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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DANIEL BURNEY, Defendant and Appellant.	B283591 (Los Angeles County Super. Ct. No. MA069527)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed.

Heather L. Beugen, 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, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Daniel Burney of assaulting Francisco Buelna with a semiautomatic firearm (Pen. Code, § 245, subd. (b)),[1] and found true that he personally used a firearm in the crime (§ 12022.5, subd. (a)). The jury found not true allegations that he personally inflicted great bodily injury (§ 12022.7, subd. (a)) and that he committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)). The jury acquitted him of the attempted premeditated murder of Buelna (§§ 664/187, subd. (a)), and deadlocked on the lesser charge of attempted voluntary manslaughter (§§ 664/192, subd. (a)). The court declared a mistrial on that count, and the count was dismissed before sentencing. The court sentenced appellant to 16 years in state prison: the midterm of six years on the conviction of assault with a semiautomatic firearm, plus the upper term of 10 years for firearm use.

Appellant's sole contention on appeal is that the case must be remanded to the trial court for it to exercise its discretion under section 12022.5, subdivision (c), as amended by Senate Bill No. 620 (SB 620) effective January 1, 2018, whether to strike the section 12022.5 enhancement. We disagree.

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[1] At the close of the prosecution case, on the prosecution's motion, the court dismissed three counts: one charging assault on Buelna causing serious bodily injury (§ 243, subd. (d)), one charging a criminal threat against Buelna (§ 422, subd. (a)), and a third charging a criminal threat against Geronimo Salazar who was a witness at trial. All unspecified statutory references are to the Penal Code.

BACKGROUND

Prosecution Case

Around midnight on September 9 or 10, 2016, Francisco Buelna, Geronimo Salazar, and Juan Zepeda (Buelna's younger brother) were drinking beer outside the apartment complex where Buelna lived. A group of African- Americans were sitting nearby in the outer dirt parking lot of the apartment complex. Appellant was part of the group, as was Lemuel Parker. Both were members of the Pacoima Piru gang, a Bloods-affiliated gang.

At some point, some members of the group walked past Buelna and asked what he was looking at. Buelna asked them the same question, and fighting broke out. Before any fighting broke out, Salazar heard appellant say his gang's name, the Pacoima Piru Bloods.

Buelna twice engaged in a fistfight with appellant's companion, Parker. Around the time of the second fight, Zepeda fought separately with appellant, knocking him to the ground. Appellant got up and yelled to Parker, "Blood, pass me the gun."

Parker gave appellant a semiautomatic handgun. Buelna told appellant, "Put the gun down and fight like a man. What do you need the weapon for?" Appellant fired a shot in the air. He then said to Buelna, "Step back or I'm going to shoot you." Appellant aimed at Buelna's head and fired two rounds, striking Buelna once in the jaw and once in the neck. At that point, all the combatants ran. Buelna's neck was bleeding heavily, and later he was in and out of consciousness, but survived.

Defense

Appellant testified in his own defense, and his version of events differed sharply from the prosecution's version. As here relevant, according to appellant, Buelna, Salazar, and Zepeda were drunk and instigated fighting off-and-on between themselves on the one hand, and appellant and Parker on the other.

Before the final encounter, appellant saw that Salazar had a knife. Parker, who had armed himself earlier, gave appellant the pistol and started to fight with Buelna. Buelna fell to the ground. Thinking the fight was over, but believing that Salazar and Zepeda were about to approach, appellant pointed the gun up and shot once in the air.

Buelna got up and began walking toward appellant with Salazar and Zepeda. Salazar had his knife out, and made a jabbing motion, saying "What's up, fool? What's up?" Appellant pointed the gun at the three men and told them to back up, but Salazar continued to approach. Salazar told appellant that he better shoot or else he would take the gun. At one point, Salazar stopped, and Buelna approached.

Afraid for his life, appellant fired the gun with his eyes closed. Then he and Parker fled on foot.

DISCUSSION

The parties agree that SB 620, which was enacted while this case was on appeal, applies retroactively to appellant's case. The legislation amended section 12022.5, subdivision (c) to give the trial court

discretion to strike a section 12022.5 enhancement.[2] The parties disagree whether a remand is required for the trial court to exercise this discretion: appellant contends that it is, respondent contends that it is not. Under the circumstances of this case, we agree with respondent.

As has been established by a line of case authority dealing with SB 620, remand to allow the trial court to exercise its discretion whether to strike a section 12022.5 enhancement "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see *People v. McDaniels* (2018) 22 Cal.App.5th 420; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.) In the present case, the record contains such a clear indication.

In sentencing appellant, the court found three factors in aggravation, as set forth in the probation report. First, defendant engaged in violent conduct in the present case that indicated a serious danger to society. Second, defendant's prior sustained juvenile petitions

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[2] Amended section 12022.5, subdivision (c) 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."

and adult convictions were serious or of increasing seriousness.[3] Third, appellant was on probation when he committed the instant crime.[4] The court found that there were no factors in mitigation.

When it imposed sentence, the court stated: "[A]s to count two, the violation of Penal Code section 245, subdivision (b), probation is denied. The defendant is sentenced to the mid-term of six years in the state prison. As to the Penal Code section 12022.5, subdivision (a) allegation, the defendant is ordered to serve a consecutive term of the high term of ten years, for a total state prison commitment of 16 years. I believe that that is appropriate given the facts of this case, and also given the factors in aggravation as cited previously."

Given the court's comments, we find the instant case analogous to *People v. McVey* (2018) 24 Cal.App.5th 405 (*McVey*). In *McVey*, the defendant was convicted of one count of voluntary manslaughter (§ 192, subd. (a)) with use of a firearm (§ 12022.5, subd. (a)), and one count of felony vandalism (§ 594, subd. (a)). The trial court sentenced him to a term of 16 years, eight months. The court selected the middle term of

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[3] The probation report reflected the following history: in May 2002 (at age 17), appellant suffered a sustained juvenile petition for possession of a firearm within a school zone (§ 626.9, subd. (b)). In January 2004, he was convicted of misdemeanor burglary (§ 459); in February 2005, of misdemeanor battery on transportation personnel (§ 243.3); in November 2005, misdemeanor disturbing the peace (§ 415); in March 2006, of misdemeanor vandalism (§ 594, subd. (a)); in November 2007, of felony burglary (§ 459); in September 2009, of possession of marijuana for sale (Health & Saf. Code, § 11359); and in October 2014, of misdemeanor driving under the influence (Veh. Code, § 23152, subd. (a)).

[4] The probation was for the misdemeanor driving under the influence conviction. (See fn. 2, *ante*.)

six years for the voluntary manslaughter conviction, and added the upper term of 10 years for the firearm enhancement. The court also imposed a subordinate consecutive term of 8 months for the felony vandalism. (*Id.* at p. 409.)

On appeal, the defendant contended that the case should be remanded to allow the court to exercise its discretion whether to strike the firearm enhancement under SB 620. (*McVey, supra*, 24 Cal.App.5th at p. 418.) The appellate court disagreed: "Under Penal Code section 12022.5, subdivision (a), the trial court in this case had discretion to impose a 3-, 4-, or 10-year prison term for the firearm enhancement in count 1. In choosing the 10-year enhancement, the trial court identified several aggravating factors, including the lack of significant provocation, appellant's disposition for violence, his lack of any remorse, and his 'callous reaction' after shooting an unarmed homeless man six or seven times. These factors, the court said, far outweighed any mitigating factors. The court also noted that appellant 'did not hesitate to shoot this unarmed homeless guy' multiple times, and described appellant's attitude as 'pretty haunting.' Thus, when it imposed the sentence enhancement under Penal Code section 12022.5, subdivision (a), the court declared, '[T]his is as aggravated as personal use of a firearm gets,' and 'the high term of 10 years on the enhancement is the only appropriate sentence on the enhancement.' [¶] In light of the trial court's express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement, there appears no possibility that, if the case were remanded, the trial court would

exercise its discretion to strike the enhancement altogether. We therefore conclude that remand in these circumstances would serve no purpose but to squander scarce judicial resources. [Citations.]" (*Id.* at p. 419.)

In the present case, although the court's comments were not as pointed as in *McVey,* they carry the same import. As in *McVey*, the court found multiple aggravating factors (including the violence displayed in the current crime). It found no mitigating factors. Like the trial court in *McVey*, the court here showed leniency in selecting the middle term for the substantive offense, but imposed the upper term for the section 12022.5 enhancement. In *McVey*, the trial court stated that "'[T]his is as aggravated as personal use of a firearm gets,' and 'the high term of 10 years on the enhancement is the only appropriate sentence on the enhancement.'" (*McVey, supra,* 24 Cal.App.5th at p. 419.) Here, the trial court imposed the upper term of 10 years for the section 12022.5 enhancement "for a total state prison commitment of 16 years," and stated, "I believe that that is appropriate given the facts of this case, and also given the factors in aggravation as cited previously." Thus, taken as a whole, the trial court's comments communicate its considered exercise of discretion to impose the upper term on the section 12022.5 enhancement based on the aggravated factors it found and the absence of mitigating factors, and also communicated its judgment that the sentence imposed was "appropriate" for appellant's crime.

In these circumstances, given that the court has already expressly fashioned the "appropriate" sentence, and in doing so exercised its

discretion to impose the upper term of 10 years for the section 12022.5 enhancement, a remand for the court to consider whether to strike the enhancement in its entirety would be a useless act. As in *McVey,* "[i]n light of the trial court's express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement, there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether. We therefore conclude that remand in these circumstances would serve no purpose but to squander scarce judicial resources." (*McVey, supra*, 24 Cal.App.5th at p. 419.)

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J. COLLINS, J.