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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN GARCIA,

Defendant and Appellant.

G047628

(Super. Ct. No. 11NF0679)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Adrienne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Jonathan Garcia of attempted murder and street terrorism. (Pen. Code, §§ 664, subd. (a), 187, subd. (a), 186.22, subd. (a); all further statutory references are to this code.) The jury also found Garcia committed the attempted murder for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)); that he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) causing great bodily injury to the victim (§ 12022.53, subd. (d)); and that he personally and intentionally used a firearm (§ 12022.5, subd. (a)). Garcia contends the trial court erred in instructing the jury on the provocation necessary to reduce attempted murder to attempted voluntary manslaughter, failed a sua sponte obligation to provide jury instructions on evaluating an alleged accomplice's testimony, improperly imposed lengthy sentences for both a gang enhancement and a firearm enhancement, and violated ex post facto Constitutional principles by imposing a \$240 restitution fine. As we explain, these challenges have no merit, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On an early February evening in 2011, a resident of the La Habra Hills Apartments complex saw Garcia and two fellow Monos criminal street gang members urinating in a carport. The trio walked to the north side of the apartments, where they met Christian Eugenio, another Monos gang member. The four men spoke for several minutes until Eugenio exited the complex through a gate onto Monte Vista Street.

Eugenio crossed the street, where he was confronted by three men, including John Leyva, a former friend from middle school, but now a member of the rival West Side La Habra gang. Leyva drew a knife and stated his gang affiliation, but Eugenio disregarded the gangland threat and hurried down a side street (Heather Street).

Leyva did not pursue him, but instead apparently joined other compatriots in a church parking lot at the intersection of Monte Vista and Heather.

Garcia and his two companions emerged from the apartment complex through the same gate Eugenio had exited. They crossed the street into the church parking lot, where they and Leyva's group argued for several minutes before someone from Monos warned, "You're about to get blasted." Garcia drew a chrome-colored gun from his waistband and fired several shots at Leyva as he turned and ran. Two bullets pierced Leyva from back to front, entering in his buttocks and back, and he spent several days in the hospital. Eugenio saw Garcia draw his gun and he heard the gunshots from his vantage point on Heather Street.

After the jury's verdict as noted above, the trial court sentenced Garcia to the middle term of seven years on the attempted murder count and imposed a consecutive 10-year term for the gang enhancement and a consecutive 25-years-to life term for personally discharging a firearm causing great bodily injury. The trial court stayed punishment on the other firearm enhancements and the street terrorism conviction, and Garcia now appeals.

II

DISCUSSION

A. *No Additional Instruction on the Meaning of "Provocation" Required*

Garcia contends the trial court's instruction on the provocation necessary to reduce attempted murder to voluntary manslaughter was inadequate. Garcia correctly observes that the Supreme Court has periodically refined the law of provocation, from which he infers "the term 'provocation' has a technical meaning in the law." But the trial

court's standard instruction, CALCRIM No. 603, accurately states the law and Garcia's arguments to the contrary are unpersuasive.¹

Garcia first notes "California law provides that verbal acts can qualify as sufficient provocation to justify a manslaughter verdict, so long as they would cause an average person to act rashly. [Citations.]" He argues that under the trial court's instructions it is "likely, however," that the jury "would have concluded otherwise, applying the old adage, 'sticks and stones may break my bones, but words will never hurt me.'" But CALCRIM No. 603 itself refers to a provocative "sudden quarrel" as a basis for attempted voluntary manslaughter instead of attempted murder. If Garcia desired further elaboration or a pinpoint instruction or modification, he forfeited his challenge by failing to request it. (*People v. Anderson* (2011) 51 Cal.4th 989, 998; *People v. Hart* (1999) 20 Cal.4th 546, 622.)

¹ CALCRIM No. 603 provides in pertinent part: "An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion. [¶] The defendant attempted to kill someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant took at least one direct but ineffective step toward killing a person; [¶] 2. The defendant intended to kill that person; [¶] 3. The defendant attempted the killing because (he/she) was provoked; [¶] 4. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment; [¶] AND [¶] 5. The attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment. [¶] . . . [¶] In order for a sudden quarrel or heat of passion to reduce an attempted murder to attempted voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than judgment."

Additionally, the factual predicate for Garcia's reliance on a verbal challenge is misplaced. He suggests the "[j]urors likely wondered: Was Leyva's gang challenge 'provocation?'" But the evidence did not suggest Leyva issued *Garcia* any gang challenge. And even assuming Garcia overheard Leyva identify his West Side La Habra gang affiliation when confronting Eugenio, CALCRIM No. 603 correctly informed the jury: "The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than judgment."

As the Supreme Court has explained, the yardstick is not how an average gang member would react. In *People v. Avila* (2009) 46 Cal.4th 680, 706 (*Avila*), the court held that hearing a person shout possible gang references or a challenge would not cause an ordinarily reasonable person to become homicidally enraged. Consequently, there was no error.

Garcia's alternate contention is similarly misplaced. He suggests that under the standard instruction "jurors might have struggled to analyze how Leyva's pulling a knife on Eugenio might provoke Garcia." He argues, "Special definition was required. One definition that would have educated jurors is: 'The term "provocation" means any conduct, including words or gestures, which would be sufficient to excite an irresistible passion in a reasonable person, and lead that person to act rashly or without due deliberation and reflection.'" But Garcia does not identify how this instruction is in any way superior to CALCRIM No. 603, or how the standard instruction omits anything in

his proposal on appeal. In any event, as noted, CALCRIM No. 603 correctly states the law and it was therefore Garcia's obligation to request more precise language.

Garcia contends the trial court erroneously answered a jury question concerning provocation by directing the jury reread CALCRIM No. 603. During deliberations, the jury asked the trial court to define certain terms in the instructions, including "provocation." Specifically, the jury submitted the following note, "Question: Under attempted vol[untary] manslaughter: Heat of Passion (CALCRIM # 603) . . . pp. 65 and 66. Last sentence of p. 65, 'In order for a sudden quarrel or heat of passion . . . the defendant must have acted under the direct and immediate influence of provocation as I have defined it.' [¶] Can you define 'provocation' in this context." (Original ellipses and underscoring.)

The trial court responded with a note to the jury: "The jury asked for a definition of 'provocation' as used in CALCRIM No. 603 (attempted voluntary manslaughter: heat of passion) on p. 65. [¶] Again, this term has no special legal meaning, so please follow CALCRIM 200 . . . and closely review the language of the instruction [CALCRIM No. 603] on p[p]. 65 and 66." The trial court had earlier in responding to another jury question referred to CALCRIM No. 200, which states, "Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

Garcia suggests the trial court erred in simply referring the jury back to CALCRIM No. 603 because "this instruction does *not* define provocation at all, except to say jurors were to determine whether provocation was sufficient by considering 'whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than judgment.'" (Original italics.) This distinction

between an ordinary person's reaction from passion rather than judgment is the gravamen of provocation. (See, e.g., *Avila, supra*, 46 Cal.4th at p. 706.) And as noted, CALCRIM No. 603 also correctly identified a "sudden quarrel" or "heat of passion" as examples of the requisite provocation. The trial court therefore properly referred the jury to CALCRIM No. 603 and no more was required.

B. *No Accomplice Instruction Required*

Garcia asserts the trial court erred in failing to instruct the jury sua sponte to view Eugenio's testimony with caution as an accomplice. (See § 1111; CALCRIM Nos. 334, 335.) Section 1111 provides: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Under section 1111, "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

To be charged with an identical offense, the witness must be a principal under section 31; that is, the direct perpetrator, an aider and abettor, or a coconspirator. (*People v. Fauber* (1992) 2 Cal.4th 792, 833.) "Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn therefrom." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90.) Garcia relies on the principle that the evidence need not establish conclusively that the witness is an accomplice; rather, sua sponte instructions on the topic are warranted if supported by substantial evidence (*People v. Martinez* (1982) 132 Cal.App.3d 119, 130),

including instructing the jury to determine whether the witness is an accomplice (*People v. Tobias* (2001) 25 Cal.4th 327, 331; CALCRIM No. 334).

Here, the evidence did not require accomplice instructions. Garcia relies on Eugenio's and Garcia's fellow membership in the Monos gang, and he suggests the police suspected Eugenio was involved in Leyva's shooting when they arrested him two days later when he met with his probation officer. Indeed, the probation officer told Eugenio when he arrived at their meeting, "I'll see you in 15 years."

But the evidence introduced at trial did not suggest Eugenio and Garcia implicitly or explicitly agreed to confront or shoot Leyva. Rather, after Eugenio and Garcia parted ways, they separately encountered Leyva. No evidence indicated Garcia had seen Leyva confront Eugenio or brandish a knife; instead, Eugenio already had hurried away when Garcia exited the apartment complex and had his own confrontation with Leyva. Accordingly, no evidence suggested Eugenio was a principal, i.e., one who "actually knows and *shares* the full extent of the perpetrator's specific criminal intent, and actively promotes, encourages or assists the perpetrator with the intent and purpose of advancing the perpetrator's successful commission of the target offense." (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1220, original italics.) Mere presence at or near the scene of a crime does not establish the person was an accomplice. (*People v. Sully* (1991) 53 Cal.3d 1195, 1228.) Consequently, the trial court did not err in failing to provide accomplice instructions.

C. *No Error in Imposing Both a Firearm and a Gang Enhancement*

Garcia contends the trial court imposed an unauthorized sentence by not staying or striking the 10-year gang enhancement under section 186.22, subd. (b)(1)(C), when it also imposed a 25-years-to-life firearm enhancement under section 12022.53,

subd. (d). He relies on *People v. Sinclair* (2008) 166 Cal.App.4th 848, 855 (*Sinclair*), where the reviewing court explained “the trial court was obliged to impose and stay the gang enhancement on count 1, *unless* it exercised its discretion to strike the enhancement under subdivision (g) of section 186.22.” (Original italics.) *Sinclair* is inapposite, however, because it resolved a sentencing issue involving two overlapping firearm enhancements and did not involve a gang defendant who personally discharged a firearm.

Specifically, *Sinclair* confronted a scenario in which the trial court combined two enhancements to yield an 11-year enhanced penalty, which consisted of a one-year enhancement for a principal’s use of a firearm (§ 12022, subd. (a)(1)) and a 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)). In purporting to combine the enhancements, the trial court then struck a separate 10-year firearm enhancement (§ 12022.53, subs. (b)(1), (e)) in favor of the longer enhancement term it fashioned, on the theory the combined 11-year enhancement should be imposed because it “provides for a greater penalty or a longer term of imprisonment” under section 12022.53, subdivision (j). (*Sinclair, supra*, 166 Cal.App.4th at p. 853.) But as the *Sinclair* court explained, subdivision (j) did not authorize combining enhancements in this manner. Rather, of the two *firearm* enhancements, the trial court was obliged under section 12022.53, subdivision (j), to impose the longer 10-year term instead of the one-year term, and then separately consider whether to stay or strike the gang enhancement, given that the defendant did not personally discharge the firearm. (*Sinclair*, at p. 854.)

But where a principal in a gang offense also personally discharges the weapon, as here, the rule is well-established, as follows: “A defendant who *personally* uses or discharges a firearm in the commission of a gang-related offense is subject to *both* the increased punishment provided by section 186.22 [i.e., the gang enhancement]

and the increased punishment provided in section 12022.53” for firearm enhancements. (*People v. Brookfield* (2009) 47 Cal.4th 583, 590, original italics.) This rule follows from the express terms of section 12022.53, subdivision (e)(2), which provides: “An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.” Consequently, there is no merit in Garcia’s sentencing challenge.

D. *No Ex Post Facto Violation*

Garcia argues the trial court violated the prohibition against ex post facto punishment (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9) by imposing a restitution fine of \$240 instead of \$200. Section 1202.4 provided for a restitution fine between \$200 and \$10,000 when Garcia committed his offense. He infers from his request for the minimum fine that the trial court intended to impose the statutory minimum, but mistakenly selected the \$240 figure from the newly amended versions of sections 1202.4 and 1202.45. The claim is forfeited, however, because Garcia did not object, and the \$240 amount is not otherwise appealable as an unauthorized sentence. (*People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Scott* (1994) 9 Cal.4th 331, 354.)

Even overlooking the forfeiture, Garcia’s claim fails. The high court’s recent decision in *Peugh v. United States* (2013) 569 U.S. ___, 133 S.Ct. 2072, does not support his position. There, the federal sentencing guidelines at the time of the defendant’s fraud offense recommended a 37 to 46 month prison term, but the trial court sentenced him to 70 months consistent with a new guideline range of 70 to 87 months. The high court explained that “applying amended sentencing guidelines that increase a

defendant's recommended sentence *can* violate the Ex Post Facto Clause, notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range.” (*Id.* at p. 2082, italics added.) But the court also explained the “touchstone” for an ex post facto violation “is whether a given change in law presents a “sufficient risk of increasing the measure of punishment attached to the covered crimes.” [Citations.] The question when a change in law creates such a risk is ‘a matter of degree’” (*Ibid.*)

The de minimus \$40 amount here does not implicate ex post facto concerns. As our Supreme Court has explained, this constitutional safeguard is based on a policy of “fair warning” (*In re Ramirez* (1985) 39 Cal.3d 931, 938) “to prevent unforeseeable punishment” (*People v. Snook* (1997) 16 Cal.4th 1210, 1221). The \$240 amount was well within the applicable range of punishment and not so different in degree from \$200 to trigger the ex post facto bar.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.