Filed 4/20/11

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>TERRY ROBINSON,<br><br>Defendant and Appellant. | B223191<br><br>(Los Angeles County Super. Ct. No. NA083496) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed.

Law Office of David Andreasen and David A. Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts I through III of the Discussion.

Defendant and appellant Terry Robinson was convicted of assaulting David Moguel and Daniel Castanon with a firearm in violation of Penal Code section 245, subdivision (a)(2).[1] The jury found defendant personally used a firearm in committing the assaults (§ 12022.5) and personally inflicted great bodily injury upon Moguel (§ 12022.7, subd. (a)). The jury also convicted defendant of being a felon in possession of a firearm (§ 12021, subd. (a)(1)). The jury acquitted defendant of the attempted murders of Moguel and Castanon and found not true criminal street gang allegations. In a separate proceeding, the trial court found defendant had served a prior prison term under section 667.5, subdivision (b).

The trial court imposed a sentence of 22 years 4 months, comprised of the four-year upper term for the Moguel assault with a firearm, three years for the great bodily injury enhancement, and the upper term of ten years for the firearm use enhancement. A consecutive sentence of one year was imposed for the Castanon assault (one-third the middle term), enhanced by three years four months for the use of a firearm, and one year for the prior prison term. Sentence on the felon in possession of a firearm count was stayed pursuant to section 654.

In his timely appeal, defendant contends: (1) the trial court's limitation on the cross-examination of the prosecution gang expert was an abuse of discretion and a violation of defendant's constitutional right to present a complete defense; (2) the trial court erroneously and prejudicially permitted the prosecution to impeach defendant with his prior conviction for carrying a loaded firearm in a public place (§ 12031, subd. (a)(1)); and (3) the trial court erroneously and prejudicially permitted the prosecution to present rebuttal testimony by Viola Gutierrez. In supplemental briefing, defendant contends imposition of the enhancements for both the great bodily injury and firearm use, as to the assault on Moguel, were barred by section 654.

We affirm.

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**1** All statutory citations are to the Penal Code unless noted otherwise.

## STATEMENT OF FACTS

On the evening of October 3, 2009, just after midnight, Castanon was sitting outside his home on West Ninth Street in Long Beach with his friend Moguel. The residence was in the territory of a Hispanic street gang called Barrio Pobre. Both men are Hispanic. Moguel was drunk, but Castanon was sober. Defendant, an African-American male, approached them on foot from the alley. Moguel asked defendant, "Where are you from?" Defendant stopped, turned toward them, and said, "I'm from Insane." Castanon understood that "Insane" referred to a street gang. Moguel responded, "Fuck Insects," which was a term of disrespect for the Insane gang. Defendant turned and began to walk away in the direction of Magnolia Avenue. After walking 20 to 25 feet, defendant turned back to face Castanon and Moguel, pulled out a handgun, and fired at least five gunshots at them. Castanon heard his friend scream, "Fuck Insects."

According to Castanon, Moguel was unarmed and did not reach into his waistband prior to the shooting. Castanon ran to his neighbor's home for help; he did not realize he had been grazed in the back by a gunshot. Within a few minutes, Castanon returned to the shooting scene. Moguel was still on the steps, bleeding from a gunshot wound to his arm. The police arrived within minutes. Castanon identified defendant at a field showup shortly thereafter.

Moguel admitted being intoxicated and did not remember what he and defendant said to each other, nor did he recall what the shooter looked like. He denied ever pulling a gun out that night. Moguel understood that "Fuck Insects" was offensive and making that assertion to an Insane gang member will cause a "problem." Upon hearing it, a gang member "might actually pull out a gun and start shooting." Ordinarily, Moguel would not make such a challenge unless he was "armed and ready to get down," but Moguel was drunk that night.

Viola Gutierrez heard gunshots sometime after 12:20 a.m. from her apartment on Magnolia Avenue, which was close to the shooting scene. Within seconds, she looked out her window onto Magnolia and an alley across the street. She saw defendant run

across the street and through the front gate of her apartment complex. He had a gun in his hand and was wrapping it in a T-shirt. Gutierrez had seen defendant before that incident. Defendant entered a downstairs apartment within the complex—the unit in which Mercedes Harris (defendant's girlfriend) and her daughters lived. Gutierrez called the 911 operator and reported that an African-American ran into the Harris apartment shortly after the gunshots were fired.

Officer Lorenzo Uribe responded to the shooting scene at 12:26 a.m. Five minutes after speaking to Castanon, the officer went to the Harris apartment, where he found defendant, who matched the description of the suspect. Officer Uribe told defendant to raise his arms, but defendant began to walk away with his arms down and said, "I didn't do anything. I am here in my house. I been here all along, man." The officer and his partner opened the apartment security door, which was not locked, and detained defendant.

Officer Thomas Vriens arrived with Officer Uribe at the scene and spoke to Gutierrez at her apartment. She directed him to the Harris apartment. In a walk-in closet, the officers found a black .38 special revolver that smelled of gunpowder, indicating it had been fired recently. There were two live rounds in the weapon. The handgun was wrapped in a black T-shirt. After defendant was arrested and while the officers were removing him from the apartment, defendant yelled to Harris not to talk to the police: "You don't need to tell them shit."

Defendant was taken to the police station. During the booking process, Officer Uribe read defendant his *Miranda* rights,[2] which defendant said he understood. He admitted being a member of the Insane Crips with the moniker, "Big Gump."

Three expended .38-caliber bullet casings were found in a trash can in the alley, close to Magnolia. A damaged bullet that was consistent with having been fired from the.38-caliber revolver recovered from Harris's apartment was also recovered at the scene. One of the expended cartridge cases found at the scene had been fired from the

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

revolver. The other two could have been fired from that weapon, but were too damaged to make a conclusive determination.

The prosecution's gang expert, Detective Hector Gutierrez, had received extensive training in California street gang culture and criminal behavior, as well as participated in numerous criminal gang investigations over the past 20 years. He was familiar with the Insane Crip gang, having investigated them for nearly two decades. He had also investigated the Barrio Pobre gang. The Insane Crip gang was predominately African-American, while Barrio Pobre was Hispanic. The Insane gang had approximately 1,200 members at the time of the Moguel shooting. It had territory throughout Long Beach, and its members considered all Hispanic gangs to be rivals. Its primary activities included the commission of murders (usually the killing of rival gang members) and the sale and transportation of narcotics.

Detective Gutierrez was aware of police reports concerning defendant and had spoken to other officers about defendant. Based on the information he had received, the detective opined that defendant was a member of the Insane Crips and its clique, the Baby Insane Gang. The detective also reached this conclusion by relying on defendant's admission of gang membership during booking and the gang-related tattoos on defendant's body.

After investigating Moguel, Detective Gutierrez concluded he belonged either to the Barrio Pobre gang or the Barrio Small Town gang. He believed Castanon was either a gang member or a gang associate because he associated with gang members and dressed as one.

The detective explained that in gang culture, the question, "Where are you from?" asked whether the person addressed was a gang member and, if so, to identify the gang. The phrase was a gang challenge that can typically incite violence.

Based on a hypothetical set of facts that closely reflected the prosecution case, the detective opined the shooting was committed for the benefit of the Insane Crips because rival gang members had issued a gang challenge to the shooter. A member of the Insane Crips would be required to respond violently to the challenge. Such a violent response

not only would enhance the shooter's reputation within the gang, but would enhance the gang's reputation for violence. That, in turn, benefitted the Insane Crips by demonstrating to the community that its members were willing to commit violent acts to protect themselves and terrorize the community.

**Defense**

Defendant testified that he lived in Long Beach, outside Barrio Pobre territory. Harris, his girlfriend and mother of his daughter, lived on Magnolia within Barrio Pobre territory.[3] Defendant knew it was dangerous for him to be in a neighborhood claimed by Hispanic gangs, but Harris had called him because their daughter needed to go to the hospital the following morning. Defendant travelled most of the way by bus and was walking to Harris's apartment when he passed Moguel and Castanon, who were on the porch. Defendant did not know them and was not looking for a confrontation. Moguel, using an "aggressive" tone, asked where defendant "came from." Defendant responded, "I am not tripping," meaning that he had no gang business.

As defendant continued walking, Moguel stood up and said, "Fuck Insects," which defendant understood as an insult to his gang. Defendant said nothing and kept walking away, but looked back to keep an eye on Castanon and Moguel. When Moguel lifted up his shirt, defendant believed he "was about to grab a gun." Defendant, who had been shot before, "felt like [Moguel] was about to shoot" him. Defendant fired in Moguel's direction, aiming at his leg, and began to run away. He stopped, turned around, and fired twice more for a total of three shots from his revolver. He did not see Moguel or Castanon with a gun, but defendant heard gunshots other than his own and heard "bullets whizzing by" him. His intention was to "get [Moguel and Castanon] away from" him.

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[3] On cross-examination, he admitted two prior felony convictions—unlawful taking or driving the vehicle of another in 2009 (§ 10851) and carrying a loaded firearm in 2008 (§ 12031, subd. (a)(1)). He also admitted being a member of the Insane Crips with the moniker, "Big Gump."

He ran to Harris's apartment without knowing he had shot Moguel. Once inside, he removed three casings from the gun (leaving two live rounds in the weapon), wrapped it in a shirt, and hid it in a bag. He threw the casings in a dumpster.

Defendant denied making statements to the police officers when they arrived to arrest him.

**Rebuttal**

Gutierrez testified that "a couple days" before the shooting, she saw defendant on the street in front of her apartment building, "talking gang stuff back and forth to the Mexicans that were on the other side of the street." She was not sure who said what, but she heard "stuff" like "Insane Crips" being yelled. There were two other African-Americans with defendant. After the verbal exchange, the Hispanics went to the alley where Moguel was later shot and the three African-Americans went into her apartment complex.

## DISCUSSION

### I. Cross-Examination of the Prosecution Gang Expert

Defendant contends the trial court abused its discretion and violated defendant's constitutional right to present a complete defense by limiting the scope of cross-examination of the prosecution gang expert. The contention fails because the court's ruling was based on a reasonable application of this state's evidentiary rules, which did not prevent defendant from presenting his defense.

Our review of the record shows that Detective Gutierrez testified on direct examination that in gang parlance the question or phrase, "where are you from," is meant as a gang challenge that typically incites violence. Specifically, when a gang member addresses it to someone, he or she is asking that person about gang membership. "If you

don't come up with the right answer, there could be a verbal dispute, there could be a fight, there could be a shooting, there could be violence, and it could lead to death." The expert opined, based on a hypothetical set of facts that closely reflected the prosecution case, the shooting was committed for the benefit of the Insane Crips because rival gang members had issued a gang challenge to the shooter.

Defense counsel began his cross-examination by posing "a slightly different hypothetical," asking the expert to assume an African-American male was in "enemy territory" to visit his girlfriend in order to take their child to the doctor. Would that person have "a reasonable fear" that someone would confront, shoot, or threaten him? The trial court sustained a prosecution objection, ruling the question was an improper hypothetical question. Next, the defense asked whether it would be a threat, if a stranger challenged a person in an alley by saying, "Where are you from?" The expert agreed: "It could be, yes, sir." However, when trial counsel asked whether it would be reasonable to anticipate violent response from the stranger who made the challenge, the trial court requested a sidebar conference with both counsel. The trial court explained that the expert had no evidentiary basis for opining on what defendant was thinking prior to the shooting. At that point, there had been no testimony in support of defendant's anticipated self-defense argument to the effect that he believed the victims were preparing to shoot him.

When defense counsel resumed, he referred to the expert's testimony that the shooter possessed the weapon for the benefit of his gang and asked whether the person might have armed himself for self-protection. The trial court overruled the prosecution's objection, and the expert agreed that it was "possible." The defense adduced the expert's testimony that when a Barrio Pobre member says "Fuck Insects" to someone believed to be a member of the Insane Crips, the statement could be a threat.

As our summary makes clear, the trial court reasonably limited cross-examination based on its finding that there was no foundation for the testimony sought. California Evidence Code section 803 provides: "The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter

that is not a proper basis for such an opinion." (Evid. Code, § 803.) "A trial court enjoys broad discretion in ruling on foundational matters on which expert testimony is to be based. (*Id.*,§§ 801, subd. (b), 802; *Board of Trustees v. Porini* (1968) 263 Cal.App.2d 784, 792-794.) Our review is for abuse of discretion. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.)" (*Maatuk v. Guttman* (2009) 173 Cal.App.4th 1191, 1197.) At the time defense counsel sought to cross-examine the expert on a hypothetical set of facts reflective of defendant's anticipated defense, defendant had not yet testified. As there was no foundation for the proposed line of questioning, the trial court's evidentiary ruling was well within its legitimate discretion.

We turn to defendant's constitutional argument. "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]" (*People v. Hall* (1986) 41 Cal.3d 826, 834; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; see *People v. Mincey* (1992) 2 Cal.4th 408, 442 [the right to a defense does not include the right to present to the jury a speculative, factually unfounded inference].) Our Supreme Court recognizes that "'[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations.] [But i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' (*Chambers v. Mississippi* [(1973)] 410 U.S. 284, 302 [(*Chambers*)].)" (*People v. Ayala* (2000) 23 Cal.4th 225, 269.)

Along the same lines, the United States Supreme Court has recognized a criminal defendant's federal constitutional right to confront witnesses and present evidence in his or her favor. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 674 (*Van Arsdall*); *Chambers, supra*, 410 U.S. at p. 302.) In order to demonstrate a violation of the Confrontation Clause, a defendant must show that he or she was prohibited from engaging in "otherwise appropriate cross-examination" such that "[a] reasonable jury

might have received a significantly different impression of [the prosecution witness's] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination." (*Van Arsdall, supra,* at p. 680; *People v. Belmontes* (1988) 45 Cal.3d 744, 781, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) On the other hand, when the exclusion of evidence does not impair a defendant's due process right to present a defense, but amounts merely to the exclusion of some evidence concerning that defense, it is ordinary trial error subject to review under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

Here, the trial court's limitation on cross-examination did not violate defendant's rights to present a defense or to confront adverse witnesses. Defendant's proposed line of hypothetical questioning was subject to limitation because it lacked adequate foundation at that time. Had defendant wanted to pursue the foreclosed line of hypothetical questioning, nothing in the trial court's ruling prevented him from doing so after he adduced the evidentiary foundation in his own case.

In any event, it is not reasonably probable that defendant would have obtained a more favorable verdict had defense counsel been permitted to elicit such testimony during the prosecution case. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 998-999 (*Cunningham*).) Detective Gutierrez admitted that the statements attributed to Moguel were gang challenges and insults of the kind that typically incited violence. Defendant's appellate assertion that he would have been able to adduce an even more favorable expert opinion testimony from Detective Gutierrez is a matter of pure speculation. Moreover, defense counsel had adduced percipient witness testimony that provided support for defendant's self-defense argument. On cross-examination, Castanon said that Moguel told him that "he had been getting in fights with Black people earlier that evening" and Moguel "was kind of mad." He also admitted Moguel had been challenging defendant with his statements. Castanon expected "things might get rough" and he was "ready to get down"—meaning to have a fist fight or a fight of "some kind." Additionally, on cross-examination, Moguel admitted that "Fuck Insects" was offensive and saying it to an Insane gang member will cause a "problem." That person "might actually pull out a gun

and start shooting." Ordinarily, Moguel would not make such a challenge unless he was "armed and ready to get down," but Moguel was not in his "right senses" that night, being drunk.

Since *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Van Arsdall*, *supra*, 475 U.S. at p. 681.) "Accordingly, we hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis." (*Id.* at p. 684.) Thus, "if the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1129; *People v. Schmaus* (2003) 109 Cal.App.4th 846, 859-860.) Such was the case here.

**II. Impeachment with Prior Conviction**

Defendant contends the trial court erroneously and prejudicially permitted the prosecution to impeach defendant with his prior conviction of carrying a loaded firearm in a public place in violation of section 12031, subdivision (a)(1). The governing law is well established. "Any felony conviction necessarily involving moral turpitude may be used to impeach a witness at a criminal proceeding. (Cal. Const., art. I, § 28, subd. (f); *People v. Castro* (1985) 38 Cal.3d 301, 306 [(*Castro*)].) The admissibility of such a conviction rests with the trial court's discretion. (*Castro*, [*supra*,] at p. 306.)" (*People v. Maestas* (2005) 132 Cal.App.4th 1552, 1556 (*Maestas*).) As our Supreme Court has explained, "a trial court's broad latitude in this respect will not be upset on appeal absent a showing of abuse of discretion." (*People v. Robinson* (2005) 37 Cal.4th 592, 626.) "If a felony conviction does not necessarily involve moral turpitude, it is inadmissible for impeachment as a matter of law. [Citation.] Whether an offense constitutes a crime of

moral turpitude is a question of law." (*Maestas, supra*, at p. 1556.) "Moral turpitude is conduct that indicates dishonesty, bad character, a general readiness to do evil, or moral depravity of any kind." (*Ibid.*)

Section 12031 defines this weapons offense as the carrying of "a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory." (§ 12031, subd. (a)(1).) The crime can be a felony depending on whether various statutory conditions apply.

We need not decide whether the trial court erred in finding defendant's felony conviction a crime of moral turpitude because any error would have been nonprejudicial. The prosecution case as to the assault offenses was extremely strong, if not overwhelming. Defendant's testimony, while providing a basis for disputing the gang allegations and the element of malice as to the attempted murder counts, practically conceded the elements of the assault counts. Moreover, the prosecution introduced a second prior felony conviction for purposes of impeachment—unlawful taking of a vehicle (Veh. Code, § 10851), which defendant does not challenge. There is no reason to think impeachment with the weapon conviction made any appreciable difference in the jury's assessment of defendant's credibility.

Accordingly, there was no miscarriage of justice. (Cal. Const., art. VI, § 13 ["No judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."].) A miscarriage of justice results under California law only when the court, after an examination of the entire cause, including the evidence, is "of the opinion that it is not reasonably probable that a result more favorable to defendant would have occurred in the absence of error." (See *Castro, supra*, 38 Cal.3d at p. 319, applying *Watson, supra*, 46 Cal.2d at p. 836.)

## III. Rebuttal Evidence

Defendant argues the trial court erroneously and prejudicially permitted the prosecution to present rebuttal testimony by Gutierrez that a few days before the shooting, she saw defendant in the company of two other African-Americans having a verbal interchange with some Hispanics, in which she heard someone yell, "Insane Crips." As we explain, there was no error or significant likelihood of prejudice.

In a hearing near the start of trial, prior to Gutierrez's direct testimony, the trial court ruled the prosecution could introduce evidence concerning her identification of defendant and her statements to the 911 operator. But the trial court ruled inadmissible her statement that she had seen defendant "sometime before getting into it with people," based on the defense objection that such testimony would be "highly prejudicial."

At the close of the defense case and outside the jury's presence, the prosecution explained that it intended to call Gutierrez as a rebuttal witness in order to contradict defendant's testimony on cross-examination that he was not involved in a dispute in front of the apartment complex approximately a week before the shooting. Specifically, at the close of cross-examination, the prosecutor had asked whether in the numerous times defendant had visited Harris he "never had a dispute with anybody" near the shooting scene. Defendant said that was true. The prosecutor next asked, without objection, whether "about a week before" the shooting defendant engaged in "any kind of dispute with any Hispanics out in front of . . . Harris's apartment." Defendant denied it.

Defense counsel objected to the prosecution's anticipated rebuttal on the ground that defense counsel should have objected to the prosecution's line of cross-examination, based on the trial court's prior ruling and because the question was outside the scope of direct examination. The trial court overruled the objection, finding Gutierrez's proposed rebuttal testimony would be relevant because the circumstances had changed since its prior ruling—defendant had testified and the proffered evidence would contradict defendant's statements on cross-examination.

On appeal, defendant relies on the rule that "[b]y allowing objectionable evidence to go in without objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony. The so-called 'open the door' or 'open the gates' argument is 'a popular fallacy.' [Citations.]" (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192; *People v. Williams* (1989) 213 Cal.App.3d 1186, 1189-1190, fn. 1.) Specifically, defendant asserts the prosecution's cross-examination of defendant about the prior dispute was inadmissible because it was outside the scope of the direct examination, despite his counsel's failure to object. (Evid. Code, § 773, subd. (a).) Accordingly, he argues, that inadmissible testimony on cross-examination could not support the trial court's admission of rebuttal testimony. The argument fails because, even if there had been an objection on the ground the questioning went beyond-the-scope of direct examination, the trial court would have been within its discretion to find the cross-examination permissible.

"'Cross-examination . . . "may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given . . . on direct examination." [Citation.] The cross-examination is not "confined to a mere categorical review of the matters, dates or times mentioned in the direct examination."' (*People v. McClellan* (1969) 71 Cal.2d 793, 811.)" (*People v. Farley* (2009) 46 Cal.4th 1053, 1109 (*Farley*).) "It is settled that the trial court is given wide discretion in controlling the scope of relevant cross-examination." (*People v. Farnam* (2002) 28 Cal.4th 107, 187.) Here, during direct examination, defendant testified that he was in Barrio Pobre neighborhood for a non-gang related purpose and was not seeking any confrontation. On cross-examination, he elaborated that he visited Harris's apartment often—"hundreds of times."

In light of that testimony, the question of whether defendant's numerous visitations into Barrio Pobre territory were non-gang related became relevant. (See *Farley, supra,* 46 Cal.4th at p. 1109; cf. *People v. Steele* (2002) 27 Cal.4th 1230, 1247-1248 ["'It is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on that examination, he may be examined on redirect as to such new matter.'"], quoting *People*

*v. Kynette* (1940) 15 Cal.2d 731, 752.) We therefore cannot say cross-examination as to prior gang confrontations in that very location was outside the scope of direct examination as a matter of law. Defendant's denial of the prior verbal confrontation made Gutierrez's rebuttal testimony relevant. (*Cunningham, supra,* 25 Cal.4th at p. 1025 ["Evidence tending to contradict a witness's testimony is relevant for purposes of impeachment."].)

Moreover, the admission of the rebuttal testimony was harmless by any recognized standard. Gutierrez's testimony, even understood as impeachment evidence, bore primarily, if not entirely, on the truth of the gang allegations. However, the jury rejected those allegations as well as the attempted murder counts. That is, the jury apparently believed defendant's testimony that he was not seeking a gang confrontation and did not shoot his victims to benefit the Insane Crips. Accordingly, there is no reason to conclude the jury would have assessed defendant's credibility differently in the absence of the challenged rebuttal testimony. It follows that any error in admitting the evidence was nonprejudicial whether we apply the federal constitutional standard (*Chapman, supra,* 386 U.S. at p. 24) or the state law standard (*Watson, supra,* 46 Cal.2d at p. 836) for assessing harmless error.

## IV. Multiple Punishments

The jury found defendant personally used a firearm to commit both assault offenses within the meaning of section 12022.5 and personally inflicted great bodily injury upon Moguel within the meaning of section 12022.7, subdivision (a). In calculating defendant's sentence as to the Moguel assault, the trial court imposed the great bodily injury enhancement of three years along with the upper term of 10 years for the firearm use enhancement.[4] Defendant contends his sentence was unauthorized as a

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[4] The trial court imposed three years four months (one-third the middle term) for the firearm use enhancement as to the Castanon assault.

matter of law because section 654's proscription against multiple punishments arising out of the same criminal act applied to the firearm use and great bodily injury enhancements, requiring that the latter be stayed.

Defendant relies on the recent decision by our colleagues in the Fourth District, *People v. Ahmed* (2011) 191 Cal.App.4th 1407 (*Ahmed*), which held that section 654 applies to the weapons use and great bodily injury enhancements under sections 12022.5 and 12022.7. We agree that the issue is one of statutory interpretation, but respectfully disagree with *Ahmed*'s analysis and conclusion. As we explain, the specific provisions mandating the imposition of both enhancements (§§ 12022.5, subd. (a), 12055.7, subd. (a)), coupled with the express statutory directive within section 1170.1, subdivisions (f) and (g) that there is no limit on imposition of enhancements for both firearm use and great bodily injury, are controlling and create an implied exception to section 654 as a general statute.

"Where, as here, the issue presented is one of statutory construction, our fundamental task is 'to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.' [Citations.] We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. [Citation.] We give the language its usual and ordinary meaning, and '[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs.' [Citation.] If, however, the statutory language is ambiguous, 'we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.' [Citation.] Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. [Citations.] Any interpretation that would lead to absurd consequences is to be avoided. [Citation.]" (*Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227.)

Our Supreme Court has not resolved the question of whether section generally 654 applies to sentence enhancements. (See *People v. Rodriguez* (2009) 47 Cal.4th 501, 507 (*Rodriguez*) [holding that imposition of dual enhancements for firearm use under

§ 12022.5, subd. (a), and § 186.22, subd. (b)(1)(C), was barred by § 1170.1, subd. (f)]; *People v. Coronado* (1995) 12 Cal.4th 145, 158 [§ 654's prohibition against multiple punishment for a single act or omission does not apply to enhancements based on the nature of the offender]; *People v. Palacios* (2007) 41 Cal.4th 720, 727-728 (*Palacios*) [not reaching general question based on conclusion that the Legislature intended to "create a sentencing scheme unfettered by section 654" when it enacted § 12022.53].)

Here, in assessing whether section 654 proscribed punishment for both the firearm use and great bodily injury enhancements, we must consider a number of inter-related sentencing provisions. In so doing, we are mindful that "[w]here statutes are in conflict, it is well settled that '"'a general [statutory] provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.'"' [Citations.]" (*People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1045-1046 (*Chaffer*), quoting *People v. Superior Court* (*Jimenez*) (2002) 28 Cal.4th 798, 808.)

"Section 654 is a general statute that applies to all species of criminal conduct." (*Chaffer, supra,* 111 Cal.App.4th at p. 1045.) It provides in relevant part that "[a]n 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." (§ 654, subd. (a).) Thus, "[w]ith respect to punishment imposed under statutes that define a *criminal offense*, it is well settled that '[s]ection 654 bars multiple punishments for separate offenses arising out of a single occurrence where all of the offenses were incident to one objective.'" (*Rodriguez, supra,* 47 Cal.4th at p. 507, quoting *People v. Lewis* (2008) 43 Cal.4th 415, 519.)

In contrast to section 654's general sentencing provision, the two applicable enhancements—sections 12022.5 and 12055.7—are narrowly crafted statutes intended to apply to specific categories of conduct. (See *Chaffer, supra,* 111 Cal.App.4th at p. 1045

[construing § 12022.7 in relation to § 654].) The legislative intent with regard to those enhancement provisions could not be clearer. As to section 12022.5, subdivision (a), the Legislature's intent "is to '"deter persons from creating a potential for death or injury resulting from the very presence of a firearm at the scene of a crime"' [citation], and to '"deter the use of firearms in the commission of violent crimes by prescribing additional punishment for each use."' [Citation.]" (*In re Tameka C.* (2000) 22 Cal.4th 190, 196.) By its plain terms, the imposition of the enhancement is mandatory. (§ 12022.5, subd. (a) ["any person who personally uses a firearm in the commission of a felony or attempted felony *shall* be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense"], emphasis added.) Similarly, "[s]ection 12022.7 is a legislative attempt to punish more severely those crimes that actually result in great bodily injury." (*People v. Guzman* (2000) 77 Cal.App.4th 761, 765.) Its application is also mandatory by its plain terms. (§ 12022.7, subd. (a) ["Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony *shall* be punished by an additional and consecutive term of imprisonment in the state prison for three years."], emphasis added.)

Two other narrowly crafted sentencing provisions bear directly on this issue—subdivisions (f) and (g) of section 1170.1. The former provides: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury." (§ 1170.1, subd. (f).) Subdivision (g) operates reciprocally to provide that only the greatest enhancement for great bodily injury may be imposed for such injury on the same victim in the commission of a single offense, but that "subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm." (§ 1170.1, subd. (g).)

Thus, not only do the specific enhancement provisions of sections 12022.5 and 12022.7 mandate imposition of the respective enhancements, but section 1170.1, subdivisions (f) and (g) combine to require imposition of one firearm use enhancement and one great bodily injury enhancement in the circumstances presented here. There can be no serious questions but that section 1170.1 is a more specific statute than section 654. (See *In re Thompson* (1985) 172 Cal.App.3d 256, 261-262 [holding that any inconsistency between § 669 and § 1170.1, subd. (c), must be resolved in favor of the latter, which is the more specific statute].) Contrary to the conclusion in *Ahmed*, therefore, application of section 654 would conflict with these specific statutory directives: By the same act—firing his handgun at Moguel—defendant qualified himself for the two mandatory enhancements authorized by section 1170.1, subdivisions (f) and (g). Here, as in the typical case, where the gun use caused the great bodily injury, application of section 654's proscription against multiple punishments would nullify the intent of the more specific sentencing schemes.

The *Ahmed* court found no conflict between sections 654 and section 1170.1, subdivisions (f) and (g) because both of the latter provisions stated, "'*This subdivision shall not limit the imposition of any other enhancements applicable to that offense*, . . .'" including the enhancement for firearm use and for the infliction of great bodily injury. (*Ahmed, supra,* 191 Cal.App.4th at p. 1416, quoting § 1170.1, subd. (f).) According to *Ahmed*, the italicized language served to leave open the potential for other statutes, including section 654, to "limit the imposition of other enhancements." (*Ibid.*) We respectfully disagree. Such a reading is inconsistent with the "well-established rule . . . that the Legislature may create an express exception to section 654's general rule against double punishment by stating a specific legislative intent to impose additional punishment. [Citations.] A statute which provides that a defendant shall receive a sentence enhancement in addition to any other authorized punishment constitutes an express exception to section 654." (*People v. Ramirez* (1995) 33 Cal.App.4th 559, 572-573; see also *Palacios, supra,* 41 Cal.4th at p. 730 ["courts have repeatedly upheld the

Legislature's power to override section 654 by enactments that do not expressly mention the statute"].)

Our conclusion is bolstered by examination of section 1170.1 as a whole. Subdivision (a), which "describes the computation of principal and subordinate terms when consecutive sentences are imposed," is expressly made "'subject to Section 654.'" (*Palacios, supra,* 41 Cal.4th at p. 730, fn. 5.) In contrast, subdivisions (f) and (g), which describe the manner of imposing enhancements for firearm use and for infliction of great bodily injury, contain no reference to section 654. Had the Legislature wanted to impose an additional limit to the imposition of such enhancements, it could have easily done so. (Cf. *People v. Oates* (2004) 32 Cal.4th 1048, 1056-1057 [Finding section 12022.53 was intended to permit multiple enhancements and applying maxim of statutory construction, *expressio unius est exclusio alterius*, where "the Legislature expressly included in section 12022.53 specific limitations on imposing multiple enhancements, but did not limit imposition of subdivision (d) enhancements based on the number of qualifying injuries."].)

Defendant, however, urges we draw the contrary inference, asserting the reference to section 654 in subdivision (a) of section 1170.1 was intended to make the entire statute subject to section 654. A fundamental problem with that argument is that section 1170.1 did not make subdivisions (f) and (g) subsidiary terms with regard to subdivision (a), but rather are co-equal provisions. Moreover, our Supreme Court rejected a similar argument in *Palacios*, in which the defendant contended section 654 should apply to limit the imposition of enhancements under section 12022.53: "Defendant goes too far. Section 1170.1 describes the computation of principal and subordinate terms when consecutive sentences are imposed. The reference to section 654 in section 1170.1 simply ensures that consecutive sentences for subordinate terms do not result in multiple punishment. By including section 12022.53 as a 'specific enhancement' for purposes of section 1170.1, the Legislature was not broadly subjecting section 12022.53 to the operation of section 654." (*Palacios, supra,* 41 Cal.4th at p. 730, fn. 5.) We note that

just as section 12022.53, the enhancements under sections 12022.5 and 12022.7 are specific enhancements under section 1170.1. (§ 1170.1l.)

Finally, in light of these considerations, we see no reason to interpret subdivision (h) of section 1170.1 as imposing a "negative implication" in favor of section 654's application to subdivisions (f) and (g). (See *Ahmed*, *supra*, 191 Cal.App.4th at p. 1416.) Subdivision (h) makes it clear that section 654 does not apply in the case of violations for an offense specified in section 667.6 (prior sex offenses). In that case, "the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term." (§ 1170.1, subd. (h).) Subdivision (h) applies to a special set of circumstances different from those addressed by subdivisions (f) and (g) and was not part of the Legislature's 1997 revisions that resulted in the latter two provisions. Moreover, it is difficult to draw a clear implication of legislative intent concerning section 654's application from the proscriptive statement in subdivision (h), given the express "subject to" reference to the contrary in subdivision (a). Since the relevant portions of subdivisions (f) and (g) were enacted at a different time from the enactment of subdivisions (a) (the reference to section 654 was in the original version of the statute) and (h) (part of the 2000 revisions), it would be more sensible to infer that each subdivision stands by itself as to that question.

In sum, the trial court was authorized to impose the firearm use and infliction of great bodily injury enhancements mandated by sections 12022.5 and 12055.7, pursuant to the statutory directives in section 1170.1, subdivisions (f) and (g), because those specific provisions are controlling and create an implied exception to section 654 as a general sentencing statute.

## DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

I concur:

ARMSTRONG, Acting P. J.

People v. Terry Robinson
B223191

MOSK, J., Dissenting

I dissent.

The majority opinion and the position of the court in *People v. Ahmed* (2011) 191 Cal.App.4th 1407, 1413-1417 (*Ahmed*) both make sense. I side with the court in *Ahmed* under the interpretative device known as the rule of lenity—i.e. when as here, the "language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." (*People v. Ralph* (1944) 24 Cal.2d 575, 581; see 1 Witkin, Cal. Criminal Law (3d ed. 2000) § 24, p. 51; *People v. Avery* (2002) 27 Cal.4th 49, 58 [the rule is inapplicable "'unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguity in a convincing manner is impracticable'"]; see also *United States v. R.L.C.* (1992) 503 U.S. 291, 307 (conc. opn. of Scalia, J).)

Penal Code section 1170.1 (section 1170.1), subdivisions (f) and (g) each provides that "this subdivision shall not limit the imposition of any other enhancements applicable to that offense." Subdivision (f) adds "including an enhancement for the infliction of great bodily injury," and subdivision (g) adds "including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm." Subdivision (h) provides, "For any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term."

Thus, it is reasonable to conclude that by virtue of subdivision (h), Penal Code section 654 does not limit the enhancements that may be applied to a defendant who is convicted of one of the sexual crimes specified in Penal Code section 667.6, while subdivisions (f) and (g), unlike subdivision (h), have merely specified that "[t]his subdivision" does not limit enhancements—leaving Penal Code section 654 to limit any

enhancements. It is equally reasonable to infer that (f) and (g) remove any limitation on enhancements for the use of a dangerous or deadly weapon or infliction of great bodily injury, notwithstanding Penal Code section 654. (See *People v. Byrd* (April 7, 2011, D056974) __ Cal.App.4th __, __, fn. 9 [2011 WL 1318743].)

Certainly the Legislature wanted there to be enhanced penalties for the use of a firearm and for the infliction of great bodily injury. But the question is whether that has been accomplished without adding multiple layers of punishment for a single act.

To me, the two interpretations seem reasonable and "in relative equipoise." (*People v. Avery, supra*, 27 Cal.4th at p. 58.) Under those circumstances, I invoke the rule of interpretation discussed above and would direct the trial court to modify the judgment to stay the Penal Code section 12022.7, subdivision (a) great bodily injury enhancement connected with Count 2.

Recognizing that reasonable minds appear to differ on this issue, resolution might be appropriate by a higher authority.

MOSK, J.