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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. URIEL GARCIA, Defendant and Appellant.	B236377 (Los Angeles County Super. Ct. No. GA080080)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dorothy L. Shubin, Judge. Affirmed.

Susan Wolk, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Uriel Garcia of attempted premeditated murder, with gang and firearm allegations found true. The trial court sentenced him to state prison for a term of life with the possibility of parole, with a minimum parole eligibility period of 15 years, plus a consecutive term of 20 years for the firearm enhancement. He appeals, claiming numerous evidentiary, instructional and sentencing errors. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

At about 7:00 p.m. on June 5, 2007, Uriel Garcia, a "shot caller" for the Pee Wee Locos clique of the Monrovia Nuevo Varrio (MNV) gang, told younger MNV gang member Valentin Valenzuela, "Go[, g]o."[1] From behind a wall in the parking lot behind a Smart and Final store, Garcia and Valenzuela fired five or more bullets at Derrick Green who stood near his friend and Duroc Crips gang member D'Andre Brown, as Green, Brown, Tracey Brooks and others stood on a public street near Huntington Drive and California Avenue.

Garcia was charged with Green's attempted premeditated murder (Pen. Code, §§ 187, subd. (a); 664, subd. (a) (count 2)).[2] (All further undesignated statutory references are to the Penal Code.) It was further alleged Garcia personally used a firearm within the meaning of section 12022.53, subdivision (b); Garcia personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c); and a principal personally used and intentionally discharged a firearm within the meaning of

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1 A "shot caller" is someone who directs both midlevel and younger gang members what to do for that gang, such as dealing narcotics, stealing cars, and committing robberies and drive-by shootings, known as "putting in work" for the gang.

2 Both Garcia and Valenzuela were charged with Green's (count 2) as well as Brooks's (count 1) attempted premeditated murders; in addition, Garcia was charged with the January 29, 2008 murder of Brandon Lee (count 3), with gang and firearm allegations as to all counts. However, on June 6, 2011, Valenzuela pled no contest to Green's attempted murder (count 2) and was sentenced to state prison for a term of 15 years, and Garcia was acquitted on Brooks's attempted murder (count 1) as well as Lee's murder (count 3).

subdivisions (b), (c) and (e)(1) of section 12022.53, as it was also alleged Garcia committed the attempted murder for the benefit of, at the direction of or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C).

At trial, the People presented evidence of the facts summarized above. In addition, gang expert Detective Brian Steinwand testified he was the head of the Monrovia/Duarte gang task force. This task force was formed in early 2008 to address the increase in gang violence in the area between 2006 and 2008. In a period of about 18 months, there were about 79 shootings between the Duroc Crips (a black gang) and two Hispanic gangs—MNV and Duarte Eastside. The Crips were "warring back and forth" with the two Hispanic gangs.

Detective Timothy Brennan also testified to his own gang expertise and explained how someone becomes a gang member and "puts in work" for the gang, described the territorial nature and hierarchy within a gang, including the role of the "shot caller," and told the jury gangs operate on respect and intimidation. Given a hypothetical based on the evidence presented as to count 2, Detective Brennan testified Green's shooting was committed in association with and for the benefit of MNV.

Pursuant to court orders, the task force obtained telephone wiretaps relating to MNV and the Duroc Crips. Between September 2008 and January 2009, seven or eight subjects, including Garcia, were targeted.

The jury heard evidence that Garcia, his girlfriend at the time and their son were shot at in 2006, and Garcia suspected Duroc Crips gang member Brandon Lee was involved.[3] Then, on June 2, 2007—three days prior to the Smart & Final shooting involved in counts 1 and 2, someone shot Lee.[4] Although no one had been prosecuted, Garcia took credit for that shooting in the wiretap evidence. He claimed he had two guns

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3 Detective Brennan, a gang investigator also assigned to the gang task force, testified the gang would seek retribution for such an event.

4 The name Valentin Valenzuela came up during the police investigation of the June 2, 2007 shooting of Lee, but police were unable to determine who had been the shooter and no witnesses were located.

in the Smart and Final shooting three days later (June 5, 2007) and did not mention Valenzuela. On January 29, 2008, Brandon Lee was shot and killed (count 3), and it remained unknown who had shot him.

Garcia (who had a Monrovia tattoo across his back) was supplying guns to the gang and recruiting new members. In some of his telephone calls, he called meetings to discuss MNV business including the police murder investigation and said money was needed for guns and "for some of the homies that are locked up." He acknowledged having others commit crimes, including shootings, for the gang. He said, "If I get shot, you ride for me. If you get shot, I ride for you," meaning he would retaliate for a fellow gang member if the fellow gang member were shot and expected the same from his fellow gang members for himself. He was referred to as a "shot caller" within the gang.

Tracey Brooks testified that prior to the Smart & Final shooting, Garcia and Valenzuela told her they were MNV gang members and asked if she was a gang member. Then, just before the shooting, she heard arguing between the African Americans and the Hispanics. She testified Garcia came out of the bushes. She saw both Garcia and Valenzuela holding guns, focused on the African American men to the right of her on the street; she heard shots from more than one gun as she turned and ran. According to Green, Garcia appeared to be the initiator and appeared to be showing the other shooter what to do during the Smart & Final shooting. Green's cousin (Jimmie Dixon) also testified he saw "[t]wo male Hispanics shooting" their handguns at Green; after that, he said, the "two guys jump[ed] in a car and le[ft]."

Police recovered 12 expended bullet casings from two different types of guns at the scene of the Smart & Final shooting.

Garcia, known as "Krazy Eyes" within the gang, told police he got around without any trouble resulting from his eyesight.

In his defense, Garcia presented evidence he was legally blind as of November 2008.

The jury convicted Garcia as charged and found all related special allegations true. For the attempted premeditated murder of Green, the trial court sentenced Garcia to state

prison for a term of life with the possibility of parole (and a minimum parole eligibility period of 15 years) plus a consecutive 20-year term on the firearm enhancement for personal and intentional discharge of a firearm (§ 12022.53, subd. (c)).

Garcia appeals.

DISCUSSION

Garcia Has Failed to Demonstrate Prejudicial Error in the Absence of CALCRIM No. 375 Among the Jury's Instructions.

Although the trial court instructed the jury with CALCRIM No. 1403 (limited purpose of evidence of gang activity) because of the evidence of Garcia's MNV conduct, Garcia says the court had a sua sponte duty to instruct the jury with CALCRIM No. 375 (evidence of uncharged offenses to prove identity, intent, common plan, etc.) as well because the prosecution presented evidence of Garcia's uncharged attempted murder of Brandon Lee.[5] We disagree.

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5 CALCRIM No. 375 provides in part: "The People presented evidence that the defendant committed ((another/other) offense[s]/the offense[s] of _____ <insert description of alleged offense[s]>) that (was/were) not charged in this case. . . . You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the (uncharged offense[s]/act[s]). Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely. If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: . . . The defendant was the person who committed the offense[s] alleged in this case](./; or) The defendant acted with the intent to _____ <insert specific intent required to prove the offense[s] alleged> in this case](./; or) The defendant had a motive to commit the offense[s] alleged in this case](./; or) The defendant knew _____ <insert knowledge required to prove the offense[s] alleged> when (he/she) allegedly acted in this case](./; or) The defendant's alleged actions were the result of mistake or accident](./; or) The defendant had a plan [or scheme] to commit the offense[s] alleged in this case](./; or) The defendant reasonably and in good faith believed that _____ <insert name or description of complaining witness> consented](./; or) The defendant _____ <insert description of other permissible purpose; see Evid. Code, § 1101(b)> .] In evaluating this evidence, consider the similarity or lack of similarity

According to the record, Garcia did not request CALCRIM No. 375. Pursuant to CALCRIM No. 1403, the trial court instructed the jury: "You may consider evidence of gang activity *only for the limited purpose of deciding whether* the defendant acted with the intent, purpose, and knowledge that are required *to prove the gang-related enhancement charged* or the defendant had a *motive* to commit the *crimes charged*.

"You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion.

"*You may not consider this evidence for any other purpose*. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." (Italics added.)

As our Supreme Court explained in *People v. Milner* (1988) 45 Cal.3d 227, 251, "We rejected a similar argument in the context of prior criminal offenses in *People v. Collie*[(1981)] 30 Cal.3d 43, 64: 'Neither precedent nor policy favors a rule that would saddle the trial court with the duty either to interrupt the testimony *sua sponte* to admonish the jury whenever a witness implicates the defendant in another offense, or to review the entire record at trial's end in search of such testimony. There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. . . . But we hold that in this case, and in general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility

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between the uncharged (offense[s]/ [and] act[s]) and the charged offense[s].] Do not consider this evidence for any other purpose [except for the limited purpose of _____ <insert other permitted purpose, e.g., determining the defendant's credibility>]. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.] If you conclude that the defendant committed the (uncharged offense[s]/ act[s]), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <insert charge[s]> [or that the _____ <insert allegation[s]> has been proved]. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt."

of evidence of past criminal conduct.'

"We believe that the holding in *Collie, supra,* 30 Cal.3d 43, is equally applicable to this case which concerns past bad acts as opposed to prior criminal offenses." (*People v. Milner, supra,* 45 Cal.3d at pp. 252-252.)

"Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citations.] "'[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." [Citations.]'" (*People v. Valdez* (2012) 55 Cal.4th 82, 138, further citations omitted.) Moreover, CALCRIM No. 1403, is neither contrary to law nor misleading. (*Ibid.*) "It states in no uncertain terms that gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang enhancement, the motive for the crime and the credibility of witnesses." (*Ibid.*) In this case, gang evidence was essential to establishing the motive for the charged crimes and Garcia's role in them, the central importance of respect in gang culture, and gang members' motivation to seek retribution. Although Garcia was not charged with the June 2, 2007, shooting of Brandon Lee, he was charged in count 3 with Lee's murder. According to the wiretap evidence, Garcia believed Lee was involved in the 2006 incident in which shots were fired at Garcia, his then girlfriend and his baby and wanted to "hit" Lee before Lee and the Crips retaliated against Garcia and MNV. Because gang evidence was central to this case involving gang members committing gang shootings for gang motives in the context of the "warring back and forth" between MNV and the Duroc Crips, broad admissibility of gang evidence was appropriate. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1170.)

Further, notwithstanding the admission of this evidence suggesting Garcia's involvement in the uncharged prior shooting at Lee, he was nevertheless acquitted of Lee's subsequent murder while considerable evidence supports his conviction on count 2—including his own admissions recorded on the telephone wiretaps in addition to the testimony of Green who knew Garcia prior to the June 5, 2007 Smart & Final shooting;

he cannot establish prejudice in the absence of CALCRIM No. 375 in any event. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Garcia Has Failed to Demonstrate Prejudicial Error in the Trial Court's Admission of Gang Evidence.

Citing our decision in *People v. Albarran* (2007) 149 Cal.App.4th 214, Garcia says the erroneous admission of a "tsunami" of marginally relevant but highly prejudicial gang evidence rendered his trial fundamentally unfair and violated his federal due process rights. We disagree.

First, as he concedes, Garcia only objected to testimony characterizing him as a "shot caller" in the trial court. Otherwise, he made no objection on the grounds of Evidence Code section 352 and did not raise any constitutional objection in the trial court. Consequently, he has forfeited this claim.

Further, "California courts have long recognized the potential prejudicial effect of gang evidence. As a result, our Supreme Court has condemned the introduction of such evidence 'if only tangentially relevant, given its highly inflammatory impact.' (*People v. Cox* (1991) 53 Cal.3d 618, 660 [280 Cal. Rptr. 692, 809 P.2d 351], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [87 Cal. Rptr. 3d 209, 198 P.3d 11].) Because gang evidence creates a risk that the jury will infer that the defendant has a criminal disposition and is therefore guilty of the charged offense, 'trial courts should carefully scrutinize such evidence before admitting it.' (*People v. Williams* (1997) 16 Cal.4th 153, 193 [66 Cal. Rptr. 2d 123, 940 P.2d 710].)

"Nonetheless, evidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192 [24 Cal. Rptr. 3d 887]; see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [16 Cal. Rptr. 3d 880, 94 P.3d 1080]; Evid. Code, §§ 210, 351.)" (*People v. Samaniego, supra,* 172 Cal.App.4th at pp. 1167-1168.)

As we noted in addressing Garcia's first argument, "Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related," and "'[b]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.' [Citations.]" (*People v. Samaniego, supra,* 172 Cal.App.4th at p. 1168.) For the reasons addressed in connection with Garcia's first argument, gang evidence was properly admitted, the jury received CALCRIM No. 1403, and Garcia has failed to demonstrate prejudicial error in the trial court's admission of gang evidence. (*People v. Breverman, supra,* 19 Cal.4th at p. 178; *People v. Gray* (2005) 37 Cal.4th 168, 231.)

The Trial Court's Denial of Lesser-Related Crime Instructions Did Not Constitute an Abuse of Discretion.

According to Garcia, the trial court's refusal to instruct the jury as to the crimes of assault with a deadly weapon under section 245 (CALCRIM No. 875) and/or the negligent discharge of a firearm pursuant to section 246.3 (CALCRIM No. 970) violated his rights to due process, to a fair trial, to present a defense, to the effective assistance of counsel and to a reliable verdict and sentence. Again, we disagree.

At trial, defense counsel argued: "[J]ust to make the record clear, electing to charge is not the issue. The due process part of the lesser related issues is really what the issue is," noting the shooting "hit nobody or nothing." In his opening brief, Garcia concedes: "[A]ccording to current case authority, he does not have a state or federal constitutional right to a verdict on a lesser related offense." Furthermore, citing *People v. Kraft* (2000) 23 Cal.4th 978, 1064, he acknowledges he is "aware that case authority exists stating that a defendant has no right to jury instructions upon lesser related offenses, even if the instruction is supported by substantial evidence and defense counsel requests such instruction." He says, however, *Kraft* "improperly" relied on *People v. Birks* (1998) 19 Cal.4th 108 (*Birks*), but also necessarily concedes our Supreme Court determined *Birks* did not violate the federal constitution in *People v. Rundle* (2008) 43 Cal.4th 76. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

In any event, where, as here, there is no evidence the offense was less than that charged, such an instruction is not warranted. (*People v. Moye* (2009) 47 Cal.4th 537, 548.) As already described, the record does not support Garcia's argument in this regard. To the contrary, the jury heard evidence Garcia came out of the bushes and, along with a fellow gang member he urged to "Go, go," shot repeatedly at a group associated with a rival gang, including Green (who had attended high school with Garcia in the small, tight knit community of Monrovia, where "[e]verybody knows everybody"), during a "gang war" between the Hispanic and African American gangs in the area. Consequently, it is not reasonably probable Garcia would have received a more favorable verdict if the jury had been instructed on assault with a deadly weapon and negligent discharge of a firearm with respect to count 2 (Green's attempted premeditated murder). (*People v. Watson* (1956) 46 Cal.2d 818.)

To the extent Garcia makes passing reference to a denial of his right to effective assistance of counsel, he fails to substantiate it, identifying neither deficient performance nor resulting prejudice. "In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746, citations omitted.) "If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*Id.* at p. 746, citations omitted.) Garcia has failed to demonstrate prejudicial error.

The Trial Court Did Not Abuse its Discretion in Admitting Evidence of Garcia's Status as an MNV Shot Caller.

Garcia says the trial court's denial of his motion to exclude evidence he was a "shot caller" violated his constitutional rights to due process, a fair trial and a reliable verdict and sentence. At trial, however, Garcia objected to such evidence solely on the basis of Evidence Code section 352, and, citing *People v. Carter* (2003) 30 Cal.4th 1166, 1194, acknowledges admission of this type of evidence is reviewed for an abuse of discretion. He says the applicable law is addressed in his argument relating to the "glut" of gang evidence; because the term "shot caller" is a pejorative and threatening term which permeated the trial, he says he was prejudiced by the admission of this evidence. For the same reasons addressed in connection with Garcia's first and second challenges to the admission of gang evidence, we find no abuse of discretion.

Garcia Has Not Demonstrated Prejudicial Error in the Admission of Evidence of his own Pre-Trial Comments as to the Possible Length of his Imprisonment.

In wiretap evidence, Garcia indicated he believed a gang enhancement for "[b]eing a gang leader" would "hit me with triple the time I'm going to get anyways." Citing *People v. Holt* (1984) 37 Cal.3d 436, 458, he says he was prejudiced as a result because a jury's possible punishment is not a proper matter for jury consideration.

Again, Garcia failed to object to the admission of this evidence and therefore forfeited this objection. (*People v. Dykes* (2009) 46 Cal.4th 731, 756.) Moreover, unlike the circumstances in *People v. Holt, supra,* 37 Cal.3d 436, this case does not present a circumstance in which the prosecutor improperly referred to punishment during argument but rather the defendant's own speculation as to his punishment, and in this case (but not in *Holt*) jurors were instructed: "You must reach your verdict without consideration of punishment." We presume jurors understand and follow the trial court's instructions. (*People v. Gray, supra,* 37 Cal.4th at p. 231.) Accordingly, we find no error. In any case, in light of the evidence of Garcia's guilt as to count 2, it is not reasonably probably he would have received a more favorable verdict absent the admission of this evidence. (*People v. Holt, supra,* 37 Cal.3d at p. 458; *People v. Watson, supra,* 46 Cal.2d 818.)

Substantial Evidence Supports the Jury's Conclusion Garcia's Attempted Murder of Green Was Premeditated.

We reject Garcia's assertion insufficient evidence of premeditation supports the jury's determination on count 2. Garcia ignores the record as well as the standard of review.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]

"'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' (*People v. Jones* (1990) 51 Cal.3d 294, 314 [270 Cal.Rptr.611, 792 P.2d 643].)" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Reversal is unwarranted unless it appears that "upon no hypothesis whatsoever is there sufficient substantial evidence to support the conviction." (*People v. Bolin* (1998) 18 Cal.4th 297, 331, citation omitted.)

Garcia simply argues an alternative interpretation of the facts. For example, noting none of the bullets hit Green or anyone else, he speculates Green did not feel his safety was in jeopardy or he and Brown would have left the area and entered his grandparents' residence.

As Green testified, however, he had lived in Monrovia, a very tight knit community where "[e]verybody knows everybody," his entire life; he and Garcia attended high school together. Because he found it "abnormal" for Garcia and those with him to be in a "Black neighborhood" during the "gang war" between the Hispanic and

African American gangs, he had a "gut feeling" he should look over the wall and felt he had "caught [Valenzuela and Garcia] off guard." According to the record, Garcia and Valenzuela then came out of the bushes, Garcia called out, "Go, go," and the shooting started. We find no error. (*People v. Bolin, supra,* 18 Cal.4th at p. 331.)

Garcia's Sentence Does Not Constitute Cruel and/or Unusual Punishment.

According to Garcia (age 22 at the time of his crime), his sentence of life with the possibility of parole, with a minimum parole eligibility of 15 years, plus a consecutive 20 years, is cruel and/or unusual in violation of our state and federal constitutions. He also says the degree of disparity is demonstrated by the disparity between his sentence and Valenzuela's. Three days before Garcia's trial, Valenzuela pled guilty to count 2 (with the remaining counts dismissed), but he received a 15-year determinate sentence (the low term of five years for the attempted willful, deliberate and premeditated murder plus ten years for the gun use pursuant to section 12022.53, subdivision (b)).

As the Attorney General observes, the determination of whether a sentence is cruel and/or unusual does not involve the mere comparison of his sentence following trial to his fellow gang member's sentence following entry of a plea. Garcia ignores the fact he was convicted of committing an attempted premeditated murder. He fails to demonstrate that his resulting sentence is so grossly disproportionate as to constitute the "extreme" case meeting the necessary federal standard (*Lockyer v. Andrade* (2003) 538 U.S. 63, 72; *Harmelin v. Michigan* (1991) 501 U.S. 957) or so disproportionate that it shocks the conscience and offends fundamental notions of human dignity under our Supreme Court's authorities (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Dillon* (1983) 34 Cal.3d 441, 478). Garcia's cursory claim is meritless.

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J **ZELON, J.**