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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RAEKWON FRANKLIN, Defendant and Appellant.	B284671 (Los Angeles County Super. Ct. No. NA099770)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesus I. Rodriguez, Judge. Affirmed in part and Reversed in part.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Raekwon Franklin (defendant) was convicted of attempted willful, deliberate, premeditated murder (Pen. Code, §§ 664 and 187, subd. (a)[1]) and assault with a firearm (§ 245, subd. (a)(2)). On appeal, he contends his convictions should be reversed because the trial erred by excluding evidence that defendant's two victims had sustained juvenile adjudications for assault and making criminal threats. Because we find that defendant has forfeited such claims by failing to raise them adequately before the trial court, we affirm the convictions. We do, however, vacate defendant's sentence and remand for resentencing in accordance with this opinion.

BACKGROUND[2]

On April 18, 2014, at about 9:00 p.m., defendant approached then-minors Kevin G.[3] and Nkosi Sanchez, who were walking together down the street, and asked them, "Where you from?"—a question which both Kevin and Sanchez understood to mean defendant wanted to know whether they were gang bangers. Sanchez responded, "We don't bang," or "Nowhere." Defendant than pointed a shotgun toward them and fired.

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[1] All statutory citations are to the Penal Code unless otherwise indicated.

[2] Because the only issues on appeal pertain to defendant's forfeited claims and sentencing issues, we focus our background on facts bearing on such issues.

[3] Kevin G. was still a minor at the time of trial and was referred to by his first name and the first initial of his last name. For ease of reference we refer to him as Kevin herein.

Sanchez ran away. Kevin suffered a shotgun wound to the stomach and was transported to the hospital, but he ultimately survived.

The District Attorney of Los Angeles County charged defendant in an information with two counts of attempted willful, deliberate, premeditated murder in violation of sections 664 and 187, subdivision (a)(1) (counts one and three), and one count of assault with a firearm in violation of section 245, subdivision (a)(2) (count two). Count one related to the April 18, 2014, incident involving Kevin. Count two related to the April 18, 2014, incident involving Sanchez. Count three related to a separate incident on July 22, 2014, involving a different victim and charging two additional codefendants; count three is not the subject of this appeal. As to counts one and three, the information alleged that defendant personally used a firearm in violation of section 12022.53, subdivisions (b), (c), and (d). As to count two, the information alleged that defendant personally used a firearm in violation of section 12022.5. As to all counts, the information alleged that defendant committed the crimes for the benefit of a criminal street gang, in violation of section 186.22, subdivision (b)(1).

At trial, the jury found defendant guilty on counts one and two and found true the firearm and gang allegations as to those counts. The jury could not reach a verdict as to count three, and the trial court declared a mistrial as to that count.

The trial court sentenced defendant to a total term of life plus 43 years to life in state prison. On count one, the court imposed a life term for the attempted murder offense, plus a consecutive term of 25 years to life for the firearm enhancement and an additional 10 years for the gang enhancement. On count

two, the court imposed a consecutive eight-year term, consisting of the mid-term of three years for the assault offense, plus a consecutive five-year sentence for the gang enhancement. The court stayed the firearm enhancement as to count two.

Defendant filed a timely notice of appeal.

DISCUSSION

I. Defendant Has Forfeited His Claims of Error

On March 1, 2015, almost one year after the shooting incident involving Kevin and Sanchez, but prior to trial in this case, juvenile petitions were sustained against both of them. Kevin's petition was sustained for making criminal threats and assault (§§ 245, 422), and Sanchez's petition was sustained for assault with a firearm (§ 245, subd. (a)(2)).[4] On appeal, defendant contends the trial court erred in two respects when it excluded evidence of the sustained petitions against Kevin and Sanchez in that: (1) defendant was entitled to impeach their credibility because the sustained petitions were for crimes of moral turpitude; and (2) defendant had a federal constitutional right under the confrontation clause to confront them with the sustained petitions. Because defendant did not adequately raise either contention for admissibility before the trial court, we hold that defendant has forfeited review of them.

A. *Relevant Proceedings*

At a pretrial hearing on May 30, 2017, the prosecutor brought to the trial court's attention the sustained petitions for

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[4] The record on appeal does not include the petitions, but both parties agree as to the charges and date they were sustained.

Kevin and Sanchez, framing the issue as follows: "There are prior convictions or sustained petitions, rather, that [defense] counsel indicated, in fact, regarding an incident that happened after the date of this offense. If counsel is going to be using that for propensity for violence, I'll ask the court to make a ruling on that."

Later in the hearing, the trial court addressed the matter of the sustained petitions, and the following colloquy occurred:

> THE COURT: . . . . So the two sustained petitions are on 3-1-15 as to Mr. Kevin G. and Nkosi [Sanchez]. And you say that they are relevant, [defense counsel], they should be able to be used?
>
> [DEFENSE COUNSEL]: Yes, for impeachment purposes.
>
> THE COURT: Why is that?
>
> [DEFENSE COUNSEL]: It shows a propensity for violence.
>
> THE COURT: What do you mean "propensity for violence"?
>
> [DEFENSE COUNSEL]: Propensity for violence. Shooting into—
>
> [¶] . . . [¶]
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> THE COURT: Are you saying now character evidence is that if a person conducts—does something that is more likely or not he will do it again?
>
> [DEFENSE COUNSEL]: No. What I'm saying is that it fits the same pattern in [*sic*] scheme. It's a modus operandi.
>
> THE COURT: Okay.

[DEFENSE COUNSEL]: They approach the victim in the second case identically to the way they approached [defendant]. They did the same thing. They strong armed.

THE COURT: It's not a prior bad act; it's a propensity—it's character evidence, isn't it?

[¶] . . . [¶]

[DEFENSE COUNSEL]: . . . [I]t shows—oh, shows, number one, propensity for—

THE COURT: It's character evidence, you say it's character evidence. You're not saying it's self-defense; right? It's for—It's for self-defense?

[DEFENSE COUNSEL]: Okay. I'm saying [defendant] was defending himself against two people—

THE COURT: All right.

[DEFENSE COUNSEL]: —Who approach him in the night. They separate so that they have him flanked. One person reaches for a gun. He gets—he pulls out his gun first and fires. Those two people who approach him later on perform the exact same act, in the exact same manner against another person to which they have now sustained a petition for, one person for firing a gun into a vehicle with people and for the other person, Mr. Kevin G., for telling him to do it for which he admitted to terrorist threats.

THE COURT: All right.

[DEFENSE COUNSEL]: So this shows a common pattern and scheme that they have used in this case, and they are continuing to use.

The trial court and prosecutor then engaged in a discussion about whether the sustained petitions could be admitted as character evidence, even though the conduct underlying the petitions occurred after the incident involving defendant. That discussion ended with the prosecutor summarizing her position with respect to defendant's use of such evidence as follows: "And I don't believe that there is—there is a relevant point to be made on modus operandi or lack of mistake or that sort of thing that's in the context of presuming the current incident, and I don't believe that that is relevant subsequent conduct when [defendant] did not know that this incident occurred. [¶] In fact, that didn't happen and also it's—it would—*he's obviously saying it's not used for impeachment purposes as far as the voracity* [*sic*] *and truth of the people who are testifying*; therefore, I don't believe it's relevant in this case." (Italics added.)

The trial court then invited a response from defense counsel, telling him, "You have the last word . . . ." Defense counsel did not respond to the prosecutor's statement that the defense did not contend the sustained petitions could be used for impeachment as to Kevin G.'s or Sanchez's truthfulness generally. Nor did defense counsel mention his constitutional right to confrontation. Instead, defense counsel continued to proffer the sustained petitions as character or propensity evidence, arguing, "[T]hey continue to use the same pattern. The two of them are always together. They always come up on one person who is by himself, and they pull out a weapon and—the second instance, they actually used it. They didn't get a chance to use it in [defendant]'s case."

Before ruling on the admissibility of the sustained petitions, the trial court again asked the defense to clarify its

argument concerning the admissibility and use of the sustained petitions at trial, explaining "I sort of tried to ask you several times. I want the record to be clear." The following discussion ensued:

> THE COURT: Kevin G. and Nkosi [Sanchez] sustain petitioned [*sic*] a year later this is not an issue of self-defense; correct? Or is it because I'm confused? I'm confused what you are arguing, but that does not mean you're not being clear. Maybe it's just me.
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> [DEFENSE COUNSEL]: Well, yes, it does go to self-defense. . . .
>
> THE COURT: So how could it be, [defense counsel], when it happened a year later? How could it be if they are—if they have a sustained petition or a incident a year later? I'm not sure yet when the sustained petition is. A year later, your client cannot foretell the future.
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: So therefore, whether they did it a year later, I mean, I'm thinking it couldn't be self-defense could it?
>
> [DEFENSE COUNSEL]: It goes to self-defense because he knew that they had a reputation for pulling guns on people, and after this fact, they did it again.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Which shows a common scheme and modus operandi.

THE COURT: So you're talking about character evidence so to speak?

[DEFENSE COUNSEL]: Yes.

Having clarified the defense position, the trial court ruled that the sustained petitions could not be used by the defense as either character evidence or to establish self defense, stating: "Okay. At this time I'll deny your request. Of course, it's without prejudice. If you find case law on point or close to it, about this type of factual pattern which in the crime world should not be unique where people conduct crimes or people that are in gangs or a subsequent date commit other crimes. If you have any case law to the contrary of my ruling, I'm willing to—read it and look at it. [¶] So at this time, it doesn't appear to be coming in as character evidence; it doesn't appear to be a—no identity of common scheme or plan or self-defense because this happened a year later. So again, if you have a case law to the contrary, let me know."

Thereafter, once trial had begun, but prior to either Kevin or Sanchez testifying, the defense again raised the matter of the sustained petitions and cited authority to the trial court as follows:

[DEFENSE COUNSEL]: Additionally, your Honor, as to the issue of impeachment, you made your ruling at the 402's.[5] I mentioned if I could cite

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5 We presume "402's" refers to the pre-trial hearing on May 30, 2017. Evidence Code section 402 provides for a court to hear and determine questions of admissibility of evidence during a hearing outside the presence of the jury at trial.

you some case law allowing me to impeach him on bad acts.

THE COURT: Subsequent bad act.

[DEFENSE COUNSEL]: Yes. *People v. Wheeler* (1992) 4 Cal.4th 284; *Davis v. Alaska*, 415 U.S. 308, 1974, California Evidence Code 1103.

THE COURT: Okay. Thank you. Okay. Let's forge ahead. People ready?

As the trial progressed, immediately before calling either Kevin or Sanchez to testify, the People sought to confirm the trial court's ruling concerning the sustained juvenile petitions. This led to the following discussion at sidebar, during which the defense argued the petitions were character evidence and the trial court ruled they were inadmissible on that basis:

[PROSECUTOR]: I have the two victims, named victims in the case that are to counts 1 and 2.

THE COURT: Who is it?

[PROSECUTOR]: I have two witnesses that are going to be testifying, and I believe counsel just cited the court case law. And I wanted to get a ruling as to impeachment. Again, I think it is [Evidence Code section] 352.

THE COURT: Well, one moment. When we have 402's—I will stand to be correct[ed]—but I was under the impression that [sections] 245(a)(2) and 422 were going to be used for sort of character, that's what the court's ruling was. Am I off base?

[DEFENSE COUNSEL]: No.

THE COURT: Okay.

[DEFENSE COUNSEL]: I was going to show tendency towards violence, which would be character.

THE COURT: Right. So you are now requesting that you be allowed to ask the question about the sustained petition?

[DEFENSE COUNSEL]: Correct.

THE COURT: For what purpose?

[DEFENSE COUNSEL]: To show propensity towards violent acts.

THE COURT: On that ground it is denied.

Kevin G. and Sanchez then testified at trial. The use of the sustained petitions did not arise again.

B. *Analysis*

"To preserve an alleged error for appeal, an offer of proof must inform the trial court of the 'purpose and relevance of the excluded evidence . . . .' (Evid. Code, § 354, subd. (a).) This is in accord with 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court *on the ground sought to be urged on appeal*.' [Citation.]" (*People v. Hill* (1992) 3 Cal.4th 959, 989, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Here, the record is clear defendant never raised in the trial court the grounds for admission he now advances on appeal, namely: (1) to impeach credibility with crimes of moral turpitude; and (2) to exercise his constitutional right of confrontation. Rather, before the trial court, defendant argued only that he sought to use the

sustained petitions as propensity or character evidence to impeach Kevin and Sanchez.

At the pretrial hearing, defense counsel was explicit that he sought to use the sustained petitions "for impeachment purposes" because they purportedly demonstrated Kevin's and Sanchez's "propensity for violence." Indeed, defense counsel elaborated that the petitions were part of a "pattern," "scheme," and "modus operandi" of the victims provoking violence. Defense counsel offered no other basis for admissibility of the petitions. Even after the prosecutor clarified explicitly that the defense did not intend to use the sustained petitions to impeach the victims' general veracity and the trial court indicated the defense could have "the last word," defense counsel did not correct the prosecutor's characterization of the defense's position and continued to argue the petitions demonstrated "the same pattern" of violence purportedly used by the victim against defendant. Furthermore, when the trial court stated it wanted "the record to be clear" and asked defense counsel explicitly "So you're talking about character evidence so to speak," defense counsel simply replied "Yes," without qualification or further explanation. Finally, when the trial court stated it would exclude the sustained petitions because "it doesn't appear to be coming in as character evidence," defense counsel did not indicate the trial court had failed to consider any other asserted basis for admission and instead remained silent.

Later on, during the course of the trial, the defense eventually provided the trial court with citation to authority that, in defense counsel's view, would allow him "to impeach [the victims] on bad acts," specifically: (1) Evidence Code section 1103; (2) *Davis v. Alaska* (1974) 415 U.S. 308 (*Davis*); and (3)

People v. Wheeler (1992) 4 Cal.4th 284 (*Wheeler*), superseded by statute on other grounds, as stated in *People v. Duran* (2002) 97 Cal. App. 4th 1448, *id.*, at p. 1460. Evidence Code section 1103 provides for the admission of character evidence of a victim under certain circumstances.[6] In *Davis, supra,* 415 U.S. at page 309, the U.S. Supreme Court considered "whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as juvenile delinquent" and found a violation of the defendant's right to confrontation in that case. In *Wheeler*, *supra,* 4 Cal.4th at pages 295 to 296, the California Supreme Court held that, "if past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion," so long as such conduct evidences moral turpitude and satisfies the balancing test under Evidence Code section 352. Defense counsel, however, provided no argument or explanation whatsoever to the trial court as to how such authority supported admissibility of the sustained petitions to impeach Kevin and Sanchez.

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[6] Evidence Code section 1103 states in relevant part: "In a criminal action, evidence of the character . . . of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] . . . [o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character." Evidence Code section 1101 provides for the general prohibition that "evidence of a person's character . . . is inadmissible when offered to prove his or her conduct on a specific occasion."

Under the circumstances, defendant's mere citation to authority did not preserve the two claims of error he now makes on appeal, particularly in light of defense counsel's repeated affirmations that the evidence was being proffered to show propensity for violence. Evidence Code section 1103 relates to the admissibility of evidence of a victim's character—the ground for admissibility asserted in the trial court but not on appeal. *Davis, supra*, 415 U.S. 308, relates to a defendant's confrontation clause right to impeach a prosecution witness with the witness's criminal conduct to show bias, but it says nothing about using a victim's criminal conduct to impeach for truthfulness—the confrontation clause claim defendant advances on appeal. As for *Wheeler, supra,* 4 Cal.4th 284, that case does hold that a defendant may impeach a witness's credibility with crimes of moral turpitude, subject to the court's discretion and balancing of factors under Evidence code, section 352—the claim defendant now makes on appeal.[7] But, defendant in no way alerted the trial court that his citation to *Wheeler* was in support of this ground for admissibility that he did not otherwise articulate or express.

Even if we were to accept that merely citing a case, without explanation or argument, could preserve an argument for appeal, we do not find that defendant's citation to *Wheeler, supra,* 4

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[7] "[C]onduct evincing moral turpitude [may be used for impeachment] even if such conduct was the subject of a juvenile adjudication, subject, of course, to the restrictions imposed under Evidence Code section 352 and other applicable evidentiary limitations." (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1740.) Making criminal threats, assault, and assault with a firearm are crimes involving moral turpitude. (*People v. Thornton* (1992) 3 Cal. App.4th 419, 422-424; *People v. Elwell* (1988) 206 Cal.App.3d 171, 175-177; *People v. Lepolo* (1997) 55 Cal.App.4th 85, 90-91.)

Cal.4th 284 did so here. Immediately before Kevin and Sanchez were to testify, the prosecutor sought clarification of the court's ruling on the sustained petitions because "[defense] counsel just cited the court case law." Seemingly cognizant that *Wheeler* stood for a ground for admissibility the defense had not articulated, the prosecutor stated, "And I wanted to get a ruling as to impeachment. Again, I think it is [Evidence Code section] 352." When the trial court responded by stating it believed the sustained petitions were only sought to be used as character evidence and asked the defense, "Am I off base," defense counsel said "No." In fact, defense counsel again explained that "I was going to show tendency toward violence, which would be character." When the trial court again asked "[f]or what purpose" the defense wanted to use the sustained petitions, defense counsel said, "To show propensity towards violent acts," and nothing else.

Accordingly, because he sought to use the sustained petitions on a different ground in the trial court, we find defendant has forfeited his claim on appeal that the trial court abused its discretion by excluding them as impeachment as to truthfulness. (Evid. Code, § 354; *People v. Fauber* (1992) 2 Cal.4th 792, 854 ["Defendant's trial counsel did not, however, specifically raise this ground for admissibility. In these circumstances, he is precluded from complaining on appeal."]; see also *People v. Jones* (2017) 3 Cal.5th 583, 602-604; *People v. Morrison* (2004) 34 Cal.4th 698, 711-712; *People v. Hill, supra,* 3 Cal.4th at pp. 988-989.) Likewise, by failing to make any such objection before the trial court, defendant has forfeited the confrontation clause claim he now makes on appeal. (*People v. Redd* (2010) 48 Cal.4th 691, 730 ["[Defendant] did not raise an

objection below based upon the confrontation clause, and therefore has forfeited this claim"]; see also *People v. Raley* (1992) 2 Cal.4th 870, 892 [a hearsay objection did not preserve a claim under the confrontation clause].)

II. Ineffective Assistance of Counsel

Recognizing he may have forfeited his newly raised claims of error, defendant argues we should reverse his convictions because his trial counsel was constitutionally ineffective for having failed to preserve such claims.

"'It is defendant's burden to demonstrate the inadequacy of trial counsel. [Citation.] [The California Supreme Court has] summarized defendant's burden as follows: "'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] . . . Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, . . . : "'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]' [Citation.] If the record on appeal ""sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no

satisfactory explanation,' the claim on appeal must be rejected,'" and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.' [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 875-876, overruled on other grounds in *People v. Hardy* (2018) 5 Cal. 5th 56, 104.)

Here, the record on appeal does not affirmatively demonstrate that trial counsel had no rational tactical purpose for failing to proffer the grounds for admissibility of the sustained petitions now advanced on appeal. Counsel may have rationally concluded that seeking to impeach the victims' truthfulness would detract from the primary strategy of convincing the trial court to let in evidence to show the victims were the aggressors. Defense counsel might also have rationally concluded use of the sustained petitions for criminal threats and assault might not have survived the balancing test under Evidence Code, section 352,[8] particularly where such crimes bear less on a witness's truthfulness than crimes of moral turpitude involving fraud or deceit, or where such crimes might impermissibly have caused the jury to view them as propensity evidence—a ground upon which the trial court had excluded them. We therefore cannot find on this record that there is no satisfactory explanation for trial counsel's failure to make the arguments defendant now makes. Accordingly, we must reject defendant's claim of ineffective assistance of counsel made on this direct appeal.

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[8] Even though the confrontation clause includes the right to cross-examine adverse witnesses on matters reflecting on their credibility, such cross-examination may be restricted by the trial "on the grounds stated in Evidence Code section 352." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

III. Remand for Resentencing

Defendant contends the consecutive 10-year term imposed by the trial court for the gang enhancement on count one is unauthorized. The Attorney General agrees, as do we.

Pursuant to section 186.22, subdivision (b)(1)(C), the trial court imposed an additional term of 10 years because the crime of attempted murder charged in count is a violent felony, as defined in section 667.5, subdivision (c). "Section 186.22(b)(1)(C) does not apply, however, where the violent felony is 'punishable by imprisonment in the state prison for life.' (Pen. Code, § 186.22, subd. (b)(5).) Instead, section 186.22, subdivision (b)(5) [citation] applies and imposes a minimum term of 15 years before the defendant may be considered for parole." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

Because defendant's conviction on count one for attempted willful, deliberate, and premeditated murder (§§ 664, 187, subd. (a)) is a violent felony (§ 667.5, subd. (c)(1)) that is punishable by life imprisonment (§ 664, subd. (a)), the trial court erred by imposing the consecutive 10-year term pursuant to section 186.22, subdivision (b)(1)(C). We, therefore, vacate defendant's sentence on both counts and remand for the trial court to resentence defendant in accordance herewith. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258 ["When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking the illegal portions, the trial court may reconsider all sentencing choices"].)

We note that, on remand, the trial court may exercise its discretion to strike the section 12022.53 firearm enhancement originally imposed on count one. At the time of defendant's

sentencing in 2017, trial courts had no authority to strike firearm enhancements under section 12022.53. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 506; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) As both parties agree, the passage of Senate Bill 620 changed that. Effective January 1, 2018, trial courts now have the discretion to strike or dismiss a section 12022.53 firearm enhancement "in the interest of justice." (§ 12022.53, subd. (h); see *People v. Arredondo, supra,* 21 Cal.App.5th at p. 506.) Accordingly, the trial court shall decide whether to exercise this newfound discretion on remand.

DISPOSITION

We affirm the convictions, vacate the sentence, and remand for resentencing in accordance with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIN, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.