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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY ERNESTO ROMAN,

Defendant and Appellant.

E054698

(Super.Ct.No. RIF10003632)

**OPINION**

APPEAL from the Superior Court of Riverside County. W. Charles Morgan,  
Judge. Affirmed as modified.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney  
General, and Steve Oetting and Vincent P. LaPietra, Deputy Attorneys General, for  
Plaintiff and Respondent.

Defendant Tony Ernesto Roman meted out discipline to an errant member of his gang by shooting and killing him.

After a jury trial, defendant was found guilty on one count of first degree murder (Pen. Code, §§ 187, subd. (a), 189), with an enhancement for personally and intentionally discharging a firearm and causing death (Pen. Code, § 12022.53, subd. (d)) and a gang enhancement (Pen. Code, § 186.22, subd. (b)), and one count of gang participation (Pen. Code, § 186.22, subd. (a)). Defendant was sentenced to a total of 50 years to life in prison, plus the usual fines and fees.

Defendant now contends:

1. Defense counsel rendered ineffective assistance by failing to request instructions on voluntary intoxication.
2. Punishment for both murder and causing death by discharging a firearm violated double jeopardy.
3. Punishment for both murder and gang participation violated Penal Code section 654 (section 654).
4. The trial court erroneously failed to award sufficient presentence custody credit.

The People concede that the sentence violates section 654. We agree; we will modify the sentence so as to correct this error. While this appeal was pending, the trial court remedied the error regarding presentence custody credit. Otherwise, we find no error. Hence, we will affirm the judgment as modified.

# I

## FACTUAL BACKGROUND

Defendant was the second-in-command of a Corona gang called the Visioneros (VNS). His moniker was “Rider.”

The victim, Sergio “Downs” Rocha, was also a member of VNS. Defendant and Rocha had been friends since childhood. As of 2010, however, they were “bumping heads” over a number of issues.

First, Rocha was using methamphetamine. Defendant was “angry and disappointed,” because he “hated meth.”

Second, Rocha had started hitting his girlfriend, Vanessa Merced. At one point, defendant told Rocha, “Don’t put your hands on her or I’ll put my hands on you . . . .”

Third, Rocha had trashed Merced’s apartment. Defendant was “appalled” and said that Rocha “was giving everyone a bad name . . . .” He added that Rocha “is fucking up and I’m tired of apologizing for him.”

Fourth, and most grievously, Rocha had defied defendant’s orders regarding a gun. Rocha was the VNS “sergeant at arms,” meaning that he was the custodian of the gang’s firearms. The gang, however, had only one gun — a chrome .22 semiautomatic with a black handle.

When defendant saw Rocha twirling the gun with the safety off, he took it away from him and gave it to another VNS member, Daniel “Weeble” Ocampo. Rocha then stole the gun from Ocampo’s apartment. Defendant found it in Rocha’s apartment and

stole it back. In the wake of this incident, defendant told others that he wanted Rocha out of the gang.

Rocha started avoiding defendant. In early August 2010, defendant phoned him and asked for a meeting, but Rocha insulted defendant, then hung up on him.

On August 17, 2010, around 11:00 a.m., according to Rocha's girlfriend, while she and Rocha were at Ocampo's apartment, Ocampo told them to leave because defendant was on his way there and defendant was drunk. (At trial, Ocampo did not remember this.)

That same day, around 5:30 p.m., Rocha and his girlfriend were hanging out at a picnic table outside Ocampo's apartment building. They were with a small group of people, including Ocampo and Paul "Oso" Sanchez, who was yet another VNS member. Ocampo knew that defendant was looking for Rocha. He phoned defendant and left a message for him saying that Rocha was there.

Shortly thereafter, a man dressed all in black, including a hoodie, gloves, and a bandanna over his face, approached the group.<sup>1</sup> Merced recognized him as defendant, based on his voice, his height, and "the way he walked . . . ." At trial, Ocampo identified him as defendant. Sanchez likewise identified him as defendant.

Defendant ordered Rocha to get up. Defendant then said, "Vanessa, tell your man to get up and stop being such a bitch." She told Rocha not to get up, but Rocha said he

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<sup>1</sup> Black was a VNS gang color.

had to. He kissed her, then stood up. Defendant pulled out the chrome .22 and shot Rocha once in the forehead, killing him.

Merced later told the police that the shooter sounded drunk. (At trial, she did not remember saying this.)

About a week after the shooting, in a phone call with another VNS member, Johnny “Spooke” Recendez, defendant admitted that he was the shooter. When Recendez commented, “That’s fucked,” defendant replied that he was “cleaning up house.” Defendant went to North Carolina, where he was arrested. He falsely told the police that, on the date of the shooting, he was in North Carolina.

Defendant, testifying on his own behalf, denied shooting Rocha. When the shooting occurred, he testified, he was at the home of his aunt, Rosanna Alvarado. He was reluctant to give her name because she had outstanding warrants.

## II

### DEFENSE COUNSEL’S FAILURE TO REQUEST INSTRUCTIONS ON VOLUNTARY INTOXICATION

Defendant contends that his trial counsel rendered ineffective assistance by failing to request instructions on voluntary intoxication.

“ . . . ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the

outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.

[Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

"[E]vidence of voluntary intoxication [is] relevant on the issue of whether the defendant actually formed any required specific intent." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242-1243; see also Pen. Code, § 22, subd. (b).) Thus, in a homicide case, it may be relevant to the issues of premeditation and deliberation and intent to kill. (Pen. Code, § 22, subd. (b).)

"The trial court," however, "has no duty to instruct sua sponte on voluntary intoxication. [Citation.]" (*People v. Clark* (1993) 5 Cal.4th 950, 1022, disapproved on an unrelated point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Rather, "[a]n instruction on the significance of voluntary intoxication is a "pinpoint" instruction that the trial court is not required to give unless requested by the defendant.' [Citation.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.)

“[A] defendant is entitled to such an instruction only when there is substantial evidence of the defendant’s voluntary intoxication and the intoxication affected the defendant’s “actual formation of specific intent.” [Citation.]” (*People v. Verdugo, supra*, 50 Cal.4th at p. 295.) Substantial evidence of intoxication alone is not enough; there must also be evidence that the intoxication impaired the defendant’s ability to formulate intent. (*People v. Williams* (1997) 16 Cal.4th 635, 677-678.) Here, while there was some evidence that defendant had been drinking, there was absolutely no evidence that this had any effect on his ability to form any specific intent. If defense counsel had requested a voluntary intoxication instruction, the trial court could properly have refused it. Thus, the failure to request one was not ineffective assistance.

Separately and alternatively, defendant cannot show prejudice. There was powerful evidence of premeditation and deliberation and, a fortiori, of intent to kill. Defendant had decided that the victim had to be removed from the gang and was on the lookout for him. After Ocampo tipped defendant off, defendant dressed all in black, putting a bandanna over his face and wearing gloves — all this on an August day in the Inland Empire that Merced described as “freakin’ hot.” He also armed himself with the gang’s only gun, the same gun that Rocha had previously misappropriated. In Merced’s opinion, this was deliberate and “symbolic. [Rocha] stoled [*sic*] it . . . [and] he got shot with the gun he stoled [*sic*].”

The evidence that defendant was intoxicated was minimal. And, as already discussed, there was no evidence that intoxication had any effect on his ability to form

intent. Thus, even if the jury had been instructed on voluntary intoxication, there is no reasonable probability that it would have returned a more favorable verdict.

### III

#### PUNISHMENT FOR BOTH MURDER AND THE FIREARM ENHANCEMENT

Defendant contends that the imposition of punishment both for murder and for personally and intentionally discharging a firearm, causing death, violates double jeopardy.

As defendant concedes, however, the California Supreme Court has held that enhancements are not treated as crimes or offenses for purposes of the multiple conviction aspect of double jeopardy. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130, and cases cited.) He indicates that he is raising this issue “to preserve it for later review.” That is his privilege. At this stage, however, we must reject it.

In any event, even assuming that a conduct enhancement could violate double jeopardy, Penal Code section 12022.53 does not. “In *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), the Supreme Court made clear that the protection against multiple punishments for the same offense did not necessarily preclude cumulative punishments in a single prosecution. The key to determining whether multiple charges and punishments violate double jeopardy is legislative intent. [Citation.] When the legislature intends to impose multiple punishments, double jeopardy is not invoked. [Citation.]

“Here, the language of California Penal Code § 12022.53 is clear. Subsection (d) provides for a 25 year enhancement when a ‘firearm is used’ to commit murder. There is, therefore, no question as to what the California legislature intended. . . . [T]he California legislature has simply determined that ‘a criminal offender may receive additional punishment for any single crime committed with a firearm.’” (*Plascencia v. Alameida* (9th Cir. 2006) 467 F.3d 1190, 1204.)

We therefore conclude that the sentence did not impose multiple punishment in violation of double jeopardy.

#### IV

#### MULTIPLE PUNISHMENT FOR BOTH MURDER AND GANG PARTICIPATION

Defendant contends that the imposition of separate and unstayed punishment for both murder and gang participation violated section 654.

The crime of gang participation has three elements: (1) “Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive”; (2) “knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity”; and (3) “willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.” [Citation.]” (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

While this appeal was pending, the Supreme Court held that section 654 bars multiple punishment for both gang participation and for the underlying felonious criminal

conduct. (*People v. Mesa* (2012) 54 Cal.4th 191, 193, 197-200; accord, *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1313-1316 [Fourth Dist., Div. Two].) Here, the murder was the only felonious criminal conduct supporting the gang participation charge. Thus, as the People concede, the trial court should have stayed the sentence for gang participation.

In our disposition, we will modify the sentence accordingly.

## V

### PRESENTENCE CUSTODY CREDIT

Defendant contends that the trial court erroneously failed to award him presentence custody credit for the time he spent in custody in North Carolina.

While this appeal was pending, the trial court, at defendant's request, modified the judgment so as to award him the presentence custody credit that he is seeking. Hence, as defendant concedes, this contention is moot.

## VI

### DISPOSITION

The trial court is directed to modify the judgment by staying execution of the concurrent two-year term imposed on count 2; the total term is unaffected. This stay will become permanent once defendant has served the rest of his sentence. The judgment as thus modified is affirmed. The superior court clerk is directed to prepare a new sentencing minute order and a new abstract of judgment and to forward a certified copy

of the amended abstract to the Director of the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.)

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RICHLI  
J.

We concur:

McKINSTER  
Acting P. J.

CODRINGTON  
J.