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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RICKY SANDERS et al., Defendants and Appellants.	B156084 (Los Angeles County Super. Ct. No. TA059122)

APPEAL from the judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Affirmed.

Doris S. Browning, under appointment by the Court of Appeal, for Defendant and Appellant Ricky Sanders.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant Andre Donovan Sheppard.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Adrian N. Tigmo, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II through III.B.1 and III.B.3.

I. INTRODUCTION

After a consolidated trial, defendants Ricky Sanders (Sanders) and Andre Donovan Sheppard (Sheppard) were found guilty of first degree murder (Pen. Code, § 187, subd. (a)),[1] for the shooting and killing of Kevin Lenaris (Lenaris) after losing money to him in a dice game. Firearm enhancement allegations (§ 12022.53, subds. (c), (d)) were found to be true. Sanders contends that the prosecutor violated his discovery obligations under section 1054.1, and, based on that violation, the trial court abused its discretion in denying a defense request for a continuance; that his trial counsel was ineffective in failing to join the request for a trial continuance; that the trial court abused its discretion in refusing to instruct the jury with CALJIC No. 2.28 (failure to timely produce evidence); and that he was denied his right to effective assistance of counsel, due process of law, and the right to confront and cross-examine witnesses. In addition to joining these contentions (except that regarding ineffective assistance of counsel), Sheppard contends that the trial court committed prejudicial error in refusing to instruct the jury on voluntary manslaughter; that based on the doctrine of merger and section 654, it was improper for the trial court to impose a firearm enhancement under section 12022.53, subdivision (d); and the trial court should have stricken the firearm enhancement findings made under section 12022.53, subdivisions (c) and (d). We affirm the judgment. In the published portion of the opinion we hold that neither the "merger doctrine"—a felony-murder rule should not be applied when the only underlying felony committed by the defendant was assault—established in *People v. Ireland* (1969) 70 Cal.2d 522, 538-540 (*Ireland*) nor section 654—a person committing an offense punishable by multiple laws can only be punished under the one providing the longest sentence—precludes enhanced punishment for firearm use under section 12022.53, subdivision (d).

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[1] All further undesignated statutory references are to the Penal Code.

[The portions of this opinion that follow (parts II-III.B.1) are deleted from publication.]

II. FACTUAL BACKGROUND

One evening in October 2000, Lenaris, the victim, was playing dice in an apartment building with a group of men that included Sheppard and Sanders. Lenaris won money at this game.

Latoya Doss said that at some point Sheppard and Sanders left and came back wearing black clothing that she described as "war gear."[2] Someone told her that Sheppard and Sanders demanded their money back from Lenaris. Witnesses testified that Sheppard asked Lenaris where he was from, and Lenaris replied that he did not "gang bang" and that he was from nowhere; that Sheppard and Sanders began hitting Lenaris, who ran; and that both Sheppard and Sanders shot Lenaris and took his money. Before the gunshots were fired, witnesses heard someone yell, "They're fighting."

Lenaris died, having been struck on the head and shot three times, twice in the chest and once in the arm. The money he won during the dice game was not on his body.

Latoya Doss, Krishanna Jacobs, and Aaron Sherfield identified Sheppard and Sanders as the shooters in a photographic line-up. Aaron Sherfield testified that he saw Sheppard and Sanders shoot Lenaris.

In an amended information, Sanders and Sheppard were charged with murder. (§ 187, subd. (a).) The information alleged that Sheppard personally used a firearm (§ 12022.53, subds. (a)(1) and (b)), intentionally and personally discharged a firearm (§ 12022.53, subd. (c)), and intentionally and personally discharged a firearm which

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[2] Another witness, Aaron Sherfield, said that Sheppard and Sanders had not changed clothes when they returned.

caused great bodily injury and death (§ 12022.53, subd. (d)). The information contained similar allegations as to Sanders under section 12022.53, subdivisions (a)(1), (b), and (c).

Before the case was submitted to the jury, Sheppard's counsel requested the trial court to give CALJIC No. 2.28 (failure to timely produce evidence) and to instruct the jury on voluntary manslaughter. The trial court denied both requests. The jury was instructed that it could find defendants guilty of first degree murder if it believed either that the murder was committed with premeditation and was willful and deliberate or if the murder occurred in the commission of a robbery.

The jury found both defendants guilty of first degree murder and found true the firearm allegations. The trial court sentenced Sanders to 25 years to life in prison and a consecutive 20 years under section 12022.53, subdivision (c). Sanders was given 294 actual days plus 44 good time/work time days for a total of 338 days of credit. The trial court sentenced Sheppard to 25 years to life in prison and a consecutive 25 years under section 12022.53, subdivision (d). He received 330 actual days of credit plus 48 good time/work time days for a total of 378 days. As to both Sanders and Sheppard, all other firearm allegations were stayed. The trial court imposed a $200 restitution fine (§ 1202.4, subd. (b)) and a $200 parole revocation fine (§ 1202.45) on both Sheppard and Sanders.

Sheppard filed a motion for a new trial on the ground, among others, that the prosecution violated its discovery obligations under section 1054.1. The trial court denied the motion.

III. DISCUSSION

A. Sanders's Contentions

Sanders's arguments on appeal are as follows: (1) the prosecutor failed to disclose the whereabouts of prosecution witnesses in violation of section 1054.1; (2) the trial court abused its discretion in denying the defense request for a continuance based on the failure

to disclose witnesses' addresses; (3) his trial counsel was ineffective in failing to join the request for a continuance that Sheppard made; (4) the trial court abused its discretion in refusing to instruct the jury with CALJIC No. 2.28;[3] and (5) he was denied his right to effective assistance of counsel, due process of law, and the right to confront and cross-examine witnesses. Sheppard joins all contentions except those concerning ineffective counsel. We hold that because the prosecutor did not violate section 1054.1, all of Sanders's contentions fail, as do Sheppard's to the extent he joins in Sanders's contentions.

1. *Discovery events*

On February 28, 2001, Sheppard's counsel made a written informal discovery request that included a request for the names, addresses, and phone numbers of all witnesses to the alleged crime. Sheppard's counsel filed in May 2001 an additional

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[3] Sheppard's counsel requested an instruction based on CALJIC No. 2.28 be given. The requested instruction was as follows: "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. Concealment of evidence and delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the People concealed or failed to timely disclose the following evidence: [¶] 1. The addresses of witness [¶] The criminal records of the witnesses [¶] The photographs of the crime scene [¶] The chronological log prepared by Detective Smith [¶] Although the People's concealment and failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any concealment or delayed disclosure are matters for your consideration. However, you should consider whether the concealed or untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence."

request for formal discovery that also included a request for the names and addresses of witnesses.

At a pretrial conference on August 15, 2001, Sheppard's trial counsel, in the context of setting a trial date, informed the trial court that there was outstanding discovery. The prosecutor said that they should be able to resolve all discovery issues by the end of the month. The trial court then set the trial date for October 24, 2001.

On September 10, 2001, Sheppard's counsel sent a section 1054 request to the prosecutor requesting that the prosecutor provide her with, among other things, the names and addresses of witnesses he intended to call at trial, in addition to the witnesses' statements.

On October 16, 2001, Sheppard's counsel filed a motion for discovery sanctions or, in the alternative, to continue the trial. She asserted that she had requested in writing discovery. She renewed the request for current witnesses' addresses, the investigating officer's chronological log, photographs shown to witnesses, and witnesses' criminal histories. The prosecutor gave her some unmarked, undated tape recordings of interviews inculpating Sheppard. One tape recording had no sound. The investigating officer failed to appear with what was referred to as the "murder book" on October 10, 2001, but was supposed to meet with the prosecutor on October 12, 2001.

At a pretrial hearing on October 24, 2001, the prosecutor said that there was some evidence he had been trying to give to defense counsel, but he was having trouble getting in touch with the investigating officer. Based on the prosecutor's conflict with another trial, the trial court continued the trial date to November 2, 2001 and scheduled a hearing on October 30, 2001 regarding discovery. The investigating officer, Detective William Smith, was ordered to be present.

At the October 30, 2001 hearing, Sheppard's counsel told the trial court that she still did not have witnesses' addresses and the investigating officer's chronological log. The parties were going to check whether there were copies of audiotapes with sound. The investigating officer said he would provide the chronological log and witness addresses that day.

On Thursday, November 1, 2001, the prosecutor represented that the chronological log and witness information had been turned over "as of today." Detective Smith represented that audiotapes with sound had been produced, but that videotapes of Darneisha Holland and Aaron Sheffield had no sound. Sheppard's counsel also renewed her request to continue the trial on the ground that the defense did not receive the witness information until October 30. The trial court stated that it hoped someone's investigator would be trying to find the witnesses, and that it would deny the request for a continuance without prejudice until "we see where we are on" the new trial date of November 5, 2001.

On November 5, 2001, Sheppard's counsel announced she was not ready for trial because, "to the extent we got any addresses for witnesses last week," her investigator had been unable to locate anyone. Also, the investigating officer told her the week before that two of the witnesses were in jail, but counsel found out on Friday that one of the witnesses was in prison. Sheppard's counsel requested a two-week continuance to locate witnesses and interview them, as the defense had not interviewed any eyewitnesses. She also asserted that it was her position that the prosecutor was required to investigate and to find witnesses that had moved. The prosecutor said that he did not have addresses for "a lot of people" and that he was only able to contact witnesses through other people. He said that one witness was in prison and the other in county jail and that he had not interviewed witnesses. Sheppard's counsel requested that if the continuance was not going to be granted then that the defense be allowed the opportunity to talk to the witnesses before they testified. The trial court agreed to permit defense counsel to talk to the witnesses before they testified, but denied the continuance request, and scheduled the trial on the next day, November 6.

On November 6, 2001, Sanders's counsel announced ready for trial, but Sheppard's counsel announced not ready.

2. *The record does not show that the prosecutor violated section 1054.1 by withholding witnesses' addresses*

Section 1054.1 provides, in part, as follows: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial." These disclosures shall be made at least 30 days before trial. (§ 1054.7.) The defense counterpart to section 1054.1, section 1054.3, has been interpreted to require defense counsel to disclose the names and addresses of prospective witnesses "to the extent this information is known to, or reasonably accessible to, the defense." (*In re Littlefield* (1993) 5 Cal.4th 122, 131.)

Nothing in the record suggests that the prosecutor withheld the addresses of witnesses from the defense. Rather, Sheppard's counsel conceded that the defense had the names and addresses of eyewitnesses "as of the event, which is a year ago." The witnesses, however, had since moved and defense counsel did not have their new addresses. The prosecutor represented that he too did not have addresses for "a lot of people," that he had to contact them through other people, and that he had not interviewed the witnesses he had been able to locate. When the trial court asked Sheppard's counsel if it was her position that the prosecution "is required at your request to launch an investigation and try to find witnesses for you that have moved," counsel responded, "essentially, yes."

Defendants cite no authority to support that position. Section 1054.1 required the prosecutor to disclose only that information in his possession or in the possession of investigating agencies. The prosecutor here did so. Neither section 1054.1 nor *In re Littlefield, supra,* 5 Cal.4th 122, required the prosecutor to conduct an investigation for the benefit of the defense to update witness information and to determine the location of witnesses who moved since the initial disclosure. Section 1054.1 does not impose an

ongoing duty on the prosecution to provide updated information that is not in its possession: "[T]he prosecution has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense." (*Id* at p. 135.)

The prosecutor gave the defense the names of witnesses and the addresses it had for those witnesses. Although addresses of the witnesses may have changed, there is no authority suggesting that the prosecutor, even if it had such addresses, must continuously provide them to the defense absent a specific request. Also, there is no authority that the prosecutor has any duty with respect to information not in his possession.

Nothing in the record indicates that the prosecutor had in his possession the addresses of witnesses not provided to the defense. The prosecutor said he did not have current addresses for witnesses in his possession. The prosecutor also indicated that he too was unable to contact the witnesses directly; instead, he had to go through nonwitnesses to contact witnesses, and he specifically denied that he was "sitting on witnesses hiding them." That the prosecution was able to locate witnesses to call them as witnesses at trial does not show that the prosecution withheld address information from the defense, as the prosecutor said he contacted witnesses through third parties. It is not established that the prosecution actually had the addresses of these witnesses, even though the prosecution ultimately was able to locate witnesses for trial. The defense also had an investigator that could have located witnesses who had moved.

Moreover, the trial court gave the defense the opportunity to interview witnesses before they testified, but no further request for a continuance was made based on information obtained from any interviews. Instead, the theory of the defense rested on misidentification of the defendants as the shooters based on poor lighting of the area where the murder occurred and based on differing testimony from witnesses and experts as to the type of guns with which Lenaris was shot.

No constitutional violation arose because of the belated disclosure of witnesses' addresses.[4] There is no general federal discovery right. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559 ["There is no general constitutional right to discovery in a criminal case"]; *United States v. Ruiz* (2002) 536 U.S. 622, 629 [same].) There is a right, however, to the disclosure of exculpatory evidence. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437; *Brady v. Maryland* (1963) 373 U.S. 83, 87.) But reversal is permitted for nondisclosure of exculpatory evidence only under the following narrow circumstances: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282; accord, *United States v. Howell* (9th Cir. 2000) 231 F.3d 615, 624.) In the present case, there has been no showing that the nondisclosed addresses were of any exculpatory or impeaching value. Hence, there could be no federal constitutional violation.

There is insufficient evidence to warrant the imposition of statutory instruction sanction, i.e., CALJIC No. 2.28. Moreover, to impose a statutory instruction, the party proposing an instruction must show that it fully complied with its disclosure duties. (§ 1054.5, subd. (b).) The record does not reflect that such showing was made in this case.

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[4] Notwithstanding defendants' failure to object on federal constitutional grounds, we may reach the merits of the issue. (§ 1259 ["Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. . . ."]; see also *People v. Scott* (1978) 21 Cal.3d 284, 290 ["In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. . . . The transcript of the hearing on the motion to compel the examination reveals that the trial court fully understood and considered the nature of the constitutional challenges which defendant now raises"].)

Sanders did not request a continuance, and therefore, he waived any claim of error based on the denial of that request. Because we hold that the record does not show that the prosecutor violated his discovery obligations under section 1054.1 or any constitutional rights by withholding witnesses' addresses from the defense, the trial court did not abuse its discretion in denying the request Sheppard made to continue the trial.

Sanders did not establish that he was denied the right to effective assistance of counsel and to confront and cross-examine witnesses. The record is silent as to why his trial counsel did not request a continuance. Therefore, the issue is not subject to a resolution favorable to Sanders on direct appeal, unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Sanders has not sustained his burden of showing prejudice, an essential element of any ineffective assistance of counsel contention. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *Ceja v. Stewart* (9th Cir. 1996) 97 F.3d 1246, 1255.)

B. Sheppard's Contentions

In addition to joining some of Sanders's arguments, Sheppard contends that the trial court erred by refusing to instruct the jury on voluntary manslaughter. He also argues that the trial court improperly imposed enhanced punishment under section 12022.53, subdivision (d) and that the jury's findings under section 12022.53, subdivisions (c) and (d) must be stricken. We do not agree.

1. *Voluntary manslaughter*

The jury was instructed on premeditated, willful, first degree murder and felony-murder during perpetration of a robbery. The trial court denied Sheppard's request that

the jury be instructed on the lesser included offense of voluntary manslaughter based on sudden quarrel or heat of passion. Sanders joins in this argument.

A trial court has a sua sponte duty to instruct on all lesser included offenses which find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 162 (*Breverman*); see also *People v. Flannel* (1979) 25 Cal.3d 668, 684 ["Substantial evidence" is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed].) Any evidence, no matter how weak, will not give rise to a sua sponte duty to instruct on a lesser included offense. (*Flannel,* at p. 684, fn. 12.) Thus, the trial court may refuse a defense request to instruct on a lesser included offense when there is insufficient evidence to support the request. (*People v. Daniels* (1991) 52 Cal.3d 815, 868.)

Voluntary manslaughter is a lesser included offense of intentional murder. (*Breverman, supra,* 19 Cal.4th at p. 154.) Voluntary manslaughter is the unlawful killing of a human being without malice upon a sudden quarrel or heat of passion. (§ 192, subd. (a).) To determine whether a killing arises to voluntary manslaughter, the fundamental inquiry is "whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion—not necessarily fear and never, of course, the passion for revenge—to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." (*People v. Berry* (1976) 18 Cal.3d 509, 515.) "No specific type of provocation is required, and 'the passion aroused need not be anger or rage, but can be any " ' "[v]iolent, intense, high-wrought or enthusiastic emotion" ' " [citations] other than revenge [citation].' " (*People v. Lasko* (2000) 23 Cal.4th 101, 108, quoting *Breverman, supra,* at p. 163.)

Here, the evidence showed that defendants were gambling, and that they lost money to Lenaris. After leaving, defendants returned and demanded their money from Lenaris. Defendants then shot Lenaris and took his money. To support his argument that the voluntary manslaughter instruction should have been given, Sheppard relies on

evidence that before gunshots were fired witnesses heard someone yell, "They're fighting," and that Lenaris said he did not "gang bang." This evidence is insufficient to show either that defendants' reason was obscured by passion or that Lenaris did anything to create provocation sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (See, e.g., *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1703-1705 [instruction not required when a group of men, including the defendant, took the victim into the woods and killed him in retaliation for a suspected molestation of a child unrelated to defendant]; *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1551-1552 [instruction not required when evidence showed that defendant shot prostitute when she refused to perform a sexual act after having been given drugs]; *People v. Balderas* (1985) 41 Cal.3d 144, 196 [defendant who shot victim because victim resisted robbery was not entitled to voluntary manslaughter instruction].)

The evidence does not show that defendants were provoked by something other than a desire to get back the money they had lost. Such a motive will not support a voluntary manslaughter instruction. (*People v. Berry, supra,* 18 Cal.3d at p. 515.) That there may have been a fight that preceded the shooting also does not show that defendants killed Lenaris because of a sudden quarrel or heat of passion. The only evidence of a fight was testimony that someone said, "They're fighting." There was no evidence regarding the nature of any fight or how it broke out—if at all; instead, the only evidence was that defendants struck and then shot Lenaris to get their money back. In addition, evidence that defendants asked Lenaris where he was from and Lenaris's response that he did not "gang bang" does not show that Lenaris provoked defendants into acting rashly and without due deliberation and reflection.

Here the evidence was that defendants were armed, and after beating the victim, shot him and took his money. This does not suggest that the killings were done with sufficient heat of passion to constitute voluntary manslaughter. Because the record does not contain substantial evidence to show a sudden quarrel or heat of passion, the trial court did not err in refusing to instruct the jury on voluntary manslaughter.

[The portion of this opinion that follows (part III.B.2) is to be published.]

2. *Enhanced punishment under section 12022.53, subdivision (d)*

The trial court sentenced defendant Sheppard to a consecutive 25-year-to-life term under section 12022.53, subdivision (d)[5] because of his use of a firearm. Defendant Sheppard argues that because the elements of the offense for establishing premeditated and deliberate first degree murder necessarily included an intent to kill, enhanced punishment under section 12022.53, subdivision (d), which requires the discharge of a firearm causing great bodily injury or death, is precluded under the doctrine of merger and under section 654.

In *Ireland, supra,* 70 Cal.2d 522, the California Supreme Court established the merger doctrine upon which Sheppard relies. In *Ireland*, defendant shot and killed his wife. The jury was instructed that it could find defendant guilty of second degree felony murder based on the underlying felony of assault with a deadly weapon. (*Id.* at p. 538.) The Supreme Court held that the felony-murder rule could not be applied when the only underlying or predicate felony the defendant committed was assault, because the assault is an integral part of the homicide. To hold otherwise would relieve the prosecution in most homicide cases of the need to prove malice, as most homicide cases involve assault. (*Id.* at p. 539.) "This kind of bootstrapping finds support neither in logic nor in law. We therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the

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5 Section 12022.53, subdivision (d) provides as follows: "Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, and who in the commission of that felony intentionally and personally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged." (*Ibid*.) Thus, the felony of assault "merged" into the resulting homicide. This principle is referred to as the "merger doctrine" (*People v. Hansen* (1994) 9 Cal.4th 300, 311 (*Hansen*)), even though the court in *Ireland* stated, "Although we are not at this time prepared to say that the limitation which we have above articulated, when applied to fact situations not now before us, will come to assume the exact outlines and proportions of the so-called 'merger' doctrine enunciated in . . . other jurisdictions, we believe that the reasoning underlying that doctrine is basically sound and should be applied to the extent that it is consistent with the laws and policies of this state." (*Ireland,* at p. 540, fn. omitted.)

This merger doctrine has not been applied other than in the context of felony murder and assault. (*Hansen, supra,* 9 Cal.4th at p. 312; *People v. Sanders* (1990) 51 Cal.3d 471, 509, 517 [error to instruct the jury that it could convict defendant of first degree murder if it found the killing occurred during a burglary in which defendant's intent was to commit an assault]; *People v. Garrison* (1989) 47 Cal.3d 746, 778 [an unlawful entry with the specific intent to commit murder cannot support a felony-murder conviction under the doctrine of merger].) Thus far, there is no authority extending the merger doctrine to enhancements. The California Supreme Court has ruled that the merger doctrine applies to "certain inherently dangerous felonies," and permits them to be used "as the predicate felony supporting application of the felony-murder rule" only when this "will not elevate all felonious assaults to murder or otherwise subvert the legislative intent." (*Hansen*, at p. 315; see also *Ireland, supra,* 70 Cal.2d at p. 539.) A sentence enhancement does not fit within this delineation of the merger doctrine.

Also, the trial court instructed the jury to find the firearm enhancements not true if it had a reasonable doubt that the allegations were true. Thus, the "bootstrapping" concern underlying the court's decision in *Ireland, supra,* 70 Cal.2d 522, is not present in the case of enhancements. In *Ireland*, the court was concerned about eliminating the prosecution's need to prove malice in homicide cases. But in the case of the firearm enhancement, the prosecution's burden is not reduced, as the conduct underlying the

enhancement must be proven beyond a reasonable doubt. In the instant case, there was compliance with the holding of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, which is that "[o]ther 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."

Sheppard also invokes section 654,[6] which provides that a person committing an act punishable under separate laws may only be punished under the provision providing for the longest imprisonment, but not also under the other laws. Three Courts of Appeal have rejected Sheppard's argument that section 654 precludes enhancement of a sentence under section 12022.53, subdivision (d). (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1314; *People v. Myers* (1997) 59 Cal.App.4th 1523, 1529; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157-1159.) "[S]ection 654 does not bar imposition of a single firearms use enhancement to an offense committed by the use of firearms, unless firearms use was a specific element of the offense itself. Indeed, where imposition of a firearms use enhancement is made *mandatory* notwithstanding other sentencing laws and statutes, it is *error* to apply section 654 to stay imposition of such an enhancement." (*People v. Hutchins,* at p. 1314.)

Therefore, neither the merger doctrine nor section 654 precludes imposition of the firearm enhancement under section 12022.53, subdivision (d).

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[6] Section 654 provides, in pertinent part, as follows: "(a) 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. . . ." The California Supreme Court has not yet addressed whether section 654 applies to enhancements. (*People v. Jones* (1993) 5 Cal.4th 1142, 1152.)

[The portion of this opinion that follows (part III.B.2) is deleted from publication.]

3. *Jury's findings under section 12022.53, subdivisions (c) and (d)*

The jury found true the allegations under sections 12022.53, subdivisions (c) and (d), but the trial court imposed sentence only on the subdivision (d) finding. Sheppard contends that the jury's findings under section 12022.53, subdivisions (c) and (d) must be stricken as "improper multiple convictions/use findings" under the rule precluding multiple convictions for the greater and the necessarily lesser included offenses. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) He argues that if either all of the legal elements of the corpus delicti of the lesser offense are included in the elements of the greater offense or if the accusatory pleading's charging allegations include all the elements of the lesser offense, then the enhancement allegations must be stricken because they are essentially lesser included offenses of the murder charge.

Under *People v. Wolcott* (1983) 34 Cal.3d 92, Sheppard's arguments fail. In *Wolcott,* at pages 101-102, the court held that a firearm use enhancement allegation is not a part of the accusatory pleading for the purpose of defining lesser included offenses. Sheppard attempts to distinguish the majority's opinion in *Wolcott* and urges us to adopt the dissent's position. We may not do so. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, even if we assumed that a firearm enhancement under sections 12022.53, subdivisions (c) and (d) is a separate offense, it is not a lesser included offense to murder. Murder under section 187, subdivision (a), is the unlawful killing of a human with malice aforethought. Murder, however, can be committed without a firearm.

Therefore, we hold that the jury's findings under section 12022.53, subdivisions (c) and (d) need not be stricken.

[The remainder of this opinion is to be published.]

IV. DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

MOSK, J.

We concur:

TURNER, P.J.

ARMSTRONG, J.