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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY JACOB RAKISITS,

Defendant and Appellant.

B280133

(Los Angeles County  
Super. Ct. No. MAO66076)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Frank M. Tavelman, Judge. Affirmed and remanded with instructions.

Melanie K. Dorian, 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, Shawn McGahey Webb, Supervising Deputy Attorney General, and Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.

## INTRODUCTION

A jury found defendant Jeremy Rakisits guilty of second degree murder; the trial court imposed a sentence of 40 years to life. On appeal, defendant contends the trial court violated his rights under the Confrontation Clause when it admitted the dying victim's testimonial statement to deputies. Defendant also argues remand is necessary to permit a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) and to give the trial court the opportunity to exercise discretion under Penal Code section 12022.53, subdivision (h)<sup>1</sup> to strike or dismiss the firearm enhancement.

As defendant concedes, our Supreme Court recognizes a victim's dying declaration does not violate the Confrontation Clause. Defendant was afforded a sufficient opportunity at his sentencing hearing to make a record under *Franklin, supra*, 63 Cal.4th 261, so we do not remand for that purpose. We do remand for the limited purpose of allowing the trial court to consider whether to exercise its discretion under section 12022.53, subdivision (h) to strike or dismiss the firearm enhancement in furtherance of justice (§ 1385).

## FACTUAL BACKGROUND

The pertinent facts may be summarized as follows: Defendant and codefendant, Anthony Juarez, confronted the victim, Aaron Brockway, on the street and asked him if he "banged." Brockway responded in the negative, but one or both of the defendants fired several rounds at him from a revolver, striking the victim once in the back.

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<sup>1</sup> All further statutory references are to the Penal Code.

Brockway staggered away, bleeding heavily. When deputies arrived, Brockway was collapsed on the sidewalk. He described his assailants to the deputies and explained they shot him after asking if he “banged.” Brockway died in the hospital hours later, following surgery.

Juarez was apprehended a short distance from Brockway’s location after he was observed throwing something over a fence. Deputies recovered six spent .22 caliber shell casings from Juarez’s pocket and located .22 caliber revolver near the fence. Defendant was also apprehended nearby.

Both defendant and Juarez tested positive for gunshot residue. Defendant and Juarez were placed in adjoining cells and their extensive discussions and various admissions concerning the crime were recorded.

### **PROCEDURAL BACKGROUND**

In an information, the Los Angeles County District Attorney charged defendant with second degree murder in violation of section 187, subdivision (a). The District Attorney alleged defendant committed the offense for the benefit of a gang within the meaning of section 186.22, subdivision (b)(4) and that a principal personally used and discharged a firearm within the meaning of section 12022.53, subdivision (e)(1).

The jury found defendant guilty on the murder charge and found the gang and firearm allegations to be true.<sup>2</sup> Defendant committed the murder when he was 18 years old. He was sentenced in January 2017, more than eight months after the Supreme Court issued its decision in *Franklin, supra*, 63 Cal.4th

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<sup>2</sup> Codefendant Juarez entered into a negotiated plea agreement.

263. Defendant's trial counsel did not file a sentencing memorandum or other documentation to mitigate defendant's sentence. Defense counsel did not present any testimony or documentation at the sentencing hearing, despite being asked twice by the trial court whether he had anything to say on defendant's behalf. The trial court sentenced defendant on the murder charge to a term of 15 years to life, plus an additional consecutive term of 25 years to life based on the firearm enhancement, for an aggregate sentence of 40 years to life. Sentences on the remaining enhancements were stayed.

## **DISCUSSION**

### **A. Dying Declaration**

Defendant contends the trial court violated his rights under the Confrontation Clause when it admitted Brockway's statement to the responding deputies: "They asked if I banged. I said no." According to defendant, that statement was testimonial, i.e., it was elicited for use in a later prosecution, and not subject to cross-examination, and violated his Sixth Amendment right to confront trial witnesses against him.

Defendant concedes, however, our Supreme Court has held the admission of a statement by a dying defendant, whether testimonial or not, does not violate the Sixth Amendment. (*People v. Monterroso* (2016) 34 Cal.4th 743, 763-765.) We reject defendant's Sixth Amendment challenge to the admission of the dying declaration.

### **B. Remand for *Franklin* Hearing**

Defendant, noting he will be eligible under sections 3051, subdivision (a)(2)(B) and 4801 for a youth offender parole hearing

during his 25th year of incarceration, asks that we remand the matter for a hearing pursuant to *Franklin, supra*, 63 Cal.4th 263 to permit the trial court to determine whether he had a sufficient opportunity to submit youth-related mitigating information relevant to that hearing. The Attorney General maintains remand is unnecessary as defendant was already given that opportunity. We agree with the Attorney General's argument.

*Franklin, supra*, 63 Cal.4th 263 was filed more than eight months before defendant's January 2017 sentencing hearing. Despite being given ample opportunity, defendant and his trial counsel did not present any youth-related mitigating information or testimony. Nor has defendant contended he was afforded ineffective assistance of counsel. Given the record of the sentencing proceedings, remand for a *Franklin* hearing is unnecessary.

**C. Remand Under Section 12022.53,  
Subdivision (h)**

When defendant was sentenced, the trial court did not have discretion to strike the firearm enhancement. Section 12022.53, subdivision (h)<sup>3</sup> now gives trial courts that discretion in furtherance of justice (§ 1385). The parties agree remand is appropriate for this purpose.

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<sup>3</sup> Section 12022.53, subdivision (h), effective January 1, 2018, provides: "The 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."

### **DISPOSITION**

The judgment of conviction is affirmed. The matter is remanded to permit the trial court to consider whether to exercise its discretion under section 12022.53, subdivision (h) to strike or dismiss the firearm enhancement in furtherance of justice.

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DUNNING, J.\*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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