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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR SANDOVAL, Defendant and Appellant.	D058618 (Super. Ct. No. FVI022536)

APPEAL from a judgment of the Superior Court of San Bernardino County, John M. Tomberlin, Judge. Affirmed.

A jury convicted Salvador Sandoval of first degree murder (Pen. Code,[1] § 187, subd. (a); count 1) and street terrorism (§ 186.22, subd. (a); count 2). It found true enhancement allegations that in committing the murder, Sandoval personally and intentionally discharged a firearm (§12022.53, subd. (d)), and acted for the benefit of, at the direction of, or in association with, a criminal street gang (§ 186.22, subd. (b)(1)).

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1 Statutory references are to the Penal Code unless otherwise stated.

The court sentenced Sandoval to 53 years to life as follows: 25 years to life on the murder conviction; 25 years to life on the firearm enhancement; 10 years on the gang enhancement, stayed under section 654; plus 3 years on the street terrorism conviction.

Sandoval contends: (1) a gang expert impermissibly testified regarding Sandoval's intent; (2) there was insufficient evidence to support the street terrorism conviction and the true finding on the gang enhancement; (3) the court erroneously instructed the jury regarding provocation with CALCRIM Nos. 522 and 570 or, alternatively, he received ineffective assistance from trial counsel, who failed to request modification of CALCRIM No. 522; (4) the sentence on the street terrorism conviction should have been stayed under section 654; and (5) the sentence on the firearm enhancement violates principles of double jeopardy. We affirm the judgment.

FACTUAL BACKGROUND

Late night on September 10, 2005, Michael Paez, who rented a room from Jimmy Urbina in Hesperia, California, borrowed Urbina's vehicle and took Sandoval and Odon Tellez shopping. Alfonso Tellez, Odon's younger brother, understood that Urbina had told Paez to put gas in the vehicle. Before they left, Odon recalled seeing Sandoval with a gun on his person.

As the group returned to Urbina's house, the vehicle ran out of gas, and they pushed it to Urbina's garage. The Tellez brothers saw that Urbina, who was sitting on a chair in his garage, became upset because nobody put gas in the vehicle. Alfonso heard Sandoval tell Urbina something like, "Don't tell me that. . . . I wasn't driving." Urbina started to get up and Sandoval, facing him, fatally shot him four times, as Urbina tried to

turn to his side. The Tellez brothers testified they got in their vehicle and were about to drive off when Sandoval and Paez jumped in the vehicle and asked to be taken to Adelanto, California. The Tellez brothers refused and instead dropped them off at the house of Paez's aunt.

The San Bernardino County Chief Medical Examiner conducted an autopsy on Urbina's body, which had four entry wounds, one on the right shoulder and three in the back of the torso. The gunshots damaged Urbina's heart, lungs, stomach, intestine, diaphragm, liver and spine, and he likely would have died within a few minutes. The cause of death was multiple gunshot wounds to the chest and abdomen.

On September 18, 2005, border patrol agents stationed in Texas detained a vehicle carrying Sandoval and Paez. Sandoval was carrying a loaded .45-caliber gun, which he said he needed to protect himself from gang members and gang activity.

In December 2005, Sandoval, using a pseudonym, confessed to the murder in a letter to his sister from jail: "I'm sending you this under some one else's name so I can get in trouble [*sic*] for what Im [*sic*] about to confess. I did do what Im [*sic*] in here for. There's two more but I never got caught. Ive [*sic*] also fataly [*sic*] stabbed 2 guys. They got lucky they made it. Ive [*sic*] shot more people but never stayed around to see if they lived or not. So all I do know is Im [*sic*] guilty of 3 murders." Sandoval signed the letter, "Rambo 2 Guns".

In another December 2005 letter from jail, Sandoval admitted to his aunt that his arrest had stopped his criminal activities on the streets, but he noted, "I can still do things from in here. And Im [*sic*] doing things in here as far as to make my name bigger than it

already is." He added, "These last court dates have gone all bad. 3 levas [*sic*] already showed up to point me out as the killer. The gang unit showed up to point me out as a known gang member and active with the EME. Ill [*sic*] explain on that later."

In a December 2005 phone call from jail, a recording of which was played for the jury, Sandoval told his girlfriend, "There's . . . three people already pointing me out as the fucking killer," and added, "Shoulda killed them mother-fuckers, man. Fuckin' bitch asses." When told his mother was seeking to hire an attorney on his behalf, Sandoval replied, "It ain't gonna help. Tell her there's three witnesses against me. They got the fuckin'—the—the murder weapon. Come on." Sandoval recounted how the border patrol agents caught him with his .45-caliber gun on his person.

Both Sandoval and Paez admitted gang membership when they were booked into county jail. Sandoval was photographed with gang tattoos on his body, and identified himself in a classification interview as a member of the East Side Santa Paula gang. One of Sandoval's tattoos indicated his affiliation and allegiance to the Mexican Mafia. Sandoval's moniker, "Rambo," was tattooed on his abdomen. Paez, whose moniker is "Little Thumper," admitted being a member of the West Side Verdugo gang.

Santa Paula Police Officer Hector Ramirez testified as a gang expert that the Santa Paula 12th Street gang exists to commit crimes, including robberies, carjacking, sales of methamphetamine and heroin. Officer Ramirez reviewed photographs of Sandoval's tattoos, including those that said, "S-P" on Sandoval's chest, Sandoval's gang classification card, as well as different witnesses' trial testimony, and opined Sandoval was a member of the Santa Paula gang. Officer Ramirez testified gang members value

respect as a measure of their status among fellow gang members, the general public, and rival gangs. A gang member who has been disrespected, particularly in the presence of his fellow gang members, is expected to intimidate, harm or kill the person who disrespected him. The disrespected gang member, and his gang, benefit from the impression he makes on witnesses to his retaliation for incidents of disrespect. Officer Ramirez opined Sandoval had murdered Urbina in association with a criminal gang because during the incident, Sandoval was associating with Paez, another gang member.[2]

San Bernardino Police Officer Nick Oldendorf testified as an expert that the purpose of West Side Verdugo, a "home-grown Hispanic street gang" affiliated with the Mexican Mafia, is "to conduct crimes such as murder, carjacking, robbery, extortion, grand theft auto, narcotic sales, firearm sales and acquisitions" so as to fund the gang. After reviewing photographs of Paez's tattoos and hand signs, Officer Oldendorf opined Paez's tattoos tended to "link" Paez to West Side Verdugo.

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[2] On cross-examination of Officer Ramirez, defense counsel attempted to ask him different hypotheticals,(!RT 551-552)! including this one: "Six people at a party, drinking, dark garage. You have a person in there, and you have a gang member. Gang member shoots other person. Based on your knowledge, is that committed for the benefit of a gang?" The court sustained the prosecutor's objections to the hypotheticals. The prosecutor explained the basis for the objection outside of the presence of the jury: "Here's the problem, there's an inaccurate statement of fact that it was a party: That they were drinking. There's no evidence that the defendant or Thumper or Jose [Urbina's brother] was drinking, and so it's a cumulative effect of misstating of the evidence before the jury." The court explained its reason for sustaining the objection: "Here's the thing, for the hypothetical to be admitted—for you to ask the question, I have to find that the hypothetical is within a fair interpretation of the facts the facts before me. I have to find that it's not misleading, and so right now, I don't have that. I'll let you try it again." Officer Ramirez was excused subject to recall, but he was not subsequently recalled to testify.

Officer Oldendorf testified West Side Verdugo members are expected to prevent others from disrespecting them. A gang member's speed and severity of reaction to being disrespected is heightened when other gang members are present. Officer Oldendorf opined the fact that on the one hand Paez had Sandoval's name tattooed on his body and, on the other hand, Sandoval had Paez's name tattooed on his body, significantly showed the two had "built some sort of bond." Officer Oldendorf testified he knew of an instance in which a West Side Verdugo member associated and actively committed gang activities with southern Hispanic gang members.

During Officer Oldendorf's direct examination, the prosecutor asked, "Now, you've had a chance to become familiar with the circumstances of this case that we're here on, correct?" Officer Oldendorf replied in the affirmative and confirmed he had heard some testimony. The prosecutor continued, "[F]rom what you know about this case and your understanding of criminal street gang culture, can you render an opinion whether or not the actions of the defendant that night could have been done for the benefit of, in association with, or at the direction of a criminal street gang?" Defense counsel objected on grounds the question would elicit testimony that was cumulative and irrelevant. The court overruled that objection, and Officer Oldendorf was permitted to elaborate: "In my opinion, a gang such as Santa Paula 12th Street, which is a smaller Hispanic street gang comparing to West Side Verdugo, which is a rather large criminal street gang, *it appears as though the member of Santa Paula 12th Street was trying to impress a member of West Side Verdugo and that way of impressing that subject and get respect from that gang and that subject and being known as a soldier was to commit the*

act." (Emphasis added.) Defense counsel objected that Officer Oldendorf had provided an "[i]mproper opinion, not based on relevant facts that we heard in court." The court overruled the objection, and Officer Oldendorf continued, "The basis of the crime was over disrespect and nothing more than disrespect," and gang members regard many types of behavior, including looking at someone wrong, as signs of disrespect.

Defense Case

Paez testified that he, Urbina and Sandoval had been drinking and using methamphetamine the night of the incident. Upon returning home, Urbina yelled at Paez for not putting gas into the vehicle, and Paez denied he had agreed to do so. Urbina went inside the garage, returned and yelled at Sandoval. Paez saw Urbina was standing and was beginning to pull out his gun from his jacket just before Sandoval shot him. Paez did not contact police because at that time he was already in trouble for violating the terms of his probation on a charge of reckless discharge of a firearm. In the summer before Urbina was killed, Paez got a tattoo that included Sandoval's nickname, Rambo, because they were close friends. The same day, Sandoval got a tattoo that stated in Spanish that Paez was in Sandoval's corner for life.

Sandoval testified that the night of the incident, he had his gun on his person when he arrived at Urbina's house. Everybody there was drinking beers, and all except Alfonso were using methamphetamine. Urbina was standing by his garage and yelling obscenities at them when they returned to Urbina's house with the vehicle. Sandoval responded by walking off. Sandoval recalled thinking, "I'm not going to help push if this fool's going to be yell [*sic*] and talk shit." Sandoval was worried because previously he had seen

Urbina handle a gun. Based on Urbina's gestures and body language, Sandoval thought he might have been carrying a gun. Sandoval saw Urbina pull out a gun, and thought Urbina was going to shoot him; therefore, Sandoval shot Urbina. Sandoval denied being a member of West Side Verdugo, the Mexican Mafia or any other gang, and disputed that his tattoos indicated same. He admitted Paez belonged to West Side Verdugo. At no time during the incident did Sandoval yell out a gang name or flash a gang sign.

DISCUSSION

I.

Sandoval contends the trial court improperly allowed Officer Oldendorf to testify as a gang expert regarding Sandoval's intent. Sandoval specifically contends: "[Officer Oldendorf's] opinion was not based on a hypothetical, nor was it framed as a general explanation of gang culture and habits. Instead, the testimony amounted to an opinion about [Sandoval's] subjective intent when he fired the fatal shots. This is an issue that should be left to the jury to decide rather than having an expert tell the jury how the case should be decided."

Courts "have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case. 'Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." [Citation.] The subject matter of the culture and habits of criminal street gangs, of particular relevance here, meets this criterion.' " (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944 (*Gonzalez*).) "[A]n expert may properly testify about the size,

composition, or existence of a gang; 'motivation for a particular crime, generally retaliation or intimidation'; and 'whether and how a crime was committed to benefit or promote a gang.' " (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1513.) The expert witness may answer "hypothetical questions based on other evidence the prosecution presented, which is a proper way of presenting expert testimony. 'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." ' " (*Gonzalez*, at pp. 946-947.) "In reviewing a trial court's ruling allowing expert testimony, we ask whether the ruling was an abuse of discretion." (*People v. Mendoza* (2000) 24 Cal.4th 130, 177.)

While this case was on appeal, the California Supreme Court decided *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), which addressed the "propriety of permitting the gang expert to respond to the hypothetical questions the prosecutor asked regarding whether defendants' assault on [the victim] was gang related." (*Id*., at p. 1044.) The court approved the use of hypothetical questions in such cases, explaining, "As applied here, this rule means that the prosecutor's hypothetical questions had to be based on what the evidence showed *these* defendants did, not what someone else might have done. The questions were directed to helping the jury determine whether *these* defendants, not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*Id*., at p. 1046.)

The issue Sandoval raises regarding a gang expert's testimony presented in relation to the specific defendant's actions, and not through hypotheticals, was left open in *Vang*: "It appears that in some circumstances, expert testimony regarding the specific

defendants might be proper. [Citations.] The question is not before us. Because the expert here did not testify directly about defendants, but only responded to hypothetical questions, we will assume for present purposes the expert could not properly have testified about defendants themselves." (*Vang*, *supra*, 52 Cal.4th at p. 1048, and fn. 4.)[3]

We also need not decide the issue. Assuming, without deciding, the trial court erred in admitting the objected-to portion of Officer Oldendorf's expert testimony because it was not phrased as a hypothetical but rather based on his opinion of Sandoval's conduct as developed in trial testimony, any error was harmless. We evaluate the admission of expert testimony for harmless error under the standard announced in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Prieto* (2003) 30 Cal.4th 226, 247.) However, any error would be harmless under the standard in *Chapman v. California* (1967) 386 U.S. 18, 24 as well.

As noted, Sandoval did not object to Officer Ramirez's testimony, which was materially indistinguishable from Officer Oldendorf's testimony. Specifically, Officer Ramirez testified Sandoval was a gang member, and in association with Paez, another gang member, murdered Urbina to benefit Sandoval's respect and standing as a gang member, and the reputation of his gang. To a substantial degree, Officer Oldendorf's testimony was merely cumulative to that of Officer Ramirez's; therefore, we conclude

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3 The *Vang* court clarified its previous interpretation of *People v. Killebrew* (2002) 103 Cal.App.4th 644, explaining expert testimony might be prohibited regarding specific defendants not because expert testimony might embrace the ultimate issue to be decided by the trier of fact, but because it does not assist the trier of fact, who is as competent as the expert witness to weigh the evidence and draw a conclusion on the issue of guilt. (*Vang*, *supra*, 52 Cal.4th at p. 1048.)

beyond a reasonable doubt Sandoval would not have obtained a different result in this case absent Officer Oldendorf's testimony.

II.

Sandoval contends there was insufficient evidence to support both his conviction for street terrorism under section 186.22, subdivision (a) and the gang enhancement finding under section 186.22, subdivision (b)(1).[4]

"When the challenge is to the sufficiency of the evidence, ' "[t]he test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." ' [Citations.] We view the evidence in the entire record in the light most favorable to the respondent and we presume the existence of every fact in support of the judgment that the trier could reasonably deduce from the evidence. [Citation.] To be substantial, the evidence must be ' "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." ' " (*In re Jose P.* (2003) 106 Cal.App.4th 458, 465-466 (*In re Jose P.*).) The same standard applies to

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4 Section 186.22, subdivision (a) defines the crime of gang participation in the following manner: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

Section 186.22, subdivision (b)(1) provides for an enhanced sentence for "any person who is convicted of 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 . . . ."

challenges to the sufficiency of evidence regarding enhancements. (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).)

Sandoval specifically argues, "[T]he shooting was based on a dispute about the failure to put gas in the victim's car. The victim was not a gang rival. Evidence of a gang motivation is too speculative to be considered solid and credible. Evidence that [Sandoval] is a gang member and committed the crime in the presence of another gang does not make this a gang crime." Pointing out the court in *Albillar*, *supra*, ruled mere gang membership does not violate the statute, he claims, "[I]t follows that a someone [*sic*] who personally commits a crime while being a member of a gang has not violated [section 186.22, subdivision (a)], unless the defendant willfully commits the crime to promote, further or assist the gang."

"The gravamen of the substantive offense set forth in section 186.22[, subdivision] (a) is active participation in a criminal street gang. We explained in *People v. Castenada* [(2000)] 23 Cal.4th 743, that the phrase 'actively participates' reflects the Legislature's recognition that criminal liability attaching to membership in a criminal organization must be founded on concepts of personal guilt required by due process: 'a person convicted for active membership in a criminal organization must entertain "guilty knowledge and intent" of the organization's criminal purposes.' [Citation.] Accordingly, the Legislature determined that the elements of the gang offense are (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) the willful promotion, furtherance, or

assistance in any felonious criminal conduct by members of that gang. [Citation.] All three elements can be satisfied without proof the felonious criminal conduct promoted, furthered, or assisted was gang related." (*Albillar*, *supra*, 51 Cal.4th at pp. 55-56.)

In sum, section 186.22, subdivision (a) does not require proof the defendant participated in a gang-related offense; rather, it only requires evidence the defendant was an active member of a gang and participated in some manner in an offense committed by a member of the gang. (*Albillar*, *supra*, 51 Cal.4th at p. 55.) In *Albillar*, three gang members participated in the rape of a 15-year-old girl. In rejecting their contention their separate convictions under section 186.22, subdivision (a) required proof the rape was gang-related, the court stated: "[T]here is nothing absurd in targeting the scourge of gang members committing *any* crimes together and not merely those that are gang related. Gang members tend to protect and avenge associates. Crimes committed by gang members, whether or not they are gang related or committed for the benefit of the gang, thus pose dangers to the public and difficulties for law enforcement not generally present when a crime is committed by someone with no gang affiliation. 'These activities, both individually and collectively, present a clear and present danger to public order and safety. . . . ' " (*Albillar*, *supra*, at p. 55.)

The testimony of gang expert Officer Ramirez established that both Sandoval and Paez belonged to different gangs. Both gangs placed a high premium on respect, and their members were expected to intimidate or harm others who disrespected them. The bond between Sandoval and Paez was strong, as evidenced by the fact they tattooed their bodies with each other's names. The jury could reasonably infer, consistent with Officer

Ramirez's testimony, that when Urbina shouted at the individuals for not putting gas in the vehicles, Sandoval believed he was being disrespected and responded by shooting Urbina so as to maintain his status for aggression, particularly because Paez, another gang member, was present. In light of *Albillar*, it was not required that the prosecutor show either that Urbina's death be gang-related, or that it was committed with another gang member.

Regarding the gang enhancement, we note, "[T]he scienter requirement in section 186.22 [, subdivision] (b)(1)—i.e., 'the specific intent to promote, further, or assist in any criminal conduct by gang members'—is unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Albillar*, *supra*, 51 Cal.4th at p. 66.) Further, section 186.22, subdivision (b)(1) does not require the specific intent to promote, further, or assist a *gang-related* crime. "The enhancement already requires proof that the defendant commit a gang-related crime in the first prong—i.e., that the defendant be convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang." (*Albillar*, *supra*, at p. 66.) Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). (*Albillar*, *supra*, at p. 63.)

Sandoval contends, "[N]either the expert's speculation about [Sandoval's] intent and the prosecutor's theory about [Sandoval] gaining respect amount to solid or credible

evidence. There was no gang conversation or gang signs in connection with the shooting. Indeed, the shooting victim and the gang member [Sandoval] was allegedly trying to impress were roommates[,] not rivals. The evidence is insufficient that the shooting was a gang crime."

As stated, Officer Ramirez testified Sandoval committed the crime for the benefit of Sandoval's gang, which would gain stature from the fact one of its members committed a vicious act to make sure the gang was respected. Further, based on the portions of Officer Oldendorf's testimony that Sandoval did not object to, it was established that different gangs sometimes worked in association with each other. The jury could reasonably conclude on this record that Sandoval committed the crime in association with a gang member as Sandoval and Paez, both gang members, had a close personal relationship. Additionally, following the crime, both Sandoval and Paez got a ride with the Tellez brothers, and later both were found by the border patrol near Texas. Moreover, because under *Albillar* it was not necessary that the offense be gang-related under section 186.22, subdivision (b)(1), it is immaterial that Paez was Urbina's roommate, or that Sandoval did not speak about gangs or flash gang signs in connection with the murder. (*Albillar*, *supra*, 51 Cal.4th at p. 66.)

Finally, in finding the enhancement true, the jury could have relied on Sandoval's confession in his letter from jail, in which he stated, "I did do what Im [*sic*] in here for." By the time he wrote that letter in December 2005, the felony complaint against him, filed in September 2005, had charged him with murdering Urbina "with the specific intent to promote, further or assist in criminal conduct by gang members" in violation of

section 186.22, subdivision (b)(1)(C). Therefore, the jury was entitled to rely on that confession in evaluating Sandoval's credibility, and in weighing all the evidence to find the gang enhancement charge against him true.

III.

Sandoval contends the court prejudicially erred because the combined effect of its instructions regarding provocation (CALCRIM No. 522) and voluntary manslaughter (CALCRIM No. 570) "misinformed the jurors that they should apply an objective standard of reasonableness when determining whether the crime was first or second degree murder."

CALCRIM No. 521 provides: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before committing the act that caused death.

CALCRIM No. 522 provides: "Provocation may reduce a murder from first degree to second degree and may reduce murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

The next instruction the court gave was CALCRIM No. 570, which described murder reduced to voluntary manslaughter due to a sudden quarrel or in the heat of passion: "The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. 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. [¶] [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether an ordinary person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for an ordinary person of average disposition to 'cool off' and regain his clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis."

Sandoval does not assert that the standard instructions were in any way individually incorrect in stating the pertinent legal principles. Instead, he argues additional instructions were needed to ensure the jury appreciated the different requirements for provocation as it impacted the degree of a murder and as it impacted the difference between murder and voluntary manslaughter.

Sandoval notes the only standard for provocation stated in the instructions was that of the ordinary reasonable person, that is, a "person of average disposition," found in

CALCRIM No. 570, which addresses reduction of murder to voluntary manslaughter. Sandoval claims the jury should have been instructed to apply a subjective test in determining whether his provocation was sufficient to negate premeditation and deliberation so as to reduce a murder from first degree to second degree. Sandoval argues CALCRIM No. 522 failed to make this distinction and the combined effect of this instruction and CALCRIM No. 570 was to advise the jury to apply an objectively reasonable standard in determining whether to reduce the homicide from first to second degree murder. Sandoval concludes the inadequate instructions effectively removed the issue of his subjective mental state from the jury's consideration.

Initially, it appears this claim has been forfeited because Sandoval failed to suggest the trial court modify CALCRIM No. 522. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language' "].) However, even if, as Sandoval claims, his substantial rights were implicated and he was not required to object at trial (*People v. Salcido* (2008) 44 Cal.4th 93, 155), his claim fails on the merits.

When we review a challenge to jury instructions as being incorrect or incomplete, we evaluate the instructions given as a whole, not in isolation, to determine whether there is a reasonable likelihood they confused or misled the jury and thereby denied the defendant a fair trial. (*People v. Letner* (2010) 50 Cal.4th 99, 182.) We also presume jurors are intelligent and capable of understanding and correlating jury instructions. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) Applying these principles here, and

considering the challenged instructions in context, we conclude CALCRIM No. 522 correctly conveyed the relevant law to the jury.

CALCRIM No. 520 instructed the jury that, in order to convict Sandoval of murder, the People were required to prove malice aforethought, which may be either express or implied. That instruction, combined with CALCRIM Nos. 521 and 522, informed the jury of the necessary mental state for first and second degree murder, and explained that provocation can mitigate first degree murder to second degree murder. Thus, there was no instructional error, and no reasonable likelihood the jury misunderstood or misapplied this instruction.

Contrary to Sandoval's argument, CALCRIM No. 570, which instructed the jury on the distinction between murder and voluntary manslaughter, did not improperly suggest to the jury that it would have to find objective provocation to reduce first degree murder to second degree murder. The objective test contained in CALCRIM No. 570 concerned only voluntary manslaughter. Thus, CALCRIM Nos. 522 and 570, taken together, told the jury provocation could negate the subjective mental state of premeditation and deliberation, but in order to reduce murder to manslaughter, the provocation must be reasonable. The clear implication is that unreasonable provocation may reduce the degree of murder. We presume the jurors were able to correlate these instructions and reach the same conclusion. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

Moreover, nothing in the argument of either the prosecutor or defense counsel suggested a different conclusion to the jury. (See *People v. Young* (2005) 34 Cal.4th

1149, 1202 ["The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury"].) Defense counsel focused on self-defense and imperfect self-defense and the prosecutor focused on first degree murder, noting Sandoval had time after the first confrontation to consider his actions, but decided to shoot Urbina. The prosecutor emphasized that Sandoval shot Urbina at such an angle that precluded any finding of imminent danger required for self-defense.[5] Thus, at trial, arguments by counsel did not lead to jury confusion on this issue.

On the record presented, there was no reasonable likelihood the jury erroneously believed only objectively reasonable provocation could reduce first degree murder to second degree murder. Because we find no instructional error, we need not address Sandoval's claim defense counsel rendered ineffective assistance of counsel in failing to request modification of CALCRIM No. 522.

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[5] The prosecutor argued, "Was it an immediate threat? No. [Urbina is] sitting in a chair. There's no evidence that the victim can cause [Sandoval] great bodily injury or death at that moment. He's seated in a chair. There's no threatening statements. There's some loud verbosity about being angry. There's no weapons, and he's shot in the back. Remember what Alfonso and Odon both said. There was no reason for this. There was no threat. If they did not perceive a threat, how could the defendant perceive a threat? There is no actual belief. There's no weapons. There's no threat. Even if—even if you believe there was some challenge to fight, that's not enough to want—have the right to or the belief—sorry, the belief to pull a gun and kill someone. [¶] Is it a sudden quarrel or heat of passion? This goes into that provocation idea. Was the defendant provoked such that he was obscured or disturbed by passion or quarrel to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly without deliberation and reflection? Did you see that in this case? No. You have no provocative statements from [Urbina]. The defendant even admitted that. Odon and Alfonso say there's no threats, weapons. There's not even a physical confrontation. No pushing. There's no punch thrown, not even a missed punch thrown. There's nothing. He's sitting in a chair and is shot in the back."

IV.

Sandoval contends that pursuant to section 654, the court should have stayed the sentence on his section 186.22, subdivision (a) street terrorism crime. Sandoval claims the court erroneously found he was punishable separately for that conviction because he had been carrying a concealed weapon on the night of the crime; however, that allegation was not charged, the prosecution expressly did not rely on it—instead relying solely on the murder as the theory of guilt—and the jury did not make a finding on it. He argues the sentence was unauthorized under *Apprendi v. New Jersey* (2000) 530 U.S. 466, which holds, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[6] (*Id.*, at p. 490.)

In imposing a consecutive sentence for the street gang conviction, the court stated, section 654 did not apply, telling Sandoval, "[W]ith all due respect . . . I really don't want to miss an opportunity to sentence you to as long as I possibly can." The court stated, "I

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6 During closing argument, the prosecutor relied on the murder being the underlying felony and told the jury: "Did [Sandoval] commit a felony or engage in felony criminal activity? Yes. Murder. That's the crime that's here. There's a couple others that you may have heard evidence of like carrying a concealed weapon in public by a gang member at the time he had this gun concealed in his waistband that whole day. So there's some other conduct you can conclude, *but I'm going to rely on the murder. That's the easiest, or manslaughter if you so determine*." (Emphasis added.)

In discussing whether to stay sentence on the section 186.22, subdivision (a) conviction, the prosecutor told the court: "[Section] 654 I would agree only applies if the court believes that the . . . felonious criminal conduct the defendant engaged in was the murder itself. If the court believes that he engaged in other felony conduct that could support that charge, which the defendant admitted to that night, which included carrying a loaded and concealed weapon, which is a felony by a gang member, then the court can find there is independent felonious conduct, and it would not be [barred by section] 654."

am finding there was independent criminal activity established at the trial to support the finding of the criminal street gang activity separate from the murder in as much as you did indicate that you had been carrying that weapon, and, in fact, that was independent criminal activity separate from the actual crime for which you were convicted in Count I."

The People acknowledge the prosecutor's concession that, if the murder is considered the underlying offense, then section 654 should apply. Nonetheless, they ask us to overlook it, arguing we should uphold the trial court's decision on the separate ground that the question of whether, and under what circumstances, a defendant may be sentenced both for street terrorism under section 186.22, subdivision (a) and for the substantive crime which serves as the predicate to a gang participation conviction is pending in the California Supreme Court in *People v. Mesa* (2010) 186 Cal.App.4th 773 (*Mesa*), review granted Oct. 27, 2010, No S185688.

Although the issue will soon be decided by the California Supreme Court, we must resolve the case before us. We conclude Sandoval's sentence for the substantive gang offense should not be stayed under section 654. We review the trial court's order for error, not its reasoning. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980–981; *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451 ["Because we review the correctness of the order and not the court's reasons, we will not consider the court's oral comments or use them to undermine the order ultimately entered"].)

Section 654, subdivision (a) provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that

provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

In *People v. Herrera* (1999) 70 Cal.App.4th 1456 (*Herrera*), the defendant was a gang member who fired three shots at a rival gang member's house from the front passenger seat of a vehicle. One bullet struck an 11-year-old boy and another bullet struck a man in the left shoulder. The vehicle made a U-turn and returned for a second pass, and approximately 10 additional shots were fired but there were no further injuries. As relevant here, the jury convicted defendant of two counts of attempted premeditated murder and one count of street terrorism, and the trial court sentenced defendant on the three counts without staying the sentence on any of the counts. (*Id*. at pp. 1465-1466.) After discussing relevant California Supreme Court case authority, the court concluded section 654 did not apply, relying on the distinctions between the requisite intents for the two crimes. The court said the crime of attempted murder required defendant to have the specific intent to kill, whereas the crime of street terrorism required defendant to have the intent to actively participate in a criminal street gang. (*Id*. at p. 1467.) In *Mesa, supra*, 186 Cal.App.4th 773, this court followed *Herrera.*

In *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*), the court disagreed with the *Herrera* court's reasoning. In *Sanchez, supra*, 179 Cal.App.4th at page 1301, a jury convicted defendant of committing a robbery with a confederate and street terrorism. In finding defendant could not be punished for both crimes, the court stated: "Here, the underlying robberies were the act that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation. Accordingly, it makes no

sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies. Gang participation merely requires that the defendant 'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of that gang . . . .' [Citation.] It does not require that the defendant participated in the underlying felony with the intent to benefit the gang. [Citations.] [¶] In our view, the crucial point is that . . . defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself." (*Id.* at p. 1315.) The court in *People v. Duarte* (2010) 190 Cal.App.4th 82 followed *Sanchez* and review of *Duarte* was granted February 23, 2011, S189174.

"To satisfy the mens rea element of murder, the defendant must personally act with malice aforethought." (*People v. Concha* (2009) 47 Cal.4th 653; §187, subdivision (a).) Separately, section 186.22, subdivision (a) is a "substantive offense whose gravamen is the *participation in the gang itself*." (*In re Jose P.*, *supra*, 106 Cal.App.4th 458, 470-471.) A defendant must have the intent and objective to actively participate in a criminal street gang, but need not have the intent to personally commit any specific felony. (*Herrera*, *supra*, 70 Cal.App.4th at p. 1467.)

When a defendant commits a crime for the benefit of a criminal street gang, he or she may have two independent but simultaneous objectives—to commit the underlying crime and to benefit the gang. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 935; *Herrera*, *supra*, 70 Cal.App.4th at p. 1468.) Thus, section 654 does not prohibit punishing a defendant both for violating section 186.22, subdivision (a), and for an

underlying offense committed for the benefit of the gang when the two offenses involve different objectives. (*People v. Ferraez*, *supra*, 112 Cal.App.4th at p. 935; *Herrera*, *supra*, 70 Cal.App.4th at pp. 1467-1468.)

Although the murder in this case was committed for the benefit of a criminal street gang pursuant to section 186.22, subdivision (b), the substantive street terrorism offense, section 186.22, subdivision (a), requires a separate intent and objective from the underlying felony committed on behalf of a gang. (*In re Jose P.*, *supra*, 106 Cal.App.4th 458, 471.) In this case, as in *Herrera*, Sandoval's active participation in a gang was a well-documented substantive offense and separate from the offenses he committed when he killed Urbina. Therefore, the concurrent term imposed on the street terrorism crime was not subject to section 654.

V.

Sandoval contends the court's imposition of a 25-year term on the firearm enhancement violates principles of double jeopardy under the federal Constitution because he received multiple punishment for his murder conviction and the firearm enhancement, despite the fact they were based on the same incident.

He acknowledges the California Supreme court has ruled against that position and declined to hold that enhancements are elements of the offense for double jeopardy purposes (*People v. Izaguirre* (2007) 42 Cal.4th 126, 130-134), and we are bound to follow that decision (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Nevertheless, he raises the issue to preserve it for further review.

Relying on the California Supreme Court cases cited above, we reject the contention.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.