Filed 3/19/02

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re DAVID S., a Person Coming Under the Juvenile Court Law.	B136865 (Super. Ct. No. PJ24602)
THE PEOPLE, Plaintiff and Respondent, v. DAVID S., Defendant and Appellant.	

APPEAL from an order of the Superior Court County of Los Angeles. Jack Gold, Commissioner. Affirmed in part, reversed in part, and remanded.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, and Rama R. Maline, Deputy Attorney General, for Plaintiff and Respondent.

David S. appeals from the order of wardship after findings he committed first degree murder in which a principal intentionally discharged a firearm proximately causing death, the offense was committed for the benefit of a criminal street gang, and he was an active participant in a criminal street gang.[1] He was committed to the California Youth Authority.

He contends: (1) the court committed misconduct; (2) the evidence is insufficient to support a finding of first degree murder; (3) by operation of law the court's finding in this case is for murder of the second degree; (4) the court improperly calculated the maximum theoretical period of confinement by using the gang enhancement; (5) the evidence was insufficient to show he "actively participated" in a criminal street gang; (6) the corpus delicti of the offense of street terrorism, Penal Code section 186.22, subdivision (a), was not independently established; (7) the court improperly calculated the maximum theoretical period of confinement; and (8) the court failed to exercise its discretion under *In re Manzy W.*[2] He also requests, if a remand is ordered, that a different bench officer be required to make the determinations upon remand.

On April 25, 2001, we filed an opinion in this case rejecting appellant's contentions and affirming the order of the juvenile court. On May 9, 2001, appellant filed a petition for rehearing raising a new issue. He requested this court follow *People v. Garcia* (2001) 88 Cal.App.4th 794, and find the evidence is insufficient to support a finding of a Penal Code section 12022.53, subdivision (e) enhancement since there is no evidence in this record the shooter, Spider Acosta, an adult, was convicted of murder. Subsequent to filing his petition for rehearing on August 8, 2001, in case No. S099765, the California Supreme Court granted hearing in *Garcia*.

We granted appellant's request for rehearing so appellant could raise the *Garcia* issue in his appeal.

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[1] Welf. & Inst. Code, § 602; Pen. Code, §§ 187, subd. (a), 12022.53, subds. (b), (d) & (e)(1), 186.22, subds. (a) & (b)(1).

[2] *In re Manzy W.* (1997) 14 Cal.4th 1199, 1209

FACTS AND PROCEEDINGS IN THE TRIAL COURT

After school on July 21, 1999, appellant, a Langdon Street gang member, was "hitting up" the teenagers entering the gang's neighborhood as the children left school at Langdon and Nordoff Streets in Van Nuys. Teenager Rene S. (Rene) walked along Langdon Street with two female friends, Cinthia C. (Cinthia) and Amanda M. (Amanda). Appellant approached, ignored the young women and asked Rene where he "was from." Rene replied, "Nowhere." Appellant asked if Rene had a problem with the Langdon Street neighborhood. Rene said no.

Appellant walked to a building and returned to the sidewalk with Luis "Little Spider" Acosta (Spider), an adult enforcer for the Langdon Street gang. Spider was carrying a sawed-off rifle. Appellant "hit up" another youth walking along the street, then turned his attention to teenager Giovanni A. (Giovanni) who was walking across the street.

The previous day, appellant had confronted Giovanni and wanted to know where Giovanni "was from." Giovanni gave a belligerent reply. Appellant backed down and failed to do what the gang assigned him to do, to make sure he protected his neighborhood. On July 21, 1999, Giovanni replied "'F--- you,'" when appellant again asked where Giovanni "was from." Appellant punched Giovanni, and Giovanni in turn defended himself and bested appellant in fisticuffs. They struggled and appellant grabbed for a rock, which he claimed in his testimony he intended to use to scare Giovanni. Giovanni ran. Spider crossed the street to appellant.

At that point, Cinthia heard Spider ask appellant if he should shoot Giovanni. Appellant replied, "Shoot him, Spider. Shoot him." Spider shot three times and fatally wounded Giovanni in the chest.[3]

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[3] Amanda testified Spider asked appellant, "'Do you want me to shoot him?'" and appellant never answered.

Rene testified he did not hear any conversation between appellant and Spider just prior to the shooting.

Appellant and Spider returned across the street to the sidewalk behind Rene and the young women. Appellant grabbed the rifle from Spider and again asked Rene where he "was from." Rene replied, "'Nowhere,'" and said he knew Spider. Appellant and Spider walked off together, leaving the street by means of a gate.[4]

Subsequent to the shooting, after a *Miranda* waiver, Los Angeles Police Officer Brian Liddy interviewed appellant about the shooting.[5] Appellant told Liddy he was an active gang member of five months. He was a low-ranking soldier. His gang duties were to spray paint the Langdon Street gang name around the neighborhood and go out and "hit people up," i.e., ask persons their gang affiliations as they entered the neighborhood. Appellant explained Spider was a higher ranking enforcer who beat up or shot persons who "disrespected" the gang.

Officer Adrian Torres was a former C.R.A.S.H. officer whose responsibility it was to study and to have contact with the Langdon Street gang. Torres testified the Langdon Street gang was a criminal street gang of 50 to 100 members. The gang members committed various criminal offenses, including murder, robbery, and selling controlled substances. Torres opined a person of appellant's low rank in the gang would devote a substantial amount of his time and effort to the gang. Torres had participated in obtaining an injunction against the Langdon Street gang. He was aware two Langdon Street gang members recently had convictions for felonies enumerated in Penal Code section 186.22, subdivision (e).[6]

Torres also opined the gang members join gangs to fulfill a need to feel wanted. Gang members wish to have their individual reputations enhanced, as well as to enhance the reputation of their gang. Torres was of the opinion most gang members commit crimes, although that was not to say every gang member will do so.

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[4] Amanda claimed appellant never had the rifle.

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

[6] The People introduced into evidence two minute orders showing the commission of enumerated offenses by appellant's fellow gang members.

In defense, appellant admitted he asked Giovanni A. where he "was from" and then fought with Giovanni. He also admitted he was looking to fight Giovanni after the confrontation the previous day. Appellant claimed he was not "with" Spider and did not know Spider. When Spider asked if appellant wanted Giovanni shot, appellant replied no. Spider surprised appellant and shot Giovanni. Appellant denied confronting Rene with the rifle. Appellant admitted he went to the location to let passersby know they were entering Langdon Street territory. He said normally he would be frightened to engage in such an activity. However, he was intoxicated and Spider was there.

After direct and cross-examination, the court questioned appellant about what happened the previous day and at the shooting. During the court's inquiries, appellant admitted he believed the previous day he was remiss in letting Giovanni "maddog" him and pass by him. Giovanni had "disrespected" him and the belligerence required a confrontation the next day. Appellant admitted he was a gang member and he had attended gang meetings. Appellant denied he walked behind some buildings and emerged with Spider, who had a sawed-off rifle. Appellant insisted he simply was on the street at the same time as Spider and did not know Spider had the rifle.

DISCUSSION

I. THE COURT DID NOT COMMIT MISCONDUCT.

Appellant contends the court engaged in aggressive cross-examination of appellant during adjudication which had a clear prosecutorial purpose and thereby committed misconduct and denied appellant due process. The contention is waived by counsel's failure to object during adjudication to any questions or comments by the court.[7] The

[7] *People v. Corrigan* (1957) 48 Cal.2d 551, 556; *People v. Camacho* (1993) 19 Cal.App.4th 1737, 1745; *People v. Worthy* (1980) 109 Cal.App.3d 514, 527.

court's questioning of appellant during adjudication was not so egregious as to violate due process.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING OF FIRST DEGREE MURDER.

We reject the contention the evidence is insufficient to support the finding of first degree murder. The contention amounts to no more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the juvenile court. This is not the function of an appellate court.[8] It was up to the court to decide which of the witnesses was credible, and the court believed Cinthia when she testified she overheard appellant tell the gang enforcer Spider to shoot Giovanni.[9] The evidence showed appellant brought with him a gang enforcer armed with a sawed-off rifle during a gang confrontation with Giovanni. When Giovanni was again belligerent to, and dismissive of appellant, appellant assaulted Giovanni and fought with him. Appellant admitted Giovanni had "disrespected" him. When appellant was unable to best Giovanni in fisticuffs, by earlier arrangement, appellant told the gang enforcer to fatally shoot Giovanni. This evidence was sufficient to show appellant directed and thereby perpetrated a willful, deliberate and premeditated murder.[10]

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[8] *In re E.L.B.* (1985) 172 Cal.App.3d 780, 788.

[9] Evid. Code, § 411; *People v. Jones* (1990) 51 Cal.3d 294, 314-315; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578; *People v. Manriquez* (1999) 72 Cal.App.4th 1486, 1490-1491.

[10] *People v. Williams* (1997) 16 Cal.4th 635, 678-679; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1463-1464; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1465 [aider and abettor is principal in crime]; *People v. Burns* (1987) 196 Cal.App.3d 1440, 1441-1452; see *People v. Manriquez* (1999) 72 Cal.App.4th 1486, 1490-1491 [defendant yelling "F--- Sullivan" at an opposing gang demonstrated he was aware of his fellow gang members' intent to murder].

III. THE COURT MADE AN EXPRESS FINDING AS TO THE DEGREE OF MURDER.

There is no merit to the contention the murder was, by operation of law, murder of the second degree since the court failed to make an express finding as to degree.

The petition alleged the minor, age 15 on July 21, 1999, came within the provisions of Welfare and Institutions Code section 602 by reason that: (1) on or about July 21, 1999, he committed the crime of murder in violation of Penal Code section 187, subdivision (a), "by unlawfully and with malice aforethought murder GIOVANNI [A.], a human being"; and (2) on July 21, 1999, he committed the crime of street terrorism, in violation of Penal Code section 186.22, subdivision (A), a felony, since he "unlawfully and actively participate[d] in a criminal street gang with knowledge that its members engage in and have engaged in a pattern of criminal gang activity and did promote, further and assist in felony criminal conduct by gang members." The petition was later amended to allege as to count I enhancements pursuant to Penal Code sections 12022.53, subdivision (d), and 186.22, subdivision (b)(1).

During adjudication, the prosecutor argued the evidence. The prosecutor concluded her final argument by commenting: "Based on all the foregoing, I ask the court [to] sustain the count of 1st degree premeditated murder, the two allegations and also sustain Count II."

The court listened to the parties' arguments. The court then said this was a "classic case" of a gang shooting. Gang members asked youngsters walking home from school, "Where you from?" When a youngster failed to say the right thing, he was shot. The court commented Cinthia overheard appellant say, "Shoot him," to Spider. The court said: "I think the People have proven their case. I am convinced beyond a reasonable doubt. *The People have proven their case as stated*, and the petitions are sustained." (Emphasis added.)

At disposition the same day, the prosecutor told the court the theoretical term of confinement was 25 years to life for count I, with a mandatory enhancement of 25 years

to life for the finding of Penal Code section 12022.53, and it was potentially longer if the court imposed the term for the enhancement and count II consecutively.

The court ordered a commitment to the California Youth Authority without making any further explicit finding as to the degree of the offense. The court designated the theoretical maximum period of confinement to be 25 years to life for count I, enhanced by a term of 25 years to life for the Penal Code section 12022.53, subdivision (d), enhancement.

The court in this case made what amounted to a finding of first-degree murder by its comments as to how the offense occurred. The comments indicated the court believed Spider committed a willful, deliberate and premeditated shooting, and appellant directed Spider to commit the cold-blooded murder. There is no requirement the finding be made in any particular way, or by means of a formal statement of the court's verdict.[11]

IV. THE COURT PROPERLY CALCULATED THE THEORETICAL MAXIMUM TERM OF IMPRISONMENT BY UTILIZING AN ENHANCEMENT FOR THE FIREARM USE OF 25 YEARS TO LIFE.

Appellant complains the court improperly calculated the theoretical maximum term of imprisonment and the evidence is insufficient to support the court's finding of a Penal Code section 12022.53 enhancement under subdivisions (d) and (e)(1). We agree with his latter claim.

Section 12022.53, subdivision (e)(1), authorizes the imposition of a Penal Code section 12022.53, subdivision (d), firearm use enhancement for the unarmed perpetrator where the armed perpetrator personally and intentionally discharged a firearm causing death, the armed perpetrator is convicted of the underlying felony and a gang enhancement is additionally pled and proved.

Penal Code section 12022.53, subdivision (d) provides: "Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision

(a) [including attempted murder] . . . , and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury . . . , or death, to any person other than an accomplice shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment for that felony."

Subdivision (e) provides: "(1) The enhancements specified in this section *shall apply to any person charged as a principal in the commission of an offense* that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved." (Emphasis added.)[12] [¶] (2) An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1, shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."[13]

Appellant claims at adjudication the People failed to prove all the elements of a subdivision (e) Penal Code section 12022.53 firearm use enhancement. He argues the plain language of the relevant provision requires where the People seek to use the Penal Code section 12022.53, subdivision (d), enhancement against the non-shooter aider and abettor, subdivision (e) refers back to subdivision (d) for the elements stated there and expressly provides there must be proof the actual perpetrator of the shooting was

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[11] *In re Andrew I.* (1991) 230 Cal.App.3d 572, 581-582.

[12] Penal Code section 31 defines "principals" as: "All persons concerned in the commission of a crime whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . "

Penal Code section 971 states: "The distinction between an accessory before the fact and a principal, and between principals in the first and second degree is abrogated; and all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall hereafter be prosecuted, tried and punished as principals and no other facts need be alleged in any accusatory pleading against any such person other than are required in an accusatory pleading against a principal."

convicted of a felony to prove the enhancement. We have read the statutory language and agree with his analysis.

In this case, Spider, the adult, was the actual shooter. The court found appellant was a principal in the shooting, but appellant did not personally discharge the firearm. Spider was called as a witness at adjudication, but exercised his Fifth Amendment right against self-incrimination. The People introduced no evidence at the adjudication demonstrating Spider was convicted of murder. On this record, the evidence is insufficient evidence to support the court's finding of the section 12022.53, subdivision (e) firearm use enhancement for appellant. The Penal Code section 12022.53, subdivision (e) enhancement of 25 years to life which is attached to the finding of murder will be reversed.

The court in this case did not improperly use the Penal Code section 186.22, subdivision (b)(1) gang enhancement to calculate the theoretical maximum period of confinement.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING OF STREET TERRORISM.

Penal Code section 186.22, subdivision (a) proscribes the offense of street terrorism.[14] Its elements are: (1) the person was actively participating in a criminal street

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[13] See *People v. Gonzales* (2001) 87 Cal.App.4th 1, 13-15 (rev. den.).

[14] Penal Code section 186.22 states: "(a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years. [¶] (b)(1) . . . any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony . . . or attempted felony of which he or she has been convicted, be punished as follows: [¶] [A] . . . by an additional term of two, three, or four years at the court's discretion."

gang; (2) with knowledge that its members engage in or have engaged in a pattern of criminal activity; and (3) he willfully promoted, furthered or assisted any felonious conduct by members of a criminal street gang.[15]

The phrase, "actively participating," means the person is involved with a criminal street gang "in a manner which is more than nominal or passive."[16]

A "criminal street gang" is any ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (e) of section 186.22, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal activity.[17]

A "pattern of criminal activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the offenses enumerated in subdivision (e) of section 186.22, committed within a relevant time period, which are committed on separate occasions or by two or more persons.[18]

There is no merit to the contention the evidence fails to show appellant was "actively participating" in a criminal street gang. Appellant concedes the People proved he had the criminal knowledge necessary to prove the offense. In this case, it was established appellant was protecting the Langdon Street territory by "hitting up" the school children and other passersby entering the neighborhood, thus showing others the Langdon Street gang claimed that territory. He testified he was protecting gang territory. While appellant was engaged "hitting up" the passersby, appellant physically confronted a youth and had a gang enforcer fatally shoot the youth. Appellant admitted he joined the Langdon street gang five months before the instant shooting.

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[15] *People v. Robles* (2000) 23 Cal.4th 1106, 1115.

[16] *People v. Castenada* (2000) 23 Cal.4th 743, 747, 752.

[17] Pen. Code, § 186.22, subd. (f).

Appellant argues his low status and recent membership in the gang fails to show "active participation" in a "criminal street gang." However, appellant indicated in his own testimony he was assigned specific duties within the gang and was conscientiously performing the duties and attending gang meetings. Torres, the gang expert, testified appellant's low status did not mean appellant would not be spending a substantial part of his time attending to gang business. Appellant's motivation for attacking Giovanni showed appellant shared gang values and accepted the gang's mores and was willing to murder Giovanni since Giovanni "disrespected" him and the Langdon Street gang. This evidence was ample in showing appellant's participation with the gang was more than nominal or passive.[19]

VI. THE CONTENTION THE CORPUS DELICTI OF THE STREET TERRORISM OFFENSE WAS NOT PROPERLY ESTABLISHED IS WAIVED.

Appellant cannot complain in his appeal the corpus delicti of the offense of street terrorism was not established by the evidence at adjudication. When the People introduced the statements he made to the police, he did not object on the grounds the corpus delicti of street terrorism was not adequately established, so as to make his statements inadmissible in evidence. By failing to make the objection at the adjudication, he waived the contention on appeal.[20] It may well be "'proof of the corpus delicti was available and at hand during [adjudication], but that in the absence of [a] specific objection calling for such proof it was omitted.'"[21]

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[18] Pen. Code, § 186.22, subd. (e).

[19] *People v. Castanada, supra*, 23 Cal.4th at pp. 747, 752.

[20] *People v. Wright* (1990) 52 Cal.3d 367, 404.

[21] *Ibid*, citation omitted.

VII. THE COURT PROPERLY CALCULATED THE MAXIMUM THEORETICAL PERIOD OF CONFINEMENT.

The court expressly found the maximum theoretical period of confinement was 25 years to life for the murder offense, enhanced by 25 years to life for a principal intentionally discharging a firearm in the commission of murder proximately causing death where the murder was committed for the benefit of, or in association with any criminal street gang. The court calculated the count II street terrorism offense as a concurrent term.

Appellant contends the court erred in calculating the maximum theoretical period of confinement. Appellant argues Penal Code section 654 pertains to delinquency cases, and the court should have "stayed" the term for count II. The substantive offense and appellant's active participation in a criminal street gang are separately punishable.[22] Hence the court made no error in the calculation of the maximum theoretical period of confinement. In this opinion, however, we will reverse the finding of the firearm use enhancement. Upon remand, the court will have to recalculate the maximum theoretical period of confinement so as to omit the finding of a firearm use as to count I.

VIII. A REMAND IS ADDITIONALLY WARRANTED UNDER *MANZY W*.

The court failed to exercise its discretion to determine if the act of street terrorism in count II, a wobbler, should be treated as a felony or misdemeanor. Under *In re Manzy W.*,[23] the court was required to make that finding. We additionally will remand for the court to exercise its discretion and determine if the offense of street terrorism is a felony or a misdemeanor.

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[22] *People v. Herrera, supra,* 70 Cal.App.4th at pp. 1466-1468.

[23] *In re Manzy W.*, *supra*, 14 Cal.4th at p. 1209.

IX. THERE IS NO REASON THE CURRENT BENCH OFFICER CANNOT DETERMINE THE ISSUES DURING REMAND.

We read the entire record. There is no reason to assign the cause upon remand to a different bench officer. There is no evidence in the record indicating the court has prejudged any issues in the case.

DISPOSITION

The 25-year-to-life Penal Code section 12022.53, subdivisions (e) firearm use enhancement is reversed. The court failed to exercise its discretion to determine if the offense of street terrorism was properly a felony or misdemeanor. The cause is remanded to permit the juvenile court to exercise its discretion to determine if the offense is a felony or misdemeanor and for the court to recalculate the maximum theoretical period of confinement. In all other respects, the order under review is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS, J.