias by Tafolla and Clippinger.

To obtain disclosure of police personnel records, a defendant must submit affidavits establishing "good cause." (Evid. Code, § 1043, subd. (b)(3); *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 (*Warrick*)). The affidavits may be made on information and belief. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226 (*Mooc*)).

"To determine whether the defendant has established good cause for in-chambers review of an officer's personnel records, the trial court looks to whether the defendant has established the materiality of the requested information to the pending litigation. The court does that through the following inquiry: Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial? If defense counsel's affidavit in support of the *Pitchess* motion adequately responds to these questions, and state 'upon reasonable belief that the governmental agency identified has the records or information from the records' ([Evid. Code,] § 1043, subd. (b)(3)), then the defendant has

shown good cause for discovery and in-chambers review of potentially relevant personnel records of the police officer accused of misconduct against the defendant.” (*Warrick, supra*, 35 Cal.4th at pp. 1026-1027.)

Trial courts have broad discretion when ruling on *Pitchess* motions, and we review that exercise of discretion for abuse. (*Mooc, supra*, 26 Cal.4th at p. 1228; *People v. Memro* (1995) 11 Cal.4th 786, 832.)

We conclude the court did not abuse its discretion in refusing to order discovery of the officers’ personnel records pertaining to racial bias because defendants’ motions failed to present “a specific factual scenario of officer misconduct” based upon racial bias. (*Warrick, supra*, 35 Cal.4th at p. 1025.) The affidavits supporting defendants’ motions provided no specific facts regarding race. They did not mention the race of defendants or the two officers. Moreover, they did not assert that the officers acted due to a racial animus or that racial bias supported defendants’ defense to the proposed charges. Therefore, defendants have failed to establish good cause for in camera review of records related to racial bias.

#### B. *Inadequacy of the Record*

Defendants request that we independently examine the sealed transcript and any records produced at the in camera hearing in response to their discovery motions to review the court’s finding, following the in camera hearing, that there was no discoverable material regarding the use of unnecessary force by and the veracity of Tafolla and Clippinger.

“When a trial court concludes a defendant’s *Pitchess* motion shows good cause for discovery of relevant evidence contained in a law enforcement officer’s personnel files, the custodian of the records is obligated to bring to the trial court all ‘potentially relevant’ documents to permit the trial court to examine them for itself. [Citation.]” (*Mooc, supra*, 26 Cal.4th at pp. 1228-1229.) “The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed

irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion." (*Id.* at p. 1229.)

"The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent." (*Mooc, supra*, 26 Cal.4th at p. 1229.)

We have reviewed the sealed transcripts of the *Pitchess* motions. The transcripts are unclear as to whether the custodian brought any documents from Tafolla's and Clippinger's internal affairs files to the in camera hearing, or instead failed to produce any documents for the court's review after concluding that none of the documents within those files were potentially relevant. In any case, we conclude the trial court erred in failing to require the custodian "to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion." (*Mooc, supra*, 26 Cal.4th at p. 1229.) Since the record is insufficient for us to determine whether the court properly exercised its discretion in denying discovery on the issues of unnecessary force by and the veracity of Tafolla and Clippinger, we must conditionally reverse the judgment and remand for a new *Pitchess* hearing in which the proper procedure is followed. (*Mooc*, at p. 1231; *People v. Guevara* (2007) 148 Cal.App.4th 62, 69.)

## II. *Unanimity Instruction*

The jury found true that defendants committed assault on a peace officer with force likely to produce great bodily injury 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)).

Defendants contend that, because the prosecution presented evidence of five gangs or “affiliated groups of gangs” allegedly benefited by defendants’ conduct, the jury could have disagreed as to which gang(s) were benefited. Thus, they argue the court had a sua sponte duty to give the jury a unanimity instruction regarding the specific gang or gangs defendants’ conduct benefited. They also argue that, without a unanimity instruction, the jurors were permitted to “amalgamate the evidence of [their] association with, direction from and desire to benefit five different entities,” only two of which were proven to be criminal street gangs. We review this claim of instructional error de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

The court instructed the jury on the gang enhancement, in part, as follows:

“To prove this allegation, the People must prove that: 1) The defendant [committed or] attempted to commit the crime for the benefit of, at the direction of, or in association with a criminal street gang; and 2) The defendant intended to assist, further, or promote criminal conduct by gang members.

“A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: 1) That has a common name or common identifying sign [or symbol]; 2) That has as one or more of its primary activities the commission of assault by means of force likely to produce great bodily injury as defined in section 245; unlawful homicide or manslaughter; the sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances; the intimidation of witnesses and victims; threats to commit crimes resulting in death or great bodily injury; and 3) Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.”

A defendant is entitled to a verdict in which all 12 jurors concur beyond a reasonable doubt as to each count charged. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*)). “When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that

the defendant committed the same specific criminal act.” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) A unanimity instruction “ ‘focuses the jury’s attention on a specific act and requires the jury to determine guilt as to that act beyond a reasonable doubt.’ [Citation.] The rule is limited by its rationale: ‘A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.’ [Citation.] The same reasoning should, in general, apply to enhancements as well as the crimes that underlie them.” (*People v. Robbins* (1989) 209 Cal.App.3d 261, 264-265.)

“The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.’ [Citation.] [¶] On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant’s precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the ‘theory’ whereby the defendant is guilty. [Citation.]” (*Russo, supra*, 25 Cal.4th at p. 1132.)

Defendants argue that the prosecution presented evidence of five “related groups”—Norteños, NSH, SSH, A Street, and DGF—however, the evidence established that only A Street and DGF qualified as criminal street gangs. They contend: “[Defendants do] not argue the jurors must select only one gang for benefit under section 186.22. However, [they] submit[] that [the jurors] must agree on which gang or gangs benefitted. The necessity for that agreement is demonstrated in this case, because the prosecutor introduced evidence of two groups that satisfy California’s definition of a criminal street gang and three others associated with [defendants] which, on this record, do not.”

Defendants cite no authority for the proposition that jurors must unanimously agree on the name of the gang supporting a gang allegation. They acknowledge that in *People v. Ortega* (2006) 145 Cal.App.4th 1344, 1357 (*Ortega*), the Third District rejected

that claim. In *Ortega*, the defendant was convicted of murder and the jury found true the allegations that he killed the victim while being an active participant in a criminal street gang and that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang. (*Id.* at p. 1346.) The gang expert testified that there were thousands of Norteño gang members in the Sacramento area, in 20 to 25 subsets, and no evidence was presented that the goals and activities of a particular subset were not shared by the others. (*Id.* at pp. 1356-1357.) The court concluded there was sufficient evidence that Norteño is a criminal street gang, the murder was related to the activity of that gang, and the defendant actively participated in that gang. (*Id.* at p. 1357) The *Ortega* court also rejected the defendant’s argument that a unanimity instruction was required as to which gang was involved: “The name of a gang is not a criminal act. There was no evidence that defendant[s] belonged to any gang other than the Norteño gang, thus there was no possibility the jury was in disagreement about the gang with which defendant associated. There was no need for a unanimity instruction.” (*Ibid.*)

Here, the jury was properly instructed on the elements of the gang enhancement; we are entitled to presume it understood and followed the court’s instruction. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) If defendants are correct that the prosecution proved only that DGF and A Street are criminal street gangs, then the jury would only have had to decide whether defendants’ assault on Tafolla benefited DGF, A Street or both. Substantial evidence supports the conclusion that both DGF and A Street benefited from the assault. Consequently, since substantial evidence supports the jury’s conclusion that defendants were active members of a criminal street gang and committed the attack on Tafolla for the benefit of a criminal street gang, defendants’ argument fails.

### III. *Great Bodily Injury Enhancement*

Delgadillo contends the finding that he personally inflicted great bodily injury on Tafolla is not supported by substantial evidence.<sup>7</sup> Delgadillo asserts Tafolla’s injuries

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<sup>7</sup> The People assert that although Laupati filed a joinder in all arguments raised by Delgadillo that are applicable to Laupati, “[u]nless we are told otherwise, we believe that Laupati is not joining” Delgadillo’s great bodily injury claim. Laupati’s reply brief does

consisted of two cut lips, a mild strain to the ligaments of his left knee, and substantial injury to his shoulder, and Delgadillo’s conduct consisted only of a few initial punches to his torso and restraint of his leg. Delgadillo argues Tafolla’s lip and knee ligament injuries do not constitute great bodily injury and the record contains no evidence that Delgadillo’s conduct contributed to the significant injury to Tafolla’s shoulder.

“In determining whether the evidence is sufficient to support a conviction or an enhancement, ‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citations.]” (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) In doing so, we “ ‘neither reweigh[] evidence nor reevaluate[] a witness’s credibility.’ ” (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) In addition, we presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Section 12022.7 provides in part: “(a) Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years. [¶] . . . [¶] (f) As used in this section, ‘great bodily injury’ means a significant or substantial physical injury.” The occurrence of great bodily injury is a factual question for the jury. (*People v. Cross* (2008) 45 Cal.4th 58, 64; *People v. Meneses* (2011) 193 Cal.App.4th 1087, 1090.)

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not address the People’s assertion. For the first time in Laupati’s counsel’s declaration in support of Laupati’s joinder in Delgadillo’s supplemental opening brief regarding sentencing implications if the great bodily injury enhancement is stricken for lack of substantial evidence, counsel asserts that Delgadillo’s substantial evidence claim is “equally applicable” to Laupati. Since Delgadillo’s substantial evidence claim did not address whether there was sufficient evidence Laupati inflicted great bodily injury, we treat any such substantial evidence claim by Laupati as waived. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issues not properly addressed in appellate briefs may be disregarded].)

Personal infliction of great bodily injury in section 12022.7 means, “the individual accused of inflicting great bodily injury must be the person who directly acted to cause the injury.” (*People v. Cole* (1982) 31 Cal.3d 568, 572.) In *People v. Modiri* (2006) 39 Cal.4th 481 (*Modiri*), the Supreme Court explained how to apply section 12022.7 when the great bodily injury is inflicted in the course of a group beating. A person may receive an enhanced sentence under section 12022.7 if he or she “joins others in actually beating and harming the victim, and where the precise manner in which he contributes to the victim’s injuries cannot be measured or ascertained.” (*Modiri*, at p. 495.) The personal-infliction finding can be made “if [the] defendant personally applied force to the victim, and such force was sufficient to produce grievous bodily harm either alone or in concert with others.” (*Id.* at p. 497.)<sup>8</sup>

CALJIC No. 17.20, given in *Modiri*, and CALCRIM No. 3160, given in the instant case, permit the jury to find that the defendant personally inflicted great bodily injury during a group assault where it is impossible to determine which person caused which injury to the victim.<sup>9</sup> Here, the jury was instructed, in relevant part: “*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] If you conclude that more than one person assaulted . . . Tafolla and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on . . . Tafolla if the People have proved that: [¶] 1. Two or more people acting at the same time assaulted . . . Tafolla and inflicted great bodily injury on him; [¶] 2. The defendant personally used physical force on . . . Tafolla during the group assault; [¶] AND [¶] 3. The physical force the defendant used on . . . Tafolla was sufficient in combination with the force used by the others to

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<sup>8</sup> Although *Modiri* involved the defendant’s personal infliction of great bodily injury under section 1192.7, subdivision (c)(8), the court applied its holding equally to the personal infliction requirement under section 12022.7. (*Modiri, supra*, 39 Cal.4th at pp. 495-496; *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1417, fn. 2 (*Dunkerson*).

<sup>9</sup> *Dunkerson* upheld the CALCRIM No. 3160 instruction given here. (*Dunkerson, supra*, 155 Cal.App.4th at p. 1418.) No claim of instructional error is made here.

cause . . . Tafolla to suffer great bodily injury. [¶] The defendant must have applied substantial force to . . . Tafolla. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.”

Evidence was presented that Delgadillo hit Tafolla eight to 10 times, mostly to the rib and back area. In addition, while Tafolla was up against the tier railing, Delgadillo wrapped his arms around Tafolla’s thigh and Delgadillo started “thrashing his body” and attempting to lift Tafolla’s leg off the ground. Tafolla tried to avoid being picked up. Laupati’s left arm was pushing against Tafolla’s upper body and his right arm was trying to strike Tafolla’s face. Dr. Casey testified substantial force was applied to cause Tafolla’s knee and shoulder injuries and those injuries were consistent with an assault, “specifically if two individuals had tried to throw . . . Tafolla over a railing or tried to punch and hit him.” Even assuming only the shoulder injury constituted great bodily injury, substantial evidence supports the great bodily injury finding against Delgadillo. Although there is no direct evidence linking Tafolla’s shoulder injury to specific blows by Delgadillo, the evidence showed that Delgadillo personally applied sustained, substantial physical force to Tafolla in an attempt to throw Tafolla over the railing. Finally, Dr. Casey’s testimony establishes the force applied by Delgadillo contributed to the shoulder injury Tafolla suffered in the attack by both defendants.

#### IV. *Section 1170.1, Subdivision (g)*

Laupati was sentenced to 20 years in state prison as follows: The court imposed the five-year upper term on the assault on a peace officer (§ 245, subd. (c)), plus a three-year term on the great bodily injury enhancement (§ 12022.7, subd. (a)), plus a 10-year term on the gang enhancement (§ 186.22, subd. (b)(1)), plus a one-year term on each of the two prior prison term enhancements (§ 667.5, subd. (b)).

Delgadillo was sentenced to 18 years in state prison as follows: The court imposed the four-year midterm on the assault on a peace officer (§ 245, subd. (c)), plus a three-year term on the great bodily injury enhancement (§ 12022.7), plus a 10-year term on the gang enhancement (§ 186.22, subd. (b)(1)), plus a one-year term on one of the

prior prison term enhancements (§ 667.5, subd. (b)). The court stayed the sentences on two other prior prison term enhancements.

Defendants contend, and the People concede, that pursuant to section 1170.1, subdivision (g),<sup>10</sup> the trial court erred in imposing both the three-year great bodily injury enhancement and the 10-year gang enhancement with respect to their convictions for assault on a peace officer since both enhancements were based on the infliction of great bodily injury on the same victim in the commission of a single offense.

Section 186.22, subdivision (b)(1), specifies that a felony “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” is subject to a sentence enhancement. Subdivision (b)(1)(C), the relevant provision here, provides for a 10-year enhancement if the underlying felony is a “violent felony,” as defined by section 667.5, subdivision (c). Section 667.5, subdivision (c), lists a number of offenses which qualify as “violent” felonies. As relevant here, a “violent felony” includes “[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 . . . .” (§ 667.5, subd. (c)(8).)

Here, defendants’ infliction of great bodily injury on Tafolla qualified defendants for a three-year enhancement under section 12022.7, subdivision (a), and rendered the underlying offense of assault on a peace officer a “violent felony” under section 667.5, subdivision (c), which qualified defendants for the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C).

In *People v. Gonzalez* (2009) 178 Cal.App.4th 1325 (*Gonzales*), the parties conceded, and the court agreed, that the court’s imposition of both the three-year great

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<sup>10</sup> Section 1170.1, subdivision (g) provides: “When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm.”

bodily injury enhancement and the 10-year gang enhancement violated section 1170.1, subdivision (g). (*Gonzales*, at pp. 1327, 1331-1332.) *Gonzales* relied on *People v. Rodriguez* (2009) 47 Cal.4th 501, 508-509 (*Rodriguez*), in which the Supreme Court held that the similar provision in section 1170.1, subdivision (f), regarding multiple punishments for using a dangerous or deadly weapon, prevented the imposition of the gang enhancement (§ 186.22, subd. (b)(1)(C)) and the personal firearm use enhancement (§ 12022.5, subd. (a)).

We agree with *Gonzalez* and apply it here. The court’s imposition of the three-year great bodily injury enhancement and the 10-year gang enhancement violated section 1170.1, subdivision (g), and only the greatest of those enhancements could be imposed. The proper remedy is to reverse the sentence and remand the matter to the trial court to restructure the sentence so as not to violate section 1170.1, subdivision (g). (See *Gonzales, supra*, 178 Cal.App.4th at p. 1332; accord, *Rodriguez, supra*, 47 Cal.4th at p. 509.)<sup>11</sup>

V. *Delgadillo’s Prior Prison Term Finding*

Finally, Delgadillo argues that one of the prior prison term (§ 667.5, subd. (b)) findings is not supported by substantial evidence. The People agree.

Former section 667.5, subdivision (b) provides in part: “(b) [W]here the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an

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<sup>11</sup> At sentencing, the court concluded that due to the great bodily injury enhancement, defendants were subject to the 15 percent limitation on presentence custody credits pursuant to section 2933.1. In a supplemental brief, joined by Laupati, Delgadillo argues that striking the great bodily injury enhancement will entitle them to conduct credits under section 4019 instead of under 2933.1. In light of our decision to reverse and remand for resentencing, we need not address defendants’ presentence conduct credits.

offense which results in a felony conviction.” (Prop. 83, § 9, approved Nov. 7, 2006, eff. Nov. 8, 2006.)<sup>12</sup>

Section 667.5, subdivision (e) provides: “The additional penalties provided for prior prison terms shall not be imposed for any felony for which the defendant did not serve a prior separate term in state prison . . . .”

Section 667.5, subdivision (g) provides: “A prior separate prison term for the purposes of this section shall mean a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment or revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration.”

Courts have consistently held that only one prior prison term enhancement is proper where concurrent sentences have been imposed in two or more prior felony cases. (See *People v. Jones* (1998) 63 Cal.App.4th 744, 747; accord, *People v. Riel* (2000) 22 Cal.4th 1153, 1203.)

Here, the information alleged that Delgadillo suffered the following five prior convictions: (1) A November 6, 1992 conviction for unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), for which he was sentenced to probation; (2) an April 15, 2004 conviction for possession of a firearm by a felon (§ 12021, subd. (a)(1)), for which he was sentenced to probation; (3) an April 26, 2005 conviction for evading an officer, in willful disregard (Veh. Code, § 2800.2, subd. (a)), for which he received a prison term; (4) a June 12, 2003 conviction for unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), for which he received a prison term; and (5) a May 24, 2005 conviction for evading an officer, in willful disregard (Veh. Code, § 2800.2, subd. (a)), for which he received a prison term.

At the commencement of the court trial on Delgadillo’s prior conviction allegations, the first and fifth prior conviction allegations were stricken. The prosecution

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<sup>12</sup> Operative January 1, 2012, section 667.5, subdivision (b), was rewritten.

introduced Exhibit No. 1, the section 969b prior prison packet, regarding the second, third and fourth prior conviction allegations. Based thereon, the court found those allegations true. At sentencing, the court imposed a one-year term under section 667.5, subdivision (b) for Delgado's third prior conviction (the April 26, 2005 conviction for evading an officer); stayed the fourth prior conviction allegation (the June 12, 2003 conviction for vehicle theft); and noted that the second prior conviction (the April 15, 2004 conviction for possession of a firearm by a felon) was a "probation prior" with no prison term imposed.

Exhibit No. 1 establishes that contrary to the allegation in the information, the second prior conviction (the April 15, 2004 conviction for possession of a firearm by a felon) resulted in a 16-month prison sentence. Exhibit 1 also establishes that the 16-month sentence on the second prior conviction was imposed on May 24, 2005, to run concurrent with the sentence imposed on the third prior conviction. The parties agree that because the prison terms on the second and third prior convictions were imposed to run concurrently, they count as one prior prison term, not two. On remand, the proper remedy is for the trial court to strike either the second or third prior term finding. (See *People v. Riel, supra*, 22 Cal.4th at p. 1226.)

#### DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to hold a new in camera *Pitchess* hearing in conformance with the procedures described in this opinion. If the trial court finds there are discoverable records, it must order their disclosure to defendants, allow defendants an opportunity to demonstrate prejudice, and order a new trial if prejudice is demonstrated. If the court concludes that there is no discoverable information, or that there is discoverable information but defendants cannot establish that they were prejudiced by the denial of discovery, the court is directed to: (1) restructure defendants' sentences in accordance with section 1170.1, subdivision (g); (2) redetermine defendants' presentence custody credits; (3) strike either the second or third prior prison term findings made against

Delgadillo; and (4) prepare an amended abstract of judgment and forward a copy of the amended abstract to the California Department of Corrections and Rehabilitation.

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SIMONS, J.

We concur.

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JONES, P.J.

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NEEDHAM, J.