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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARCUS KENNETH SMITH,<br><br>Defendant and Appellant. | B279969<br><br>(Los Angeles County Super. Ct. No. BA430349) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed and remanded.

Leslie Conrad, 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, William H. Shin, Carl N. Henry and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

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## SUMMARY

Defendant Marcus Kenneth Smith appeals following his jury conviction of the first degree murder of Donald Chapman, with a true finding on the allegation he personally and intentionally discharged a firearm causing Mr. Chapman's death. The court found true a prior robbery conviction, and sentenced defendant to 80 years to life, denying defendant's *Romero* motion to strike the prior conviction.[1]

On appeal, defendant argues that prosecutorial misconduct during closing argument – based on the comment that "[y]ou can't lawyer yourself out of facts" – requires reversal. Defendant also contends the trial court did not exercise informed discretion when it denied defendant's *Romero* motion. And, in supplemental briefing, defendant contends that legislation effective January 1, 2018, ending the statutory prohibition on a trial court's ability to strike a firearm enhancement (see Pen. Code, §§ 12022.5 & 12022.53), applies and requires a remand for a new sentencing hearing.[2]

We find no prosecutorial misconduct and no error in denying the *Romero* motion. Accordingly, we affirm the judgment, but we agree that remand is required for the exercise of the trial court's discretion to decide whether to strike the firearm enhancement under the new legislation.

## FACTS

On October 12, 2014, at about 12:15 p.m., the Los Angeles Police Department responded to the scene of a shooting that had just occurred at 81st Street and Avalon Boulevard. As he

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1 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

2 All further statutory references are to the Penal Code.

arrived, Officer Michael Estrada saw a group of about 10 people waving at his car and yelling at him to help the victim, a black male lying on his back, with his arms at his sides and eyes wide open, bleeding profusely from gunshot wounds to his face and head. He was unarmed.

Officer Estrada called for backup to assist with crowd control. The scene was "hectic" and the intersection was "gang-filled"; there was "an ongoing feud between two rival gangs, the Swans and the Main Street Gangster Crips," and Officer Estrada recognized most of the people in the crowd from his previous experience as a gang officer. He had never seen the victim before. There were three shell casings "[r]ight next to the deceased," and another near the alley "just east of his body."

Officer Joel Morales also came to the crime scene with his partner, to assist with protecting the scene. A few minutes after they arrived, Officer Morales noticed "a group of men chasing another young man," the defendant. Four or five men were chasing defendant "in the middle of the street, basically." Another group of people "started shouting, 'he's the shooter, he's the shooter,' " and were pointing at defendant. After he saw defendant running, Officer Morales saw the group of men who were chasing defendant push him down and start to beat him up, screaming and yelling at him. Officer Morales and his partner "ran up to [defendant], and . . . took him into custody."

None of the people who shouted that defendant was the shooter remained at the scene to give a statement about what had happened.

Detective Ricardo Feria investigated Mr. Chapman's murder. His attempts to find witnesses to the shooting failed, but he located surveillance cameras at several places in the vicinity.

One of the surveillance cameras, at a residence on 81st Street, captured the shooting of Mr. Chapman. The video showed a dark gray sedan with a "spoiler" and custom rims pulling up at the corner of 81st Street and Avalon. Someone got out of the rear passenger seat and ran toward the southeast corner of the intersection. The video shows the person shooting Mr. Chapman. The shooter was wearing a dark-colored top and gray pants, and after shooting Mr. Chapman, ran eastbound down 81st Street and then southbound down an alley. While he was fleeing, the shooter raised his left arm "consistent with pointing a firearm and shooting in the direction of" a residence on the north side of 81st Street.

The dark gray sedan that had dropped off the shooter re-entered the video frame, traveling westbound and passing the shooting location just seconds after the shooter fled southbound down the alley.

Detective Feria also located several surveillance cameras at an apartment complex at 83rd Street and Avalon. The video on one of these cameras showed a continuation of the same north/south alley that the shooter ran down in the preceding video. This video showed an individual "wearing a dark-colored top running southbound in the alley to eastbound 82nd Street[,]" and then running eastbound on 82nd Street. Detective Feria testified this was the shooter, "[b]ased on the fact that we see the same person running southbound down the alley wearing the dark-colored sweatshirt and . . . coming up over in the rear yard of this location [(a house on 82nd Street).]" After the person in the video jumped over the wall, the video showed he was wearing light-colored cargo-type pants, and appeared to be hiding from a crowd of people in the area.

Then, the video shows the person in the rear yard "was detected by a crowd," jumped over the cinderblock wall and went

eastbound out of sight. "And it appears that multiple individuals come out of the two houses just west of that residence giving chase."

Videotape from a second camera in the apartment complex showed "that same individual . . . now running northbound on the west sidewalk of Avalon just north of 83rd." By "that same individual," Detective Feria later testified, he meant "the suspected shooter wearing the dark-colored sweatshirt and the light-colored pants[.]" The video also showed a person on a bicycle following the shooter.

Video from yet another camera, at a strip mall on the west side of Avalon between 82nd and 83rd Streets, showed the same two individuals – the suspect and the person following him on a bicycle. The black hoody "appears to be unzipped now," and underneath it the suspect was wearing a blue T-shirt with a Superman logo. Two other cameras at the strip mall, with different views, also showed the suspect running northbound on Avalon, "wearing the unzipped, black, hooded . . . sweatshirt, wearing the baggy cargo sweatpants; also again wearing the T-shirt, exposing the T-shirt with the Superman logo."

When Officer Morales arrested him, defendant was wearing a black hoodie or sweatshirt, a blue T-shirt with a Superman emblem, gray cargo sweatpants and blue shoes. No weapon was recovered. Defendant's sweatshirt tested positive for gunshot residue in three places. Detective Feria and his partner interviewed defendant at the 77th Street station on the evening of the murder. Defendant "had a good knot on his forehead," was "bleeding from his lips and had some bumps and bruises throughout his face," as well an injury to his buttocks.

When he was asked what had happened, defendant told police, "I got – got my ass kicked – excuse my language – by a Blood gang named the Swans." (Officer Jonathan Vander Lee

later testified that in June 2013, defendant told him he was a member of the Denver Lane Bloods.) Defendant explained to Detective Feria and his partner that "[t]he Denver Lanes and the Swans don't get along." Defendant was in the neighborhood (an area where the Swans "hang[] out") to go to a church at 82nd Street and Avalon with his best friend, Dominique Moore.

Defendant told the detectives he and Ms. Moore had gone to the church, where Ms. Moore's brother Kevin was a pastor, in her car at about 10:30 a.m. When he "heard the shooting from inside the church," he decided to leave. When he walked outside, he saw "a gang of people" who "thought I was a Crip," so he ran, and "they caught me right there and they beat my ass and they shot at me."

Defendant made several telephone calls on the night of his arrest. Detective Feria listened to the recordings of these calls and recognized defendant's voice. In one call, at 12:01 a.m. on October 13, 2014, defendant told an unidentified woman that, "[i]t looks like I ain't going to see you at all no more," because "[t]hey're fixing to give me life." When the woman asked why, defendant said, "Murder." Defendant said, "Yeah, I'm, I'm going to go to the pen for 25 years to life." In a second call at 3:14 a.m., defendant said, "I got a lot of time to think about, like . . . As far as how much time I'm fixin' to get . . . It's my fault." In a third call at 3:30 a.m., defendant said, "But you know, . . . it's all my fault [unintelligible] it's my fault [unintelligible] that's what happens from doing f----- up decisions. I'm man enough to pay the consequences, so . . . ."

Defendant was charged by information with the murder of Mr. Chapman and with attempt to murder John Doe, together with firearm and gang enhancements and a prior strike conviction for robbery. (A third count of shooting at an inhabited dwelling was dismissed on the first day of trial.)

In addition to testimony and documents establishing the facts just described, further evidence was elicited at defendant's trial in August and September 2016.[3]

During a search of Ms. Moore's car in an unrelated investigation, police recovered a letter dated March 15, 2016, from "Marcus (KS4)" to "Dominique (Girl Madd) " (People's Exhibit 25). The third page of the letter was a copy of a page from an arrest report made when defendant was booked at the 77th Street station, with these words underlined: "[Defendant] stated that he went to church at 82nd Street and Avalon Boulevard with his friend Domonique [*sic*] at 1030 in the morning. The services begin at 1100. During the services, he heard gun shots and became scared, so he left the church."

In the letter to Ms. Moore, defendant listed six items of "what I need you to do for me." These were: "1. I need you to say that I came to your house around 9:00 to 9:30 am. [¶] 2. I need you to say we got to the church around 10:00 to 10:30 to attend Sunday school. [¶] 3. I need you to say if they ask what I was wearing say gray sweats blue addida shoes, a blue superman shirt, and a black hooded sweater. [¶] 4. I also need you to say I left 5- to 10 minutes after 12:00 pm after everything occurred to meet up with a ride and you don't know who was coming to pick me up. [¶] 5. I need you to stick with that story don't tell them nothing more or nothing less. [¶] 6. Just say I was with you until I left and that's all you know."

The jury also heard a recording of two telephone calls from defendant in the county jail. One was on March 20, 2016. An

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[3] The jury was unable to reach a verdict on the gang allegation and it was dismissed, so we do not recount the evidence relating to that allegation.

unidentified male speaker said that "the homegirl said she got that shit you sent her," and "that wasn't cool. She said you . . . shouldn't have been saying . . . what you needed her to do, like all that, like so openly in there." In another telephone call on March 28, 2016, defendant spoke to Ms. Moore. Ms. Moore brought up "that letter that you sent me," and said "they [(the police)] got that" and "that shit was in the car when I was at work." Defendant said, "That's dumb, blood. How could you be so careless with that shit, blood?" and "[t]hat ain't nothing you just carry around with you, fool." Further, defendant said, "[o]n top of that . . . I got my . . . public defender telling me you told . . . the private investigators something else." Defendant said: "they said . . . that Dominique said . . . that she ain't had no knowledge of me being with her," and the "only thing she knows, I was on my way to the church that morning"; "[t]hat's what they say Dominique say."

At trial, Ms. Moore testified that she was at the church on the day of the shooting; she did not see defendant at the church; she did not take him to church with her that day; and he was not at her house earlier that day. Her testimony that defendant was not with her at the church was consistent with what she told the police in 2015 and the defense investigator in 2016. She testified she did not hear the shooting, but saw it when she went outside. Ms. Moore also testified she did not remember having telephone conversations with defendant about testifying for him, and did not remember getting the letter from him in March 2016.

The jury found defendant guilty of the first degree murder of Mr. Chapman, and found true the allegation he personally and intentionally discharged a firearm causing Mr. Chapman's death. The jury found defendant not guilty of the attempted murder count, and could not reach a verdict on the gang allegations, which were later dismissed.

Defendant waived a jury on a prior robbery conviction, and after a court trial, the court found the prior conviction had been proved. The court then agreed to hear defendant's oral *Romero* motion, and after argument, "exercise[d] [its] discretion in favor of denying the motion."

The court sentenced defendant to 80 years to life (25 years to life for the murder, doubled for the strike (§§ 667, subds. (b)-(i) & 1170.12), plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), plus a five-year enhancement for his prior serious felony conviction (§ 667, subd. (a)(1))). The court indicated that, "but for the *Romero* issue, the court does not have discretion with respect to the sentence that was imposed." The court also awarded custody credits and made further orders not at issue on this appeal.

## DISCUSSION

### 1. The Claim of Prosecutorial Misconduct

Defendant contends that a statement the prosecutor made during his closing argument was an "exploitation of [defendant's] right to counsel" and an "attack on the integrity of defense counsel" that violated his constitutional rights. The record shows defendant's claim is entirely unwarranted.

#### a. The law

The applicable principles are settled. "Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Cortez* (2016) 63 Cal.4th 101, 130 (*Cortez*).)

"To establish misconduct, defendant need not show that the prosecutor acted in bad faith. [Citation.] However, she does need to 'show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." ' [Citation.] If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' " (*Cortez*, *supra,* 63 Cal.4th at p. 130.)

**b. The prosecutor's comments in this case**

During his closing argument, the prosecutor reviewed with the jury the surveillance videotapes admitted in evidence. In doing so, he said this:

> "He [(defendant)] can't run down this alley. . . . [T]here's a gate here, and that gate was closed. So the reason why the defendant could not just run down this alley and had to go behind these houses is because of that gate. . . . It's 12:10 and 8 seconds [on the tape].
>
> "There's nobody else, just him. All right. You can't run from the truth. It boxes you in.
>
> "Just to show you on the map, 12:09 and 56 seconds, murder. 12:10 and 4 seconds, attempted murder. And then 12:10 and 8 seconds, you see a figure, a human being, running down the alley. And then that person is seen again on the other side of that brick wall.
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> "Those are the facts. You can't lawyer yourself out of facts. That's that gate on 82nd Street. That's why he couldn't run straight down the street. He had to make a left and hop houses and hide and duck for several minutes."

Defense counsel made no objection during the prosecutor's argument, but the following morning moved for a mistrial, saying this:

> "Yesterday during closing arguments, the People argued – was arguing the issue of fabricating an alibi and that the truth did not need a script. [¶] The People argued, quote, 'You don't get to lawyer up and get around the truth.' [(This is not what the prosecutor said; see *ante*.)]
>
> "First of all, [defendant] has a right to appointed counsel. And this, unfortunately, leads to a reasonable inference that counsel conspired with the defendant in order to fabricate an alibi. This alone is illegal, unethical, and immoral. That's something I wouldn't do. But it gives the jury that inference."

Then, defense counsel referred to discussions – all outside the presence of the jury – surrounding the admission in evidence of defendant's letter to Ms. Moore (People's Exhibit 25, telling her "what I need you to do for me" and enclosing a page from the arrest report). Defense counsel continued:

> "We discussed this previously in the 402 that during the trial the letter [(People's Exhibit 25)] was going to come in, and that . . . the letter could present a dangerous inference.[4]
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> "The People have acknowledged in doing the 402 that defense counsel did not provide this particular letter or copy of the arrest report to the defense. . . . [¶] The prosecutors agreed that they would not argue this; and if

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4 Defendant does not claim on appeal that the admission of People's Exhibit 25 was erroneous.

> desired, a stipulation would be offered because of this for the jury. [¶] On Monday the prosecutors and I discussed that I would not be seeking the stipulation since the prosecutors would not be making that type of an argument and implying that defense counsel was engaged in some wrongdoing."

After noting other points not at issue on appeal, counsel concluded: "For these reasons I'm objecting on the basis of misconduct in violation of my client's right to counsel, due process, and the right to remain silent on both state and federal grounds. And I am moving for a mistrial."

The prosecutor responded by pointing out his words meant "that you cannot argue your way out of the facts. I did not say – there was absolutely no connection between the concept of lawyer or lawyering with the fabrication of evidence. At no point during my argument was that true. None. It certainly was not."

The court responded: "[J]ust so it's very clear, I don't think that you would or did intentionally commit any kind of misconduct. [¶] . . . [¶] I do believe it is fair to argue that if the evidence shows, or it's a reasonable interpretation from the evidence that a person fabricated evidence or attempted to fabricate evidence, that one can comment on the nature of the statements that were made without violating any kind of constitutional right that the defendant has. [¶] I think it's more problematic if there's an inference that the defendant didn't say something at a time when he was exercising his constitutional right, essentially in the nature of *Griffin*[5] error. [¶] I don't believe that happened."

Addressing defense counsel, the court offered to remind the jurors that "it's up to them to make the determinations about

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**5** *Griffin v. California* (1965) 380 U.S. 609.

what the facts are and not what the attorneys say," and also to "make it clear to the jury that you were not responsible for the fact that [defendant] had access to a page from the police report . . . ." Defense counsel declined, and answered affirmatively when the court asked if she was "satisfied with the record as it is now[.]"

Defense counsel then made her closing argument. In his rebuttal statement, the prosecutor reminded the jury of the court's instruction that what he and defense counsel said was not evidence. He also said: "[I]t's not [defense counsel's] fault. She can only work with what her client has given her. You can't build the Taj Mahal out of a pile of mud . . . . And in this case, the defendant made our case for us."

**c. Contentions and conclusions**

On appeal, defendant contends the prosecutor's comment – "You can't lawyer yourself out of facts" – "penalized [defendant's] constitutional right to counsel"; was an "attack on the integrity of defense counsel"; "improperly used [defendant's] exercise of his right to counsel to imply that his defense was fabricated"; and "went even further . . . by suggesting [defendant] and his attorney had conspired to fabricate a defense." These hyperbolic claims find no support in the record or the law.

First, defendant offers no analysis or explanation of how the prosecutor's comment, " ' "[i]n the context of the whole argument and the instructions," ' " could be " ' "understood or applied" ' " by the jury " ' "in an improper or erroneous manner." ' " (*Cortez, supra,* 63 Cal.4th at p. 130.) That is because there is none. The mere use of the word "lawyer" does not implicate the right to counsel, or constitute an "attack on the integrity of defense counsel," when it is entirely untethered to defendant's exercise of the right to counsel. Neither the quoted comments nor anything else in the record before the jury contains

any suggestion or implication from which a reasonable juror could possibly infer that defendant and defense counsel "conspired to fabricate a defense." There is simply nothing there.

Second, defendant cites and quotes from more than a dozen prosecutorial misconduct cases for general propositions, but none of them applies here. For example, defendant cites *People v. Bain* (1971) 5 Cal.3d 839 for the proposition that the "unsupported implication by the prosecutor that defense counsel fabricated a defense constitutes misconduct." (*Id.* at p. 847.) Of course that is so. But unlike in *Bain*, here defendant cannot point to even a hint by the prosecutor of any fabrication by defense counsel. The contrast with *Bain* could not be clearer. (See *id.* at pp. 845-846 ["the prosecutor asserted before the jury that the defendant and his counsel had fabricated the . . . story"; the "claim of fabrication was made by the prosecution as early as the *voir dire*" and "the prosecutor expanded on the theme in his closing argument" and "returned to the theme of a fabricated story in his rebuttal argument," leaving "the clear impression with the jury that the defendant had been coached"].)

Similarly, defendant relies on *People v. Schindler* (1980) 114 Cal.App.3d 178, where "defendant clearly was impermissibly penalized for exercising her constitutional right to counsel by the prosecutor's flagrantly improper argument that the time and circumstances surrounding her selection of this particular defense counsel, who had prosecuted her husband, impeached her testimony and showed she was guilty of murder." (*Id.* at p. 189; see also *People v. Fabert* (1982) 127 Cal.App.3d 604, 610 ["Here, as in *Schindler*, the prosecution not only impermissibly adduced evidence of defendant's exercise of her right to counsel but attempted to use this evidence to convey the impression that her defense [diminished capacity] was fabricated."].)

These cases do not help defendant, and indeed they demonstrate the fallacy of his misconduct claim. In all of them, there is a direct connection between the prosecutor's "flagrantly improper" argument and the defendant's exercise of his or her right to counsel. That connection – between the claimed misconduct and defendant's exercise of his right to counsel – is entirely missing here.

In short, there was no misconduct. And if there had been misconduct, defendant would be unable to show prejudice, under any standard. We have recited the evidence at some length, and will not repeat it here. Suffice it to say by way of summary: Surveillance tapes showed the murder, and showed the shooter fleeing the scene and fleeing the crowd pursuing him, wearing the same clothes defendant was wearing when the police extracted him from the beating being administered by the crowd pursuing him. There were defendant's calls from jail that night, repeatedly saying such things as "[t]hey're fixing to give me life" for "[m]urder," and he was "going to go to the pen for 25 years to life," and "it's all my fault" and "I'm man enough to pay the consequences . . . ." There was gunshot residue on defendant's sweatshirt. There was defendant's attempt to establish an alibi by telling Ms. Moore exactly "what I need you to do for me." And there was Ms. Moore's testimony, consistent with her statements to police and defense investigators, that (contrary to defendant's statement to police) defendant was not with her at the church on the day of the shooting. This evidence is overwhelming, and does not admit of any reasonable doubt as to defendant's guilt.

**2. The Claim of *Romero* Error**

Before sentencing defendant, the court denied his *Romero* motion to strike his prior strike conviction in the interests of justice. Defendant was 19 at the time of the murder, and if the

trial court had granted his *Romero* motion, he would have been sentenced to 55 years to life instead of 80 years to life.

Defendant contends the trial court mistakenly believed defendant was entitled to the benefits of Proposition 57. Proposition 57 added section 32 of article I to the California Constitution, effective November 9, 2016. Section 32 applies to persons convicted of a nonviolent felony offense, and makes those persons eligible for parole after completion of the full term for the primary offense, excluding enhancements. (§ 32(a)(1)(A).) It also allows an award of credits for good behavior and approved rehabilitative or educational achievements. (§ 32(a)(2).)

The trial court's mistaken belief, defendant contends, means the court did not exercise informed discretion when it denied his *Romero* motion. We disagree.

**a. The sentencing proceeding**

The trial court entertained an oral *Romero* motion from defense counsel, who stated that "it's really an appeal for leniency in this case, specifically with respect to and in light of [defendant's] age," and that defendant would "be a hundred years old and will not see the light of day if he were to serve that full amount." The court replied:

> "I understand he's 21. [A]ssuming that the provisions of the new Proposition 57 don't apply to him, and I don't know why they wouldn't, he would serve a minimum of 68 years. But he has credit for some. [(Defendant had 797 days of actual custody credits.)]
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> "I would imagine that the provisions of Prop. 57 will be applicable to him, which would have a significant impact on the length of his sentence. But that doesn't eliminate the need for a ruling on a *Romero* motion. I'm not suggesting you can't make one based of [*sic*] the change in the law."

Defense counsel pointed out defendant would still have a very lengthy sentence if the court were to strike the prior conviction. While his conduct as a juvenile "was not exemplary and gives us pause," defendant had no father figure and no stability in the home, and striking the strike would give defendant "an opportunity and something to look forward to for rehabilitation."

The prosecutor noted that defendant was convicted of five violent offenses between the ages of 14 and 19; had two criminal threat sustained petitions; and an adult conviction for robbery. The murder occurred while he was on probation, he was the direct perpetrator, and he killed an innocent man. "[H]e's never shown any remorse. And he's actually tried to perpetrate a fraud upon the court through his actions while in county jail." Concluding defendant was "not someone that deserves the leniency or mercy of the court," the prosecutor stated: "And I'm making my argument in a vacuum, not assuming what's gonna happen with Prop. 57 and how it affects this defendant."

The court then ruled, stating it agreed with defense counsel in part, and continuing:

> "He is a very young man. And it gives me no satisfaction to see what's in front of him. It troubles me that someone at his age, and I have to say he looks even younger, is looking at what he's looking at.
>
> "However, he's responsible for his own conduct. And he was an adult when this crime was committed. He was still on probation for a violent offense when he committed this crime. [¶] And if for reasons of lack of adult guidance he started committing crimes at a very early age, I empathize with that, but I can't ignore that that's what he chose to do.

"So I agree that if I strike the strike, he will still be looking at a significant amount of time in custody. However, I don't think legally that he falls within the spirit of the one-strike law. So I'm going to exercise my discretion in favor of denying the motion."

The court then imposed a total term of imprisonment of 80 years to life. After advising defendant of his appeal rights and other matters, the court revoked defendant's probation and imposed the three-year sentence that had been suspended, ordering it to run concurrently. Then the court addressed defendant:

"Mr. Smith, you're a young man. And . . . I don't know for sure, but I believe that there are going to be changes in the law that are going to give you an opportunity to take advantage of programs, educational programs, any other kind of programs . . . within the state prison system. You can choose to do it or not.

"To the extent that you doing that will enhance the probabilities of you being paroled, with or without the benefit of the newly enacted constitutional provision contained in Proposition 57, you should consider doing that, because it will result in you getting out of prison at the earliest possible time.

"It appears to me that the new constitutional provision will apply to you. But it is also clear from the provision that the Department of Corrections is going to take into consideration your availing yourself of the . . . programs they have available.

"It may also be that you are eligible for the youthful offender sentencing, which would decrease the minimum amount of time that you would have to serve before you're

eligible for parole. And it's going to decrease it significantly.

"So again, it is my belief that the Department of Corrections is obliged to take into consideration your youth, your background, and use that in making a determination as to whether or not you should be paroled at the earliest possible time. I also believe they will take into consideration what you choose to do while you are incarcerated.

"So I don't believe that this is a sentence that is going to prevent you from being released if you do what you can do for yourself to get released at the earliest possible time. So that's up to you."

**b. Contentions and conclusions**

Defendant contends the court's "misunderstanding of the effect of Proposition 57" shows its exercise of discretion in denying defendant's *Romero* motion "was not fully informed." (Defendant also points out that he is not eligible for the "youth offender parole hearing" the trial court referred to when it told defendant that "[i]t may also be that you are eligible for the youthful offender sentencing which would decrease the minimum amount of time" to be served before a parole hearing.) (§ 3051, subd. (h).) We find no abuse of discretion in the trial court's ruling.

To the extent the court assumed defendant would be eligible for Proposition 57 (or section 3051) treatment, the assumption was incorrect. (The trial court's references to those provisions were somewhat equivocal ("I don't know for sure"; "with or without the benefit of . . . Proposition 57"; "[i]t appears to me"; "[i]t may also be that you are eligible . . .").) Nonetheless, we find the trial court acted well within its discretion in denying defendant's *Romero* motion.

As the Supreme Court tells us, the Three Strikes law " 'establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme." ' " (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) The court "established stringent standards that sentencing courts must follow in order to find such an exception. '[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, . . . "in furtherance of justice" . . . the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' " (*Ibid.*)

Here, the trial court expressly concluded defendant should *not* be deemed outside the spirit of the Three Strikes scheme, based on defendant's own actions as an adult committing a murder while still on probation for a violent offense. That conclusion fully supports denial of defendant's *Romero* motion, regardless of the court's belief about the timing of defendant's parole hearing. Further, while a court must explain its reasons for striking a prior, "no similar requirement applies when a court declines to strike a prior," and there is a " 'strong presumption' [citation] that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation." (*In re Large*

(2007) 41 Cal.4th 538, 550, 551.) Defendant has not rebutted that presumption.

The trial court recognized that its *Romero* ruling was a matter separate from Proposition 57. (The court stated that, while Proposition 57 "would have a significant impact on the length" of defendant's sentence, "that doesn't eliminate the need for a ruling on a *Romero* motion.") The court heard the arguments we have quoted above from defense counsel and the prosecutor. The court observed defendant "was an adult when this crime was committed," was "still on probation for a violent offense," and while he "started committing crimes at a very early age," the court could not "ignore that that's what he chose to do."

In short, the court properly considered the factors the law requires it to consider: the nature and circumstances of defendant's present and prior convictions and "the particulars of his background, character, and prospects[.]" (*Carmony, supra,* 33 Cal.4th at p. 377.) The court concluded, based on those factors, that defendant was not one of those defendants who " ' "should be treated as though he actually fell outside the Three Strikes scheme." ' " (*Ibid.*) Plainly, there was no abuse of discretion.

**3. Discretion To Strike the Firearm Enhancement**

As mentioned earlier, defendant's 80-years-to-life sentence included a mandatory 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). At the time of defendant's sentencing (on December 8, 2016), section 12022.53 specified that "[n]otwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.53, subd. (h).)

Effective January 1, 2018, as a result of the enactment of Senate Bill No. 620, the prohibition against striking a firearm

enhancement was eliminated. Now, section 12022.53 provides that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

The parties filed supplemental briefing on the applicability of amended section 12022.53 to defendant's case. Defendant argued that the new legislation applies to all cases not yet final where a firearm enhancement was imposed at sentencing, and that we should remand the case to permit the trial court to exercise the discretion it now has to strike the firearm enhancement. Respondent concedes that the amendment to section 12022.53 applies retroactively to nonfinal judgments. Respondent says nothing about whether we should remand to the trial court, and we understand respondent to have conceded that is the correct procedure.

We agree with the parties that in defendant's case, remand to the trial court for the exercise of its discretion is appropriate.

The case is not yet final. Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), when the Legislature has amended a statute to reduce the punishment for a particular offense, we assume, unless there is evidence to the contrary, that the Legislature intended the amended statute to apply "to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323.) The *Estrada* rule has been applied to statutes governing penalty enhancements (*People v. Nasalga* (1996) 12 Cal.4th 784, 792) and to situations where the amendment "vests in the trial court discretion to impose either the same penalty as under the former

law or a lesser penalty" (*People v. Francis* (1969) 71 Cal.2d 66, 76).

The amendments made by Senate Bill No. 620 do not specify that the change applies only to crimes committed on or after a particular date. Nor do the amendments contain any other indication of legislative intent contrary to the *Estrada* rule. Consequently, the amendments apply to defendants whose judgments were not yet final on January 1, 2018.

In this case, the trial court expressly recognized, when it sentenced defendant in December 2016, that "but for the *Romero* issue, the court does not have discretion with respect to the sentence that was imposed." Accordingly, under the new legislation, the case must be remanded to give the court an opportunity to exercise its discretion.

**DISPOSITION**

The judgment is affirmed. The cause is remanded to the trial court for the limited purpose of exercising its discretion under Penal Code section 12022.53, subdivision (h) and, if appropriate following exercise of that discretion, resentencing defendant accordingly.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.