Filed 12/9/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. EARL COBB, Defendant and Appellant.	B170957 (Los Angeles County Super. Ct. No. YA054539)

APPEAL from the judgment of the Superior Court of Los Angeles County. John V. Meigs, Judge. Affirmed with modifications and directions.

Raymond L. Girard, 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, Senior Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 1,2, 4, and 5 of Discussion.

Defendant and appellant Earl Cobb appeals from the judgment entered following a jury trial that resulted in his conviction of first-degree murder.[1] He contends: (1) he was denied due process as the result of an unduly suggestive pretrial identification procedure; (2) there was insufficient evidence that defendant was the direct perpetrator and no aiding and abetting instruction was given; (3) multiple enhancements under section 12022.53 subdivisions (d) and (e)(1) were barred by sections 654 and 12022.53, subdivision (f); (4) the sentence imposed constitutes cruel and unusual punishment; and (5) he was denied due process because the reasonable doubt instruction given was inadequate. We modify the judgment and affirm it as so modified.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053 (*Kraft*)), the evidence established that East Arbor Vitae Street in Inglewood is in an area claimed by the criminal street gang known as the Raymond Avenue/Osage Legend Crips (the Crips). The criminal street gang known as the Queen Street Bloods (the Bloods), of which defendant was a member, claimed an area just north of that claimed by the Crips. On January 17, 2002, the Crips and Bloods were "at war."

At 7 p.m. that day, Detective Kerry Tripp was investigating the shooting of Blood gang member Colbert Huff, which had just occurred at Inglewood Avenue and Queen Street. Defendant, wearing a black t-shirt over a red t-shirt, was one of the people

---

[1] Defendant was charged by information with the first degree murder of Shawn Quash. (Pen. Code, § 187, subd. (a)) (all further undesignated section references are to the Penal Code). Both personal firearm use enhancements and firearm use by a principal enhancements were alleged pursuant to section 12022.53, subdivisions (b), (c), (d) and (e)(1). It was further alleged that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury found true each of the section 12022.53 enhancements, as well as the section 186.22 enhancement. Defendant was sentenced to 75 years to life in prison, comprised of 25 years to life for the murder, plus consecutive 25-year enhancements pursuant to section 12022.53, subdivision (d) [personal firearm use causing great bodily injury or death] and section 12022.53, subdivisions (d) and (e)(1) [a principal used a firearm causing great bodily injury or death].

gathered at the scene.[2] He appeared particularly upset, crying and asking whether Huff would live. Also present at the scene was Huff's wife, Maria Jeffrey. Huff's killer was never identified.

At about 8 p.m., Jacqueline Mendez was walking home on Arbor Vitae Street when she noticed three men standing directly under a street light at the corner of Arbor Vitae and Osage Streets. Believing the men were "up to no good," Mendez took out a can of mace and watched them as she walked. Across the street from these three men, Mendez saw her neighbor, Barbara Turner, walking with Turner's boyfriend, Shawn Quash. Mendez watched as the three men walked into the middle of the street, exchanged words and hand gestures with Quash, then all three pulled out guns and fired multiple times at Quash.[3] When the shooting started, Mendez hid behind a parked truck. She heard about 15 shots fired before the three men ran past her to a car parked on Osage Street, got in and drove away.[4] Mendez, who only saw the three assailants from the side,

---

[2] Members of the Bloods typically wore multiple t-shirts layered over one another, one of which was usually red.

[3] An autopsy revealed that Quash suffered seven gunshot wounds, two of which were fatal. Several bullet fragments were recovered from Quash's body. Nineteen cartridge casings were discovered at the scene, but were not tested for fingerprints. Of those 19 cartridges, 13 were 9-millimeter caliber and six were .380 caliber. The six .380 caliber cartridges were of two different makes: one was stamped "G.F.L." and the other five were stamped "Winchester." The firearms used in the shooting were never recovered, but tests on the casings and bullet fragments established that two guns had been used in the shooting: a 9-millimeter and a .380 caliber. Bullet fragments in Quash's body came from both types of firearms, although the type of weapon(s) that caused the fatal head wounds could not be determined. In a search of defendant's home following his arrest, two .380 caliber cartridges stamped "G.F.L." were found.

[4] As the three men ran toward their getaway car, one of them slipped. Mendez saw this man touch the floor to right himself, but did not notice whether or not he touched any of the nearby parked cars. Defendant's palm print was lifted from the hood of a Toyota Camry which had been parked behind the getaway car. There was no way to determine how long defendant's palm print had been there, but the Toyota was very dusty and there was no dust on the palm print. When the owner of the Toyota parked it there at about 7:15 p.m., he did not notice the palm print.

described them to the police as "tall" and wearing dark gray clothes, but was unable to provide a more detailed description. She did not identify anyone from the photographic lineups shown to her by the police, and could not identify defendant in court.

Turner was standing with Quash on Osage Street when she saw three men approach. Because he was in the middle and shorter and thinner than his companions, Turner's attention focused on defendant, who was wearing a red t-shirt underneath a black t-shirt.[5] One of the three men, Turner could not recall which, said, "What's up dawg? Don't you remember us?" When Quash started to run, defendant said, "This is Bloods," and pulled out a gun. The man on defendant's right also pulled out a gun and both started shooting at Quash. As soon as she saw the guns, Turner ran and hid behind a trashcan. She heard between 12 and 13 shots fired. When she returned to the street after the shooting had stopped, the three men were gone. Tripp opined that Quash was shot in retaliation for the Huff shooting.

The day after the shooting, Turner showed Detective Stephen Seyler a photograph of Paul Cole which she had torn from a high school yearbook, and told him that she thought Cole might have been the shooter in the middle. The next day, Seyler compiled two photographic lineups. The first contained six pictures, including defendant's in position No. 1 and Cole's in position No. 5 (the 6-pack). The second contained 16 pictures, including defendant's in position No. 9 (the 16-pack). After first tentatively identifying Cole as the shooter in the middle, Turner changed her mind and positively identified defendant. She also positively identified defendant in court.

In defense, Maria Jeffrey testified that after she learned her husband, Huff, had been shot at about 7 p.m., she went to the scene of the shooting. There, she encountered defendant, whom she had never before met. A friend drove Jeffrey, defendant and another friend to Martin Luther King Hospital, where they arrived at some time between 7:45 and 8 p.m. and went directly to the trauma waiting room. Shortly before 8 p.m.,

---

[5] In a search of defendant's home after his arrest, police found a red and a black t-shirt, both inside out as though they had been recently taken off.

defendant left the trauma waiting room. When Jeffrey left the waiting room at about 8 p.m. to greet Huff's parents, she saw defendant sitting in the general waiting room. Jeffrey returned to the trauma waiting room, followed by defendant a few minutes later. At about 9 p.m., Jeffrey saw defendant standing outside with Huff's mother. That night, Jeffrey left the waiting room a number of times. Six or seven of those times, Jeffrey saw defendant in the hospital. Jeffrey particularly noticed defendant because his appearance--big, long-sleeved red t-shirt and big afro--stood out. When Jeffrey left the hospital at 3 a.m., defendant was still there.

At 7 p.m. that night, Huff's mother, Eilene, received a call from Jeffrey, informing her that Huff had been shot. When Eilene arrived at the hospital at 8:10 p.m., she met Jeffrey near the trauma waiting room. During the ensuing evening, Eilene noticed defendant in the waiting room. Shortly before 9 p.m., defendant left the waiting room. When Eilene went outside a few minutes before 9 p.m. to use her cell phone, she saw defendant standing outside. Eilene also saw defendant when she went outside to make another call at 10:26 p.m. Eilene saw defendant at the hospital several times that night.

DISCUSSION

1. *The Pre-Trial Identification Process was not Unreliable Under the Totality of the Circumstances*

Defendant contends he was denied due process as a result of the admission into evidence of Turner's pretrial and in-court identifications of him as the shooter in the middle. He argues that the in-court identification was tainted by the pretrial identification, which was unduly suggestive for two reasons: (1) Turner identified him only after she was told that Cole, whom she initially identified, could not have been involved because he was incarcerated at the time; and (2) defendant's picture was included in both the 6-pack and the 16-pack.[6] Apart from whether the pretrial

---

[6] Defendant's pre-trial motion to exclude this evidence was denied.

identification procedure was unduly suggestive, we find the resulting identification was not unreliable under the totality of the circumstances.

". . . Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable. [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 123 (*Yeoman*).) "To determine whether a procedure is unduly suggestive, we ask 'whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citations.] . . . To use a suspect's image in successive lineups might be suggestive if the same photograph were reused or if the lineups followed each other quickly enough for the witness to retain a distinct memory of the prior lineup." (*Id.* at p. 124.)

In determining whether the identification resulting from an unduly suggestive lineup is unreliable, we consider the "totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) To warrant a reversal of a conviction on this ground, it is the defendant's burden to establish a substantial likelihood of irreparable misidentification under the totality of the circumstances. (*Ibid*.)

Here, Turner described the incident to the police on the night of the shooting. Based on a conversation she had with someone, Turner later looked at an old high school yearbook because she knew the shooters were Bloods and she believed they would be pictured in the yearbook. Turner tore out a picture of Cole and brought it to Seyler. She told Seyler that the person in the picture might be one of the people who shot Quash. The next day, January 22, 2002, Seyler showed Turner the 6-pack. Turner told Seyler that she thought the person depicted in position No. 5 on the 6-pack might be the middle shooter, but also that position No. 1 (defendant), was a possibility. After Turner made her identification from the 6-pack, Seyler showed her the 16-pack to see if she could identify

the other two assailants. From the 16-pack, Turner identified defendant as someone involved in the attack. She then asked to look at the 6-pack again because she had developed doubts about her identification of No. 5 from the 6-pack as the middle shooter. Turner commented that No. 1 (defendant) and No. 5 (Cole) looked alike. She concluded that she was wrong about her identification of No. 5 and that No. 1 on the 6-pack, defendant, was the shooter in the middle. It was only after she had identified defendant on both the 6-pack and the 16-pack that Seyler told Turner that the person depicted in position No. 5 on the 6-pack was in jail and could not have been any of the three men Turner saw that night.[7] Only defendant was pictured on both the 6-pack and the 16-pack. Turner asked to see the 6-pack again after looking at the 16-pack because she realized that defendant was also pictured in the 6-pack.

Although there is no evidence the *same* picture of defendant appeared in both lineups, there is no dispute that defendant was depicted in both the 6-pack and the 16-pack. Moreover, Seyler showed Turner the 16-pack immediately after showing her the 6-pack. For these reasons, the photographic lineup was arguably unduly suggestive. (Compare *Yeoman, supra*, 31 Cal.4th at p. 124 [identification procedures not suggestive where different photographs of the defendant appeared in two lineups shown to the witness a month apart].)

We find Turner's identification of defendant was nevertheless reliable under the totality of the circumstances. The three assailants were standing directly under a street light before they crossed the street and came towards Turner and Quash. They were just 10 feet away from Turner when they stopped and pulled out their guns. Turner was able to observe them for about 30 seconds before the shooting started. During that time, Turner's attention was particularly focused on defendant because he looked dissimilar from his two companions. She looked at the photographic lineups just a few days later.

---

[7] At a previous hearing, Turner testified that Seyler told her the person depicted in position No. 5 was incarcerated immediately after she identified him and before she identified defendant in position No. 1. Also at a previous hearing, Turner testified that she felt self-induced pressure to pick someone.

Turner was positive of her pre-trial and courtroom identifications of defendant. Under this totality of circumstances, we find Turner's identification of defendant reliable despite any suggestiveness of the pretrial photographic lineup.

2. *The Judgment is Supported by Substantial Evidence*

Defendant contends that his conviction for first-degree murder and the true finding on the section 12022.53, subdivision (d) enhancement allegation that he personally used/discharged a firearm causing great bodily injury and death are not supported by substantial evidence. He argues that those findings can only be supported on an aiding and abetting theory but the trial court failed to give CALJIC No. 3.01 defining aiding and abetting and compounded this error by giving CALJIC No. 8.25 (lying in wait) where there was no evidence to support the giving of this instruction.[8] We conclude substantial evidence supports the finding that defendant was the shooter; hence the trial court correctly did not give the aider and abettor instruction.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a

---

8 Defendant's argument is premised in part on his contention that evidence of Turner's identification should have been excluded and without that identification, there was no evidence defendant was the shooter in the middle. But we have found Turner's identification was properly admitted into evidence.

reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" ' [Citation.]" (*Kraft, supra*, 23 Cal.4th at pp. 1053-1054.)

Here, the prosecution presented two theories of first-degree murder: a deliberate and premeditated killing (CALJIC No. 8.20) and lying in wait (CALJIC No. 8.25).[9] To prove deliberation and premeditation, it is not necessary to prove the defendant "maturely and meaningfully reflected upon the gravity of his or her act." (Pen. Code, § 189.) Premeditation may be inferred from a variety of circumstances including, but not limited to, the defendant's conduct at the time of the killing. (See *People v. Theriot* (1967) 252 Cal.App.2d 222, 238.) In *People v. Anderson* (1968) 70 Cal.2d 15, our Supreme Court identified three categories of evidence as pertinent to the determination of whether there was deliberation and premeditation: (1) planning activity; (2) motive; and (3) that the manner of killing was according to a preconceived plan. (*Id.* at p. 27.) Typically, a verdict predicated upon a finding of premeditation and deliberation will be sustained when it is supported by some evidence from all three categories, by extremely strong evidence of planning, by evidence of motive and planning, or by evidence of motive and manner of killing. (*Ibid.*) Motive may be inferred from evidence that the defendant and the victim were members of rival street gangs. (See, e.g., *People v. Sandoval* (1992) 4 Cal.4th 155, 175; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192; *People v. Wells* (1988) 199 Cal.App.3d 535, 541.) A manner of killing indicating that the defendant acted according to a preconceived design can be inferred from evidence that multiple shots were fired at close range (see, e.g., *People v. Thomas* (1992) 2 Cal.4th 489, 518; *People v. Francisco, supra,* 22 Cal.App.4th at p. 1192), and from the absence of any provocation by the victim (*People v. Miller* (1990) 50 Cal.3d 954, 993; compare,

---

9 It was not necessary for the jury to agree on which of the prosecution's alternate theories of first-degree murder their verdict was based. (*People v. Carpenter* (1997) 15 Cal.4th 312, 394-395; see also *Schad v. Arizona* (1991) 501 U.S. 624, 632.)

e.g., *People v. Velasquez* (1980) 26 Cal.3d 425, 435 [sudden killing in the course of an argument and struggle does not constitute premeditated murder], with *People v. Boyd* (1985) 38 Cal.3d 762, 769-770 [only evidence of argument or struggle consisted of the victim pushing the weapon away]).

Here, the evidence established that a few hours after defendant's fellow gang member was shot, defendant and two companions were armed when they went into rival gang territory, stood on a street corner for an unknown amount of time before approaching a couple walking on the street and, without any provocation, fired multiple rounds at the man after identifying themselves to the victim as Bloods. Bullets of two different calibers were found in Quash's body, shell casings of the same two calibers were found at the scene and ammunition of the same two calibers, including some by the same manufacturer as those found at the scene, were found in a search of defendant's home. From this evidence the jury could reasonably infer motive, manner of killing and planning sufficient to support a conviction for deliberate, and premeditated first-degree murder as well as that defendant personally discharged a firearm causing great bodily injury and death.

It is immaterial that the jury may have concluded otherwise based on the same evidence. Where evidence is "susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]" (*Kraft, supra*, 23 Cal.App.4th at pp. 1053-1054.)

Contrary to defendant's assertion, inasmuch as there was substantial evidence that defendant was a direct perpetrator and given that he was not charged as an aider and abettor, the trial court was not required to give an aiding and abetting instruction.

We also find no merit in defendant's related argument that the trial court erred in giving CALJIC No. 8.25, defining lying in wait, because there was no evidence of lying in wait. According to CALJIC No. 8.25: "Murder which is immediately preceded by lying in wait is murder of the first degree. [¶] The term 'lying in wait,' is defined as a waiting and watching for an opportune time to act, together with a concealment by

ambush or by some other secret design to take the other person by surprise . . . . The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation. [¶] The word 'premeditation' means considered beforehand. [¶] The word 'deliberation' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." The defendant need not be literally concealed from the victim's view." (See also *People v. Sassounian* (1986) 182 Cal.App.3d 361, 406-407.) Rather, concealment "may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares even though he sees his murderer." (*People v. Ward* (1972) 27 Cal.App.3d 218, 230.)

Here, from evidence that defendant and his companions were armed with concealed weapons while standing on a street corner in rival gang territory, at night, the jury could reasonably infer that they were waiting and watching for an opportune time to ambush someone they believed might be a rival gang member. This evidence was sufficient to warrant the giving of CALJIC No. 8.25.

3. *Multiple Section 12022.53 Enhancements*

For the first time on appeal, defendant contends the trial court erred in imposing one 25-year enhancement pursuant to section 12022.53, subdivision (d) for defendant's *personal* use of a firearm causing great bodily injury or death, and a second 25-year enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1) for defendant's *vicarious* liability for a principal's use of a firearm causing great bodily injury or death. He argues that the imposition of both enhancements violates the section 12022.53, subdivision (f) (§ 12022.53(f)) proscription against multiple enhancements, as well as section 654. The People counter that the subdivision (f) proscription should not apply to a "group shooting" where two crimes were committed: one by the defendant and one by

the accomplice(s).[10] The People analogize such a "group shooting" to the multiple victim situation, which the court in *People v. Oates* (2004) 32 Cal.4th 1048, 1066 (*Oates*), found was not subject to the section 12022.53(f) proscription against multiple enhancements.[11] We conclude that the analogy is inapt and no "group shooting" exception is warranted in this context where there was only one victim.

Section 12022.53 prescribes substantial sentence enhancements for using a firearm in the commission of certain listed felonies, including murder. Three subdivisions of section 12022.53 are germane to our analysis. Subdivision (d) of the statute provides for an additional consecutive 25 year to life prison term for any person convicted of murder "who in the commission of a felony . . . *personally* and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice . . . ." (§ 12022.53, subd. (d), italics added.) Subdivision (e)(1) imposes vicarious liability under section 12022.53 "on aiders and abettors who commit crimes in participation of a criminal street gang." (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171.) The subdivision (e)(1) enhancement provides for an additional consecutive 25 year to life prison term for "any person who is a *principal* in the commission of an offense if both of the following are pled and proved: (A) The person violated subdivision (b) of Section 186.22 [street gang participation]. (B) Any principal in the

---

10 The People argue: "In such cases, an enhancement is warranted 'per person' (§ 12022.53, subd. (f)), or per direct participant. Indeed, in such a case, more than one crime occurs; that is, while one person is the actual killer in the sense that his or her bullet caused death, other shooters are merely guilty of lesser related or included crimes."

11 At the trial, the prosecutor urged the trial court to impose both a subdivision (d) and a subdivision (e)(1) enhancement because Quash was "shot with multiple guns and multiple bullets from multiple people . . . ." On appeal, the People explain: "[W]hen a defendant participates in a group shooting and it is unclear which shooter inflicted death and which inflicted great bodily injury, the defendant should receive multiple enhancements under subdivisions (d) of section 12022.53 for his conduct and that of a principal." As we understand this argument, it is that a defendant convicted of committing a crime involving multiple perpetrators should be treated the same as a defendant convicted of committing multiple crimes.

offense committed any act specified in subdivisions (b), (c) or (d)." (Italics added.) Finally, subdivision (f) of section 12022.53 provides: "Only one additional term of imprisonment under this section shall be imposed *per person for each crime*. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment." (Italics added.)

In *Oates*, the defendant was convicted of five counts of attempted premeditated murder based upon evidence that he fired two shots at a group of five people, hitting and injuring just one of them. (*Oates, supra,* 32 Cal.4th at p. 1052.) Our Supreme Court rejected the defendant's contention that the number of subdivision (d) enhancements imposed should be limited to the number of great bodily injuries inflicted. (*Id.* at p. 1056.) It reasoned that the subdivision (d) enhancement applies where a defendant's discharge of a firearm causes great bodily injury to *any person*, not just the intended victim of the underlying crime. The court held that, because subdivision (f) of section 12022.53 requires "one additional term of imprisonment" to be "imposed for each crime," a subdivision (d) enhancement was required to be imposed for each attempted murder conviction, even though only one person suffered great bodily injury. (*Ibid.*) "Had the Legislature wanted to limit the number of subdivision (d) enhancements imposed to the number of injuries inflicted, or had it not wanted subdivision (d) to serve as the enhancement applicable to each qualifying conviction where there is only one qualifying injury, it could have said so." (*Ibid.*) "[T]he Legislature specifically considered the issue of multiple enhancements and chose to limit the number imposed 'for each crime,' not for each transaction or occurrence and not based on the number of qualifying injuries. 'Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary. [Citation.]' [Citation.] Here, there is no evidence of a contrary legislative intent. Nor is there any reason to believe the Legislature simply overlooked the kind of factual scenario at issue here, which is not particularly unusual." (*Id.* at p. 1057.)

Oates does not support the People's reading of the phrase "per *person* for each crime" in subdivision (f) to mean "per *direct participant* in each crime." On the contrary, inasmuch as the "group shooting" exemption urged by the People is not specified in the statute, under *Oates,* we may not imply that additional exemptions apply absent a clear legislative intent to the contrary. The People have demonstrated no such legislative intent.

The People's reliance on *People v. Corona* (1989) 213 Cal.App.3d 589 (*Corona*), is also misplaced. In that case, a section 12022.7 [personal infliction of great bodily injury] enhancement was imposed based upon evidence that Corona was one of a group of between six and eight men who kicked and beat Michael Golden, causing him great bodily injury. (*Id.* at pp. 591-592.) The court in *Corona* rejected Corona's contention on appeal that the evidence was insufficient to support the enhancement because there was no evidence he personally inflicted any particular injury on Golden. (*Id.* at p. 593.) It explained that a defendant who is guilty as an aider and abettor but strikes no blow is not liable under section 12022.7. (*Id.* at pp. 593-594, citing *People v. Cole* (1982) 31 Cal.3d 568 [robber who orders his accomplice to assault victim not liable under § 12022.7 because, for enhancement to apply, accused must be the person who directly acted to cause the injury].) But, "when a defendant participates in a group beating and when it is not possible to determine which assailant inflicted which injuries, the defendant may be punished with a great bodily injury enhancement if his conduct was of a nature that it could have caused the great bodily injury suffered." (*Corona, supra,* at p. 594.) *Corona* does not support the proposition, urged by the People, that a defendant is subject to multiple enhancements because he was one of several participants each of whom engaged in conduct that may have caused injuries to a single victim. Rather, it stands for the proposition that a defendant cannot insulate himself from criminal liability by being one of multiple participants even when proof of the precise level of culpability is wanting.

We conclude that the trial court erred in imposing both section 12022.53 enhancements.[12] We order the abstract of judgment modified accordingly.

4. *Defendant's Sentence Does Not Constitute Cruel and Unusual Punishment*

Defendant contends the sentence imposed upon him constitutes cruel and unusual punishment under both the California and United States Constitutions.[13] He argues that it is out of proportion to the crime and to defendant's individual culpability, as well as disproportionate when compared with the punishment for other crimes in California. He further argues that section 12022.53, both on its face and as applied to defendant, constitutes cruel and unusual punishment. We disagree.

A punishment may violate the California constitutional prohibition against cruel or unusual punishment if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. [Fn. omitted.]" (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*); see also *People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*); *People v. Cox* (1991) 53 Cal.3d 618, 690 (*Cox*).) Our Supreme Court in *Lynch* articulated a three-prong approach to administer this rule: (1) examination of the nature of the offense and the offender; (2) comparison of the challenged punishment with the penalty for more serious crimes in the same jurisdiction; and (3) comparison of the challenged punishment with the penalty for the same offense in different jurisdictions. (*Lynch, supra,* at pp. 425-427.)[14] In *Dillon*, our Supreme Court

---

[12] Inasmuch as we have found multiple enhancements were proscribed by subdivision (f), we need not resolve whether they were also proscribed by section 654.

[13] As a result of our conclusion that the trial court erred in imposing two section 12022.53 enhancements, defendant's sentence will be modified to 50 years to life. We presume that defendant wishes to make the same argument against a 50 year to life sentence as he did to the 75 years to life sentence.

[14] In *People v. Weddle* (1991) 1 Cal.App.4th 1190, footnote 2 (*Weddle*), the court explained that *intracase* proportionality means an analysis based on the nature of the offense and the offender (i.e., the first prong of the *Lynch* test) and that *intercase* proportionality means comparing the challenged sentence to the penalty for other crimes

clarified that courts must consider the nature of the offense both in the abstract--that is, as defined by the Legislature--and under the totality of the circumstances surrounding its actual commission in the case at bar. Likewise, courts must consider the nature of the offender in concrete terms including his age, prior criminality, personal characteristics and state of mind. (*Dillon, supra,* at pp. 478-479.)

Applying this technique here, we note that the sentence as now modified of 50 years to life was imposed not only on the offense of first degree murder, but also because defendant personally discharged a firearm causing great bodily injury or death to his victim. There was no evidence of any provocation before defendant and his companions ambushed the victim at night on a public street, firing multiple rounds at him from close range. As for defendant's nature, we find no mitigating factors here; nor does defendant's brief on appeal suggest any. Defendant was 19 years old when he committed the charged offense. He was an active gang member with a criminal history involving

---

in the same jurisdiction and to the penalty for the same crime in other jurisdictions (i.e., the second two prongs of the *Lynch* test). Citing language in *Cox, supra*, 53 Cal.3d at p. 690, that the Eighth Amendment does not mandate "intercase proportionality review," the court in *Weddle* concluded that comparative, intercase proportionality review is not required under the California Constitution. (*Weddle, supra,* at p. 1196.) It noted that, although *Lynch* is authority for intercase proportionality review, and *Dillon* cited this method with approval, it did not rely on intercase proportionality review in determining the sentence in that case to be disproportionate. "While neither *Lynch* nor *Dillon* has been expressly overruled to the extent they validate intercase or comparative proportionality review, later cases have clearly held, at least in the context of the death penalty, that such review is not *required* by our Constitution. [Citation.]" (*Id.* at p. 1198, fn. 8.) Accordingly, the court in *Weddle* declined to engage in any intercase proportionality review. Here, defendant makes no argument to support his contention that his sentence is disproportionate under the third prong of *Lynch*, accordingly we do not address this contention. We do, however, discuss--and reject--defendant's argument under the second prong of *Lynch* that the sentence is disproportionate because other similar crimes, such as infliction of great bodily injury with a knife rather than a gun, would have garnered a less severe sentence.

firearms.[15] (Compare *Dillon, supra*, 34 Cal.3d 441 [reduction in degree of murder justified by fact that defendant was an immature 17 year old].)

Defendant contends his sentence is excessive because "[t]he fact the victim was killed by the discharge of firearms does not in itself constitute a level of violence greater than that exhibited where premeditated murder is committed by means of stabbing, bludgeoning or drowning." Defendant is incorrect. ". . . 'The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration or relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty 'out of all proportion to the offense' . . . ." (*People v. King* (1993) 16 Cal.App.4th 567, 571-572.) California has recognized that crimes involving firearms warrant greater sentences than the same crime not involving a firearm. (See *Oates, supra*, 32 Cal.4th at p. 1057 [reciting legislative history of § 12022.53].) Such a policy does not generally result in penalties out of all proportion to the offense, and has not done so in this case. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 493.)

We are not persuaded by defendant's argument that section 12022.53, subdivision (d) is facially unconstitutional "because it does not recognize significant gradations of culpability depending on the severity of the current offense, and does not take into consideration mitigating factors." A similar argument was rejected by the court in *People v. Martinez, supra*, 76 Cal.App.4th at page 495, which observed that section 12022.53, as a whole, recognizes different gradations of culpability in the use of a gun during the commission of certain very serious felonies, including murder.

---

15 At 15 years of age, he was declared a ward of the juvenile court and placed on three years probation as a result of having been found in possession of a concealable firearm.

Defendant's claim under the federal constitution can be analyzed under a single factor analogous to *Dillon's* first factor. In *Harmelin v. Michigan* (1991) 501 U.S. 957, Justice Scalia, joined by Chief Justice Rehnquist, concluded that the Eighth Amendment does not guarantee proportionality of sentences at all. (*Id.* at p. 964.) Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment protects only against sentences which are "grossly disproportionate" to the crime. (*Id.* at p. 1001; see also *Ewing v. California* (2003) 538 U.S. 1, 20-24.) Since three justices would uphold a sentence that satisfied *Dillon's* first factor, and two justices would uphold a sentence against any proportionality challenge at all, it is clear that a majority of the Supreme Court would agree that a sentence is constitutional if it does not appear to be grossly disproportionate based on an analysis of the gravity of the offense and harshness of the penalty alone. The sentence in this case satisfies that test. (See also *Lockyear v. Andrade* (2003) 538 U.S. 63, 73 [gross disproportionality is applicable only in "exceedingly rare" and "extreme" cases].)

5. *The Reasonable Doubt Instruction Given Was Sufficient*

Defendant contends he was denied due process because, as given, CALJIC No. 2.90, which defines reasonable doubt, omitted reference to the terms "moral evidence" and "moral certainty." The identical instruction was recently approved by our Supreme Court in *People v. Brown* (2004) 33 Cal.4th 382, 391. (See also *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1091 ["The 1994 revision of CALJIC No. 2.90 conforms precisely to the instruction suggested in *People v. Freeman* (1994) 8 Cal.4th 450, 504, footnote 9 . . . and correctly defines reasonable doubt. [Citations.]"].) We find no error.

DISPOSITION

We direct the clerk to modify the sentence to reflect a term of 50 years to life comprised of 25 years to life for the murder plus a consecutive 25 years to life

subdivision (d) enhancement, to amend the abstract of judgment accordingly, and to forward a copy of the amended abstract of judgment to the Department of Corrections. In all other respects, we affirm the judgment.

CERTIFIED FOR PARTIAL PUBLICATION*

RUBIN, ACTING P.J.

We concur:

BOLAND, J.

FLIER, J.