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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERNEST LOPEZ, Defendant and Appellant.	B143476 (Super. Ct. No. GA 040566)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry Smerling, Judge. Modified with directions and affirmed.

C. Delaine Renard, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary E. Sanchez and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

Ernest Lopez and co-defendant Jim Valle were charged with murder (count 1), attempted premeditated murder (count 3), and deadly weapon/great bodily injury assault (count 4), all against Jose Negrete. Lopez alone was charged with possessing a firearm as an ex-felon (count 2). The Information also alleged on counts 1, 3, and 4, that Lopez personally, and a principal, used and fired a handgun inflicting great bodily injury or death, and those counts were committed for gang purposes. The Information further alleged on counts 3-4 that Lopez inflicted great bodily injury on Negrete. (Pen. Code, §§ 187, subd. (a); 664, subd. (a); 245, subd. (a)(1); 12021, subd. (a)(1); 12022.5, 12022.53; 186.22; all further undesignated section references are to the Penal Code.)

A jury convicted both men on counts 1, 3, and 4, finding count 1 to be second-degree murder and count 3 to be "simple" attempted murder. As to those three counts, the jury found a principal, but not Lopez, used and fired a handgun inflicting great bodily injury and death on Negrete. The jury found Lopez inflicted great bodily injury on Negrete in counts 3-4. The jury found the gang enhancement true on all 3 counts. The jury acquitted Lopez of count 2.

Later, the trial court granted Valle a new trial on all counts. The parties submitted Valle's new trial to the trial court on the transcript of the earlier trial. The trial court acquitted Valle of counts 1 and 3 and convicted him on count 4, but found all count 4 enhancements not true. Valle is not a party to this appeal.

Lopez received an aggregate 40 years-to-life sentence on count 1: a 15 years-to-life principal term, and a consecutive 25 years-to-life enhancement for the principal's inflicting death with a firearm. The court stayed sentence on counts 3 and 4 under section 654.

Lopez appeals. He contends the court erred in not instructing sua sponte (I) on heat-of-passion voluntary manslaughter and (II) that the given "natural and probable consequences" homicide instructions must apply to the criminal act aided and abetted. If

there is no sua sponte duty to give the second proposed instruction, Lopez contends his trial counsel was incompetent for not requesting such an instruction. Lopez further contends (III) the court gave erroneous instructions about the gang enhancement, which is not supported by substantial evidence. (IV) Lopez also contends his trial counsel was incompetent for not seeking bifurcation and a limiting instruction, and not objecting to some of the evidence supporting the gang enhancement. (V) Lopez contends the court prejudicially erred in giving CALJIC No. 17.41.1, which orders jurors to report juror misconduct to the court. (VI) Lopez contends the section 12022.53 shooting inflicting death enhancements are unconstitutional, cannot apply to attempted murder, and must be stricken because there is insufficient evidence of the underlying crimes.

We reject claims I-V. However, we agree with one argument in contention VI and strike the section 12022.53 enhancement. In all other respects, we affirm the judgment.

FACTS

On the evening of June 19, 1999, Negrete (the victim), Heidy Camacho, and sisters Faith and Marie Rodriguez attended a birthday party at co-defendant Valle's parents' San Gabriel home. Faith was the victim's girlfriend. The couple shared a house with Camacho, her boyfriend Felix Rodriguez (Faith's and Marie's brother), and Marie. Valle and Camacho were cousins. Valle had invited the group to the party. The Rodriguez sisters, Camacho, and the victim drove together to the party in Faith's car. Many other people, including Lopez and Valle's brother Jose, attended the party. Lopez, Valle's brother, and several other attendees were members of the Lomas street gang.

At the party, the victim, who was drunk, and Camacho had a verbal and physical argument because the victim objected to Camacho dancing with men, and did not want the victim to accept Valle's mother's invitation to stay overnight. The victim pulled

Camacho's hair. Unlike most of the partygoers, Valle had not seen the victim's dispute with Camacho.

Camacho, with Valle and Valle's girlfriend Berta, walked to a payphone in a parking lot a block away to telephone Camacho's mother. Camacho told Valle about her fight with the victim. Valle became angry. The victim and the Rodriguez sisters drove up to the payphone. The victim got out, argued briefly with Camacho, and returned to Faith's car. Valle approached the car and began arguing with the victim, objecting to the victim's treatment of Camacho. The victim got out of the car. Camacho and the Rodriguez sisters unsuccessfully tried to calm and separate Valle and the victim. Valle threatened the victim with a knife. Eventually, the argument became a physical fight.

Camacho told Berta to go get Valle's brother. Berta left, and within a few minutes several people from the party, including Lopez and Valle's brother, arrived and attacked the victim, who was badly beaten. Some of the attackers shouted and displayed Lomas gang slogans during the attack. More than one of the newcomers possessed firearms. Lopez and Valle's brother broke bottles over the victim's head. The coroner opined that the resulting head injuries were severe and possibly life-threatening. The victim ended up lying inside Faith's car, with others around and inside the car, continuing the attack. At least one gunshot was fired into the car, killing the victim. The gun was within 18 inches of the victim when the fatal shot was fired. When the shot was fired, Valle, Lopez, and a third man were inside or leaning into the car. After the shot, Lopez continued to hit the victim until pulled away. Lopez and the other attackers fled. Lopez had blood on his hands and clothes shortly after the shooting.

A police gang expert opined that the Lomas gang had existed for decades and currently had about 400 documented members in the San Gabriel Valley. The victim was killed in a Lomas-claimed area. Lopez was a documented Lomas member, and a leader of a group of young Lomas members who actively perpetrated robberies and violent

crimes. Three Lomas gang members were convicted of murder and assault with a deadly weapon in 1996. The expert described a type of group gang attack on one or two victims as a "rat-pack" attack.~5 RT 1900~ In such attacks, a large group of gang members attack to demonstrate their fierceness, loyalty to the gang, and willingness to participate in crime to further the gang's influence and reputation. The victims need not be rival gang members. The expert opined that Negrete was the victim of such an attack.

Neither Valle nor Lopez testified, but both presented defenses. Valle's witnesses said that although he participated in the initial attack on the victim, he had been pulled away before the fatal shot was fired. The witnesses said Valle was not a Lomas member or associate. Valle's witnesses said Lopez attacked the victim, and was leaning into the car when the shot was fired. Lopez presented a police detective who had interviewed several witnesses shortly after the crime. The detective presented some interview statements that were inconsistent with some of those witnesses' trial testimony. Specifically, Faith told the officer she did not see who broke the bottles on Negrete. Marie did not say she heard Lomas gang monikers shouted during the attack, and did not identify Lopez as participating in the attack, but only as running away after the shot. The detective did not see any injuries on Lopez' hands during Lopez' arrest.

DISCUSSION

I

The prosecution argued to the jury that Lopez, Valle, or the third man who was leaning into the car when the fatal shot was fired, actually fired the shot, but that all three were active participants in the entire attack on Negrete. As such, the prosecution argued the jury should convict Valle and Lopez of murder and attempted murder either as the shooter, or as aiders and abettors of the actual shooter. Lopez notes the jury acquitted him of the unlawful firearm possession charge, and found all the allegations that he used

or fired the gun untrue. Lopez argues these verdicts show the jury concluded he was not the shooter. Lopez then argues he could only be convicted of the murder and attempted murder as an aider and abettor of the shooter. Lopez then argues the jury could have concluded Valle was the shooter. Lopez points out the trial court, in granting Valle a new trial, stated the victim may have provoked Valle's original assault. If so, Lopez argues, Valle should have received heat-of-passion voluntary manslaughter instructions, which would have permitted the jury to find Valle guilty of those lesser-included crimes rather than the charged crimes. Had the jury so concluded, the general rule that an aider and abettor cannot be guilty of a greater crime than that committed by the actual perpetrator, according to Lopez, compels the conclusion that he could only be guilty of voluntary and attempted voluntary manslaughter. Lopez concludes the trial court prejudicially erred in not sua sponte instructing the jury on heat-of-passion voluntary manslaughter regarding the murder and attempted murder charges. The contention lacks merit.

The trial court must instruct the jury on lesser included offenses sua sponte if substantial evidence would support a guilty verdict of the lesser included crimes, even if the defendant objects or the lesser included offenses are inconsistent with his trial theory. In contrast, the trial court need only instruct on defenses sua sponte if they are supported by substantial evidence and are consistent with the defendant's case theory. (*People v. Barton* (1995) 12 Cal.4th 186, 194-198.) Both unreasonable self-defense and sudden quarrel/heat of passion voluntary manslaughter are lesser included offenses of, not defenses to, murder. (*People v. Barton, supra*, 12 Cal.4th at pp. 199-201, disapproving language in *People v. Wickersham* (1982) 32 Cal.3d 307, 329, that unreasonable self defense voluntary manslaughter is a defense to, rather than a lesser included offense of murder.)

One who kills in unreasonable but good faith belief in self-defense is guilty of voluntary manslaughter, not murder, and is entitled to such instructions. (*In re Christian*

S. (1994) 7 Cal.4th 768, 783.) Defendants seeking to mitigate intentional killings from murder to heat of passion voluntary manslaughter must demonstrate provocation and heat of passion. To be entitled to voluntary manslaughter instructions under a heat of passion theory, "the killing must be 'upon a sudden quarrel or heat of passion' (§ 192); that is, 'suddenly as a response to the provocation, and not belatedly as revenge or punishment. Hence, the rule is that, if sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter.' [Citation.]" (*People* v. *Daniels* (1991) 52 Cal.3d 815, 868.) The jury also may consider the defendant's history as an abuse victim in deciding if there was provocation. (See *People v. Berry* (1976) 18 Cal.3d 509, 514-516, 518; *People v. Borchers* (1958) 50 Cal.2d 321, 328-330.)

Valle was not entitled to heat-of-passion provocation instructions because the provocation was not objectively sufficient, and, in any event, sufficient time had passed to cool any provocative effect. Viewing the evidence in the light most favorable to Lopez' argument, as we must in deciding if there was evidence warranting a reasonable jury's acceptance, Valle did not see Negrete's argument with Camacho at the party. Valle only learned of the argument when Camacho told him about it as they walked to the payphone. The most aggravated account of the confrontation at the party was that Negrete was drunk, loudly objected to Camacho's dancing with men, pulled her hair once, and pushed or hit her once, forcing Camacho to the floor. Later, when Negrete approached them at the payphone, Negrete simply objected to Camacho's staying overnight. Negrete was not armed, and neither verbally nor physically threatened Camacho or Valle. When Valle first challenged Negrete, the latter denied showing disrespect for Camacho. As a matter of law, this evidence cannot objectively justify the use of deadly force, with either the bottle or the gun, particularly where Valle did not see the confrontation. Thus, the trial court did not err in not giving the provocation instructions.

Moreover, when the fatal shot was fired, Negrete was lying helpless in the car. Even if there was insufficient provocation before, none could have arisen when the shot rang out.

II

Regarding aiders and abettors, the trial court instructed the jury: "Persons who are involved in [committing] [or] [attempting to commit] a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or [¶] 2. Those who aid and abet the [commission] [or] [attempted commission] of the crime." (CALJIC No. 3.00 (6th ed. 1996).)~CT 148~

"A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she, [¶] 1. With knowledge of the unlawful purpose of the perpetrator and [¶] 2. With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] 3. By act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] [A person who aids and abets the [commission] [or] [attempted commission] of a crime need not be present at the scene of the crime.] [¶] [Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.] [¶] [Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]" (CALJIC No. 3.01 (6th ed. 1996).)~CT 149~

"One who aids and abets [another] in the commission of a crime [or crimes] is not only guilty of [those crimes], but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted. [¶] In order to find the defendant guilty of the crime of murder [as charged

in Count one,] you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime of assault with a deadly weapon or of attempted murder [was] committed; [¶] 2. That the defendant aided and abetted [that] crime; [¶] 3. That a co-principal in that crime committed the crime of murder; and [¶] 4. The crime of murder [was] a natural and probable consequence of the commission of the crime of assault with a deadly weapon or attempted murder. [¶] [You are not required to be unanimous in agreement as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and are in unanimous agreement that the defendant aided and abetted the commission of an identified and defined target crime and that the crime of murder was a natural and probable consequence of the commission of that target crime.] [¶] [Whether a consequence is 'natural and probable' is an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural consequence' is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen.]" (CALJIC No. 3.02 (2000 re-revision).)~CT 150-151~

Lopez argues the jury could have concluded he did not aid and abet the shooting if it believed he did not know any of the gang members was armed. Lopez continues that if the jury so found, it could have found him guilty of murder although it believed he aided and abetted only an assault with a deadly weapon. Lopez argues this would have been improper. To avoid this result, Lopez contends the trial court prejudicially erred in not sua sponte supplementing these instructions with one stating "that in order to convict Mr. Lopez of murder, it had to find that the shooting death of Negrete was a natural and probable consequence of the particular criminal act that Mr. Lopez aided and abetted."~AOB 49~ Alternatively, Lopez contends that, even if there was no sua sponte

duty to so instruct, his counsel was incompetent for not requesting such instructions. The contention lacks merit.

First, we reject the Attorney General's claim that Lopez waived the argument by not raising it below. If the court should have given the instruction sua sponte, then any error in failing to do so could be raised on appeal. (*People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7.)

The given instructions correctly state the law. The trial court identified the target crimes, both of which themselves were fully defined for the jury because both themselves were separate counts. (*People v. Prettyman* (1996) 14 Cal.4th 248, 266-274.) In essence, Lopez is asking us to change the rule that the jury need not unanimously agree on the predicate crime committed by the perpetrator. We decline, particularly since controlling Supreme Court authority prevents us from doing so.

In addition, we reject Lopez' factual argument that the jury could have found he only aided and abetted the assault with a deadly weapon. The jury convicted Lopez of felonious assault, and found he personally and intentionally inflicted great bodily injury in doing so. The jury also found Lopez committed the crimes to further the goals of a criminal street gang. The evidence demonstrated Lopez hit Negrete over the head with a bottle, causing severe and potentially life threatening injury. Lopez was leaning into the car when the shot was fired, continued to hit the victim after the fatal shot, and stopped only when he was pulled from the car. Lopez was a known and avowed Lomas member. Lomas members committed murders in the past to further the gang's objectives, and the gang expert opined that Negrete was killed in a "rat-pack" attack, the goal of which was to kill the victim to enhance the killers' gang reputation. Valle was a Lomas associate, and the gang members shouted and flashed Lomas gang signs during the attack. Gang members committed violent crimes as part of the gang's objectives. No jury could have believed this evidence, which the jury must have done to make the findings it did, yet

simultaneously believed that Lopez could reasonably have assumed that none of his fellow gang members was armed. Thus, on these facts, no rational jury could have made the findings necessary to warrant giving his desired instruction.

Thus, the trial court correctly instructed the jury in this area, and did not err in not giving the desired instruction sua sponte. Moreover, since there was no evidence justifying the instruction, the trial court should have refused such an instruction had Lopez requested it. Thus, Lopez' counsel cannot have been incompetent for not requesting an instruction that should have been refused.

III

Lopez contends the gang enhancement is not supported by substantial evidence, and the trial court erred in instructing the jury that attempted murder could constitute acts demonstrating Lomas' primary activity. The contention lacks merit.

Relevant gang affiliation and activity evidence is admissible to show identity of the perpetrator of gang crimes and motive for the crime. (Evid. Code, § 1101, subd. (b).) The evidence is subject to a balancing test and should be excluded if its probative value is outweighed by its substantial prejudicial effect. (Evid. Code, § 352.) We will not find the trial court abused its discretion in admitting gang evidence if substantial evidence supports the trial court's decision. (*People v. Champion* (1995) 9 Cal.4th 879, 921-925; *People* v. *Garceau* (1993) 6 Cal.4th 140, 176-179; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1516-1519; *People v. Plasencia* (1985) 168 Cal.App.3d 546, 552-553 [all upholding admission of relevant gang evidence]; cf. *People v. Cardenas* (1982) 31 Cal.3d 897, 904-906 [plurality opinion of three justices, not binding authority (*People* v. *Harris* (1985) 175 Cal.App.3d 944, 957), prejudicial error to admit gang evidence]; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1494-1501 [prejudicial error to admit gang evidence only to impeach part of co-defendant's testimony].) Where the "defendant

failed to object to the admission of any evidence referring to gangs, [he] thereby waiv[es] the issue on appeal [citation] . . . ." (*People* v. *Brown* (1994) 28 Cal.App.4th 591, 598, fn. omitted.)

The same standard governing general evidentiary sufficiency (*People* v. *Barnes* (1986) 42 Cal.3d 284, 303-304), applies to the evidentiary sufficiency of the criminal street gang enhancement under Penal Code section 186.22. (*People* v. *Ortiz* (1997) 57 Cal.App.4th 480, 484.)

Moreover, the gang enhancement may be proven by evidence of the current crimes as well as past conduct (*People v. Sengpodychith* (2001) 26 Cal.4th 316, 320, 322-324; *People* v. *Loeun* (1997) 17 Cal.4th 1, 4-5), and does not require a unanimity instruction. (*People* v. *Funes, supra*, 23 Cal.App.4th at pp. 1525-1529.)

Sufficient evidence supports the gang enhancement. Lopez was a known gang member and leader of the violent Lomas faction which committed robberies and other violent crimes on an on-going basis. During the attack, the Lomas gang members shouted and signaled Lomas gang signs, demonstrating the attack conformed to the expert's description of a "rat-pack" attack. The gang members joined in an attack initiated by Valle, a Lomas associate, and continued even after the fatal shot was fired. Three Lomas members were convicted of murder a few years before the attack on Negrete. This evidence sufficiently supports the enhancement.

Finally, the trial court properly instructed the jury regarding the gang enhancement, including the propriety of considering attempted as well as completed murders. (*People v. Galvan* (1998) 68 Cal.App.4th 1135, 1138-1142.)

IV

Lopez contends his trial counsel was prejudicially incompetent for not challenging some of the gang evidence. Specifically, Lopez objects to his trial attorney's failure to 1)

seek bifurcation of the gang enhancement from the underlying charges; 2) object to the gang expert's opinion that gang members would reasonably expect the victim of a "rat-pack" attack to die or suffer great bodily injury; 3) object to, and seek a limiting instruction about, the expert's testimony that Lopez was a leader of the violent group of Lomas gang members; 4) object to Valle's counsel's and the prosecutor's arguments discussing evidence of gang crimes not admitted before the jury; and 5) seek a limiting instruction that the gang evidence was admitted for limited purposes. The contention lacks merit.

"[T]he burden of proving a claim of inadequate trial assistance is on the appellant. [Citation.] Thus, appellant must show that trial counsel . . . failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, appellant must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." (*People* v. *Pope* (1979) 23 Cal.3d 412, 425.) "'It is established that reversal for ineffective assistance of counsel is generally unwarranted unless *the defendant* shows counsel's alleged failings *prejudiced* his defense. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 693-694 . . . ; *People* v. *Pope*[, *supra*,] 23 Cal.3d [at p.] 425 . . . ; [citation].)' [Citation.]" (*People* v. *Wright* (1990) 52 Cal.3d 367, 404.)

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687.) "The defendant must

show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.)

First, the record is silent regarding trial counsel's tactical reasons, if any, for his alleged failures, making review of this claim on appeal difficult. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268.)

Second, as Lopez concedes, essentially all the challenged evidence was cross-admissible to show motive on the underlying charges, as well as to prove the gang enhancement. Thus, Lopez would not have been entitled to bifurcation had he sought it. (*People v. Funes*, supra, 23 Cal.App.4th at pp. 1516-1519.) Moreover, experts can rely on hearsay for their opinions, and the court admonished the jury more than once during the testimony that the gang expert's recitation of hearsay could be considered only to determine the weight to give his opinion, not as substantive evidence. Moreover, had Lopez' trial counsel made the suggested objections, the trial court would not have abused its discretion in overruling them. Thus, regarding his first three incompetence claims, Lopez has failed to demonstrate incompetence, since, had his trial counsel made the motions he urges on appeal, none of them should have been granted. Counsel cannot be incompetent for failing to bring motions which properly would have been denied.

Valle's trial theory was that he was not a gang member or associate, fought with Negrete only over the victim's treatment of Valle's cousin Camacho, and was taken from the scene before the shooting. Valle argued Negrete's death was the result of a vicious gang attack in which Lopez played a leading role and in which he had no part. Valle's argument included allusions to what was claimed to be commonly known gang behavior, such that gangs do not care if innocent bystanders are killed during drive-by shootings, and a recent newspaper report of a gang shooting in Long Beach, none of which was in

evidence. During rebuttal argument, the prosecutor repeated some of Valle's counsel's arguments as, essentially, concessions about the evils of gang conduct. We agree with Lopez this material should not have come before the jury. The prosecutor did not introduce it. However, given the volume of properly admitted gang evidence, we cannot say these comments prejudiced the result. The jury acquitted Lopez of possessing the gun, and found he did not personally use, fire, or inflict death or great bodily injury with the gun. Thus, the jury was not so inflamed it was unable to carefully analyze the evidence and return verdicts favorable to Lopez on several counts and enhancements.

Finally, the trial court properly admonished the jury regarding the limited purposes of the challenged evidence. As Lopez concedes, the attorneys in argument repeated the limited purposes for which some of the evidence was admitted. We reject Lopez' claim that an additional instruction, given with the other concluding instructions, repeating the earlier admonishments was necessary, or, if given, would have affected the result.

Accordingly, Lopez has failed to show that his counsel failed him.

V

We recognize our Supreme Court has granted review in several cases upholding the propriety of CALJIC No. 17.41.1. Until the Supreme Court instructs otherwise, we agree with the reasoning of those cases and decline to find the instruction unconstitutional. We think the Supreme Court's recent opinion rejecting a claim that juries be instructed on nullification reinforces our conclusion and undermines that aspect of Lopez' attack on the instruction. (*People v. Williams* (2001) 25 Cal.4th 441, 447-463.)

VI

Recently, we found that where no one is convicted of both the underlying crime and the personal use section 12022.53 enhancement, the enhancement may not be imposed where only a principal has been found to have committed the enhancement.

(*People v. Garcia* (2001) 88 Cal.App.4th 794, 796-800.) Because Valle was convicted on retrial only of assault with a deadly weapon, without any enhancements, and the jury found Lopez did not possess, use, fire, or inflict death or great bodily injury with the firearm, we conclude the firearm enhancement must be stricken. The Attorney General recognizes that *Garcia* compels this result, and asks us to reconsider it. We realize our Supreme Court has granted review in *Garcia*. (Review granted Aug. 8, 2001 [S097765].) However, until we receive further guidance from the Supreme Court, we stand by our reasoning in *Garcia*.

Because of our conclusion, we need not address Lopez' remaining challenges to the section 12022.53 enhancement.

DISPOSITION

We strike the true section 12022.53 enhancement on counts 1, 3, and 4, and the resulting sentence enhancement on count 1. We remand the case to the trial court to prepare a new abstract so reflecting, and forward it to the Department of Corrections. In all other respects, we affirm the judgment.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

I concur:

VOGEL (Miriam A.), J.

MALLANO, J

I disagree with the majority opinion's conclusion that the gang enhancement is supported by substantial evidence. "To trigger the gang statute's sentence enhancement provision ([Pen. Code,] § 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang's *primary* activities is the commission of one or more of certain crimes listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322, italics added.) Although there was testimony that members of the gang, including Lopez, were very active in the commission of robberies and other violent crimes, no specifics were given as to dates or the number of crimes involved (the gang had existed for decades), save that three gang members were convicted of murder over three years earlier. This evidence, along with the present crimes, does not amount to sufficient evidence that the gang's *primary* activities were the commission of specified crimes. "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Id*. at p. 324.) Accordingly, the gang enhancement finding ought to be reversed. (This would also offer an additional ground for reversing the Penal Code section 12022.53 enhancement.)

I agree with the majority opinion that Lopez cannot complain that Valle did not receive heat-of-passion voluntary manslaughter instructions, but for a different reason. Lopez was a direct participant in a felonious assault upon the victim, even though Lopez did not shoot him. Lopez hit the victim on the head with a bottle before the victim was shot. He kicked the victim after the victim was shot. The jury found that Lopez personally inflicted great bodily injury upon the victim in connection with the attempted murder. Because Lopez was a direct participant, he cannot benefit from Valle's acting in heat of passion. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1122.)

With regard to Lopez's contention that his trial counsel was prejudicially incompetent for not challenging some of the gang evidence, I agree that Lopez's appeal must fail in this regard, because the record is silent about trial counsel's tactical reasons,

if any, for his alleged failures. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–268.) I write separately only to emphasize that objectionable gang evidence was admitted, the worst example of which was that Lopez was a leader of the "youngsters" set of the gang, which was very active in committing robberies and other violent crimes.

MALLANO, J.