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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY MICHAEL DELCI, Defendant and Appellant.	B292466 (Los Angeles County Super. Ct. No. VA136663)

APPEAL from the judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed and remanded with directions.

Elizabeth K. Horowitz, 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, Yun K. Lee and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Anthony Michael Delci (defendant) was convicted, along with codefendant Victor Marcus Arzate, of the murder of Jonathan R.[1] The jury concluded the murder was committed for the benefit of a criminal street gang. Defendant was convicted of second degree murder while codefendant Arzate, identified as the shooter, was convicted of first degree murder. Defendant was sentenced to state prison for 30 years to life.

Defendant challenges his conviction on numerous grounds. He contends he is entitled to a new trial in light of the passage of Senate Bill 1437 during the pendency of this appeal. He further argues the court abused its discretion in denying his motion for new trial based on newly discovered evidence. Defendant also argues the court made several evidentiary and sentencing errors.

We conclude remand for a resentencing hearing is warranted but otherwise affirm the judgment of conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and codefendant Arzate were jointly tried before separate juries. In summarizing the material facts, we draw upon our opinion in Arzate's appeal (*People v. Arzate* (Feb. 27, 2019, B286532) [nonpub. opn.] (*Arzate*)) as to the evidence and testimony heard by both juries, supplemented by the additional evidence heard only by defendant's jury.

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[1] Because of the gang allegation, we refer to the witnesses and victim by their first names only. We refer to witness G.E. by his initials because he was a minor at the time of the incident and when he testified at trial.

1. The Shooting

On the afternoon of August 30, 2014, Joann R. was at her home near La Cuarta Avenue and Washington Street in the city of Whittier. Her adult son, Jonathan, and adult daughter, Maria G., and several other family members were also there. Maria, who had been on the front porch with one of her children and Jonathan, came inside and told her mother not to go outside because a white car had driven by and someone in the car had been "throwing" gang signs. (*Arzate*, *supra*, B286532.)

A few minutes later, Joann and Jonathan went out into the front yard to pick up a few items that had been left outside. Joann saw a man (who she later identified as codefendant Arzate) standing in the street in front of her house. Arzate yelled at Jonathan "where you from?" Joann understood this to be gang talk. Jonathan yelled back that he was "from nowhere," attempting to indicate he had no gang affiliation. (*Arzate*, *supra*, B286532.)

Looking through a window from inside the house, Maria saw that the white car had returned and one of the passengers was out in the street. She could hear her brother saying that he was "from nowhere" but otherwise could not hear what was being said. (*Arzate*, *supra*, B286532.)

Arzate kept yelling at Jonathan so Joann said "he's from nowhere. What do you want?" By that point, Jonathan had stepped out to the gate which was open to the sidewalk. Joann noticed that Arzate was holding a "shiny" handgun. She yelled at her son that the man had a gun and Jonathan told her to run. Joann turned and headed toward the back yard. From the window, Maria saw her brother turn around as if to come back

inside the house. At that point, Arzate started shooting. (*Arzate*, *supra*, B286532.)

Joann heard a gunshot and Jonathan yelling out. When she turned back toward her son, she heard another shot and saw Jonathan fall onto his knees, bleeding, and clutching at the gate. She heard a total of four gunshots. Joann screamed for her daughter as she tried to help her son. Maria and her boyfriend ran outside and someone called 911. (*Arzate*, *supra*, B286532.)

Juan G. witnessed a portion of the incident from his car, as he happened to be driving by that afternoon. Juan and his wife were driving eastbound on La Cuarta Avenue near the intersection with Washington Street. Juan saw two men in the street who appeared to be in a "heated" conversation. He could not hear what they were saying, but they were about four feet apart from one another and he could see they were yelling at each other. One of the men was wearing black shorts, a black tank top and a baseball cap and was holding a "shiny silver" revolver down at his side. Juan tried to drive around them and make a left turn onto an alley but a white Honda CRV was blocking the way, so he made a right turn instead. Almost immediately he heard four gunshots. When he looked in his rearview mirror, he could see the Honda still in the alley facing the street. The man in the black shorts ran toward the white Honda, jumped into the front passenger seat and then the Honda immediately drove off down the street. (*Arzate*, *supra*, B286532.)

Juan did not get a good look at the faces of the men involved in the argument so he could not identify anyone, but after he made his turn down the alley and came around the block, he saw the Honda again, as it was fleeing the scene. He was able to write down the license plate number because of traffic

congestion. He saw two, possibly three, people in the Honda. Juan provided the information to the police officers who had arrived on the scene. (*Arzate*, *supra*, B286532.)

On that August afternoon, G.E. was 14 years old and had just been jumped into the Pico Nuevo gang the night before by defendant, who went by the moniker Toker, and codefendant Arzate, who used the moniker Suspect. Sometime around noon, they were driving around in the city of Whittier in defendant's white Honda CRV. Defendant was driving, Arzate was in the front passenger seat and G.E. was sitting in the back seat. (*Arzate*, *supra*, B286532.)

When they pulled up to the intersection of La Cuarta Avenue and Washington Street, G.E. saw some people standing outside a house on the corner. G.E. thought they might be gang members because they had a lot of tattoos. G.E. "threw a gang sign" out the window—a "P" for Pico Nuevo. Defendant drove around the block and then came back to that same intersection. One of the men with the tattoos was still standing outside the home near some trash cans. Defendant stopped the Honda and backed into an alley with the front of the car facing the street. Arzate grabbed a silver handgun and got out of the car. Arzate had the same gun with him the night before when he and defendant jumped G.E. into the gang. After Arzate got out of the car, G.E. asked defendant what was going on and he said, "who knows." Defendant told G.E. to calm down and be cool. Arzate walked toward the other man who was now standing at the open gate. Arzate stopped in the middle of the street. (*Arzate*, *supra*, B286532.)

G.E. saw Arzate holding the gun in his hand, with his arm down at his side. Arzate and the other man started "banging on

each other," meaning they were saying, "*Ese*, where you from?" G.E. then heard at least three gunshots and saw the other man fall to the ground near the gate. He noticed for the first time there was an older woman in the yard and she put her hands up to her face. G.E. was shocked and "frozen" in the back seat. Arzate ran back to the Honda and jumped inside the front passenger seat and exclaimed, "I got him." Defendant asked Arzate "where was he from?" Arzate said he was "VNE" (Varrio Nueva Estrada). They then fled the scene. (*Arzate*, *supra*, B286532.)

Jonathan was transported to the hospital where he was pronounced dead. His cause of death was identified as multiple fatal gunshot wounds (one to the lower back and one to the back of the right leg). (*Arzate*, *supra*, B286532.)

2. The Investigation

Detective Jose Bolanos of the Whittier Police Department interviewed Jonathan's sister Maria at the scene shortly after the shooting occurred. She wanted to remain anonymous and appeared fearful. Detective Bolanos also ran the partial license plate number that had been provided at the scene for a white Honda. He and the other officers investigating the shooting were eventually able to identify defendant as a possible suspect. (*Arzate*, *supra*, B286532.)

Around 10:00 that same night, defendant was seen driving the white Honda. He was pulled over and detained. Prior to getting out of the vehicle, defendant made gestures with his hands consistent with known gang signs. The Honda was impounded and searched the next morning. The rear driver's side cargo panel was loose. When the panel was removed, a stainless steel revolver was found inside, along with a "speed

loader" for the revolver. Subsequent ballistics testing matched the revolver to the bullets recovered from Jonathan's body during the autopsy. (*Arzate*, *supra*, B286532.)

Sometime in early September 2014, codefendant Arzate was arrested and taken into custody on an unrelated robbery charge. Detective Chad Hoeppner of the Whittier Police Department, along with another detective, interviewed Arzate and took a DNA sample. (*Arzate*, *supra*, B286532.)

3. The Charges and Jury Trial

Defendant was charged by information with one count of murder (Pen. Code, § 187, subd. (a) [count 2]), and one count of possession of a firearm by a felon (§ 29800, subd. (a)(1) [count 1]). It was alleged as to count 2 that a principal personally and intentionally used and discharged a firearm causing great bodily injury and death to the victim within the meaning of section 12022.53, subdivisions (b) through (e)(1). It was further alleged that both offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22 and that defendant had suffered a prior serious or violent felony within the meaning of the "Three Strikes" law and section 667, subdivision (a)(1).[2]

Arzate was charged as a codefendant in the murder and was also charged with possession of a firearm in count 3. Defendant and Arzate were tried jointly with separate juries. As we already noted above, Arzate is not a party to this appeal (we affirmed Arzate's conviction in an unpublished decision, *Arzate*, *supra*, B286532).

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[2] Just before the start of jury selection, defendant pled guilty to count 1 and admitted the gang allegation as to count 1.

The prosecution presented witnesses attesting to the facts about the shooting and the investigation that followed as set forth in parts 1 and 2, *ante*. In addition to testifying about the events of August 30, 2014, Joann and Maria repeatedly denied that Jonathan was a gang member. They also denied Jonathan went out into the street and confronted defendant. Maria conceded that one of her other brothers, Joe, was a member of the Whittier Varrio Locos gang. (*Arzate*, *supra,* B286532.)

At the outset of G.E.'s testimony, he confirmed he was testifying pursuant to a grant of use immunity. When asked why he was testifying, he said it was "the right thing to do." He testified to the facts set forth in part 1, *ante*. (*Arzate*, *supra*, B286532.) G.E. also testified that Whittier Vario Locos was a gang allied with Pico Nuevo and that the gang known as VNE was just another gang. He did not believe they were rivals.

Detective Hoeppner testified about the investigation of the shooting as set forth in part 2, *ante*. The audio recording of the detectives' interview of G.E. was played for the jury. In the interview, G.E. initially denied being with defendant and Arzate that day, but eventually admitted they had been driving around together. G.E. denied being the shooter and said he was drunk. He said Arzate told him to throw the gang sign. G.E. also said defendant told Arzate not to do anything and that after Arzate jumped out of the car, defendant told G.E. nothing was going to happen, that Arzate knew the guy or something. During his trial testimony, G.E. could not recall those statements from defendant, but only remembered defendant asked Arzate where the guy was from.

The prosecution presented the testimony of Detective Edgar Romo, a 17-year veteran of the Los Angeles County

Sheriff's Department, as its gang expert. He testified to his training and experience regarding Hispanic gangs, and Pico Nuevo in particular. Detective Romo explained the gang's history, territory, gang signs and symbols, and primary activities. Detective Romo said that Pico Nuevo's two main rivals were Rivera and Pico Viejo, but that Pico Nuevo basically did not get along with any of the other gangs in the area. (*Arzate*, *supra*, B286532.) Detective Romo said he was not an expert on the Whittier Varrio Locos gang.

Detective Romo attested to the primary activities of the Pico Nuevo gang and identified two predicate offenses. The prosecution presented certified abstracts of judgment for both convictions. Detective Romo stated his opinion that both of the defendants in those cases were active members of the Pico Nuevo gang. (*Arzate*, *supra,* B286532.)

Detective Romo answered a hypothetical based on the facts of the case and explained his opinion why a murder completed in such fashion was committed not only in association with a gang (three members involved), but for the benefit of the gang (enhancing its reputation). Detective Romo was shown numerous photographs depicting the tattoos of both defendant and codefendant Arzate. He identified them as typical Pico Nuevo tattoos. He stated his opinion that defendant was an active Pico Nuevo gang member with the moniker Toker, and Arzate was an active member of the PeeWees clique of Pico Nuevo with the moniker Suspect. (*Arzate*, *supra,* B286532.)

Defendant exercised his right not to testify. Defendant called Martin Flores as a gang expert. Mr. Flores testified to his background and experience, including running a nonprofit organization working with gangs and participating in various

gang task forces. Mr. Flores spoke about gang culture generally and opined that the Pico Nuevo gang was allied with, and not rivals of, Whittier Varrio Locos in 2014 when the shooting occurred. He conceded that defendant was a gang member with Pico Nuevo.

Codefendant Arzate presented the testimony of Detective Robert Wolfe who said that, after speaking to the victim's family members and to other officers on the scene, it appeared Jonathan had been a member of the Whittier Varrio Locos gang, not VNE.

4. The Verdict and Sentencing

The jury found defendant guilty of second degree murder, acquitting him of first degree murder. The jury also found true the gang allegation but found all of the gun use allegations not true.

Defendant filed a motion for new trial. The motion included a brief declaration from defense counsel attesting to an interview with Josh S., a Whittier Varrio Locos gang member, who reported that one of Jonathan's sisters (Yvette G.) had been dating Arzate and the relationship had ended a few weeks before the shooting. At the hearing on the motion, the court allowed defendant to present Yvette's testimony. We reserve a more detailed discussion of the facts related to defendant's motion to part 2 of the Discussion, *post*. After entertaining argument, the court denied defendant's motion and proceeded to sentencing.

The court granted defendant's motion to strike his strike prior. The court found the prior conviction true for purposes of the five-year enhancement. The court sentenced defendant to state prison for a term of 30 years to life calculated as follows: a term of 15 years to life on count 2 (murder), plus a consecutive determinate term of 10 years for the gang enhancement and a

consecutive term of five years pursuant to Penal Code section 667, subdivision (a)(1). The court imposed a concurrent term of seven years on count 1 (possession of a firearm), consisting of a three-year high term and a four-year gang enhancement. The court awarded defendant 1,415 actual days of presentence custody credits and imposed the following fees: $300 restitution fine (Pen. Code, § 1202.4, subd. (b)), $80 court security fee (Pen. Code, § 1465.8), and $60 criminal conviction assessment (Gov. Code, § 70373). The court imposed and stayed a $300 parole revocation fine (Pen. Code, § 1202.45). The court also ordered restitution pursuant to Penal Code section 1202.4, subdivision (f) to the California Victim Compensation Board and to the decedent's son.

This appeal followed.

DISCUSSION

1. Senate Bill 1437

Defendant contends he is entitled to a reversal of his second degree murder conviction and a new trial in light of the passage of Senate Bill 1437 during the pendency of this appeal. Defendant argues he is entitled to this relief on direct appeal and need not file a petition in the superior court as specified in the new statute. We disagree.

Senate Bill 1437, which became effective January 1, 2019, "was enacted to 'amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, Senate Bill 1437 accomplishes this by

amending [Penal Code] section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability." (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723 (*Martinez*).)

Further, Senate Bill 1437 establishes a specific procedure, codified at Penal Code section 1170.95, whereby individuals who have been convicted of murder based on a natural and probable consequences theory or under the felony murder rule may petition the sentencing court to consider evidence, including new evidence outside the record of conviction, and, where appropriate, to vacate the murder conviction and sentence the individual on any remaining counts. (*Martinez*, *supra*, 31 Cal.App.5th at pp. 723-724; see also Pen. Code, § 1170.95.)

Martinez concluded that a defendant whose direct appeal from conviction was not yet final when Senate Bill 1437 went into effect, like defendant here, was nonetheless required to follow the statutory petition procedure of the new law and could not seek the benefits of the amendatory provisions on direct appeal. (*Martinez*, *supra*, 31 Cal.App.5th at pp. 724-728.) The persuasive logic of *Martinez* has been followed in *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1153 (*Anthony*) and *In re R.G.* (2019) 35 Cal.App.5th 141, 146.

Other than expressing our agreement with the thorough and correct analyses of *Martinez* and *Anthony*, we have nothing to add. Despite defendant's assertion to the contrary, both cases adequately address and reject all of the arguments he raises here.

2. Motion for New Trial

Defendant next argues the trial court abused its discretion in denying his motion for new trial based on newly discovered evidence. We are not persuaded.

A trial court presented with a motion for new trial is vested with broad discretion. " ' "To grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial." [Citation.] "[T]he trial court has broad discretion in ruling on a new trial motion . . . ," and its "ruling will be disturbed only for clear abuse of that discretion." [Citation.] In addition, ' "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." [Citation.]' [Citation.] [¶] ' "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative e merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' " ' " (*People v. O'Malley* (2016) 62 Cal.4th 944, 1016-1017.)

Applying this standard, we find no abuse.

Defendant's motion was based on evidence claimed to have been discovered after trial. It was not supported by any declaration. Defense counsel argued generally that sometime after trial, a Whittier Varrio Locos gang member named Josh S. came forward and reported that one of Jonathan's sisters (Yvette) had been dating Arzate and the relationship had ended badly a

few weeks before the shooting. Later, defense counsel submitted a one-paragraph declaration briefly outlining what he believed Josh would attest to if called as a witness, but no declaration from Josh was provided.

At the hearing on the motion, the court allowed Yvette to testify. She said that approximately two weeks before the shooting of her brother she had broken off her relationship with codefendant Arzate. Yvette did not state the relationship ended badly. Yvette confirmed she had not been at the family home when the shooting occurred but went home when a friend texted her saying there were police at her house. When she arrived, her sister Maria told her that Jonathan was dead. Later that evening, her mother told her the detectives had said the shooter had been Arzate. She said her mother and sister knew she had dated Arzate and they told her that they informed the detectives of this fact when they were interviewed. Yvette denied being friends with defendant and that she only knew of him because of having dated Arzate. She also denied knowing G.E.

Defendant contends the evidence was significant because Yvette's testimony provided Arzate with a personal motive for the shooting. Defendant argues the evidence would have allowed him to bolster his claim there was no gang motive for the shooting and that he had no idea what Arzate was planning on doing that day. Defendant further contends the evidence would have cast doubt on the credibility of the main prosecution witnesses, including the investigating officers (for failing to disclose the connection in any police report), and Maria and Joann (for failing to acknowledge they knew who Arzate was).

Yvette did not testify the relationship with Arzate ended badly or in a manner that would reasonably make Arzate come

back to target her brother with violence. She did not say her mother and sister knew Arzate well enough to recognize him when he confronted Jonathan outside their home. G.E.'s testimony in support of the gang basis for the shooting was compelling. Even assuming the trial court accepted defense counsel's contention the information was newly discovered, the trial court acted well within its discretion in concluding the evidence was not material and not reasonably probable to result in a different outcome.

3. The Challenged Evidentiary Rulings

Defendant contends the court made three prejudicial evidentiary errors. The contentions are without merit.

First, defendant argues the trial court improperly limited his ability to cross-examine Detective Romo, the prosecution's gang expert. After Detective Romo testified on cross-examination that he had never worked on a case involving the Whittier Varrio Locos, defense counsel sought to follow up by asking if he had been provided a copy of G.E.'s statement that Pico Nuevo was aligned with, and not rivals of, Whittier Varrio Locos. After a sidebar discussion with counsel, the court ruled defendant could not ask the follow-up question. Assuming there was error purely for the sake of argument, it was harmless by any standard. Detective Romo plainly stated he was not familiar with the gang and defense counsel was free to attack the credibility of his opinions on that basis. Numerous other witnesses, including G.E. and defendant's expert, testified that defendant's gang was aligned with Whittier Varrio Locos in 2014 when the shooting occurred.

Defendant next contends the court improperly allowed speculative testimony by G.E. relating how defendant acted after

the shooting. The prosecutor asked what defendant was doing immediately after Arzate fired the gun. G.E. said he did not know exactly, "he was just getting the car ready." And, "I don't know exactly what he was doing, but he was like starting the car or getting ready I guess."

Defense counsel objected on the grounds of speculation and moved to strike the answer. The court struck only the words "I guess." Defense counsel did not raise any further objection.

The prosecutor continued to ask G.E. about what defendant was doing before Arzate got back into the car. G.E. said he could not recall whether the car engine was on or off but he confirmed that defendant's hands were on the steering wheel. G.E. also said defendant asked Arzate after he got into the car "where was he [referring to the victim] from" and Arzate said he was "VNE."

Defendant contends G.E.'s testimony was speculative and should have been stricken in its entirety, and the court compounded the error by striking only the words "I guess," from the record. Defendant contends, in so doing, the court "transformed" the improper testimony into a "nonspeculative statement" and allowed the prosecutor to argue that defendant was knowledgeable about Arzate's plans all along and readying himself in the car to flee the scene. Reading the challenged question and answer in the context of the larger colloquy on the same topic, there was no error. G.E.'s testimony was based on his personal knowledge from his vantage point in the back seat, looking and talking with defendant who was in the driver's seat. G.E. explained that defendant had his hands on the steering wheel and appeared to be waiting for Arzate to get back in the car. The phrase "I guess" is commonly used to mean "I expect" or

"I suppose," and did not render speculative G.E.'s testimony about what defendant was doing after Arzate shot Jonathan.

Finally, defendant contends the court erred in allowing the prosecutor to refer to the shooting as a "murder" in questioning several witnesses. Defendant concedes he did not raise timely objections when the word was used but only requested the prosecutor be admonished the day after. The contention has been forfeited. It could not have prejudiced defendant's case since the prosecutor had told the jury from the outset that defendant was being tried for murder.

4. Cumulative Error

Defendant argues the combined effect of the trial errors deprived him of due process. "In examining a claim of cumulative error, the critical question is whether defendant received due process and a fair trial. [Citation.] A predicate to a claim of cumulative error is a finding of error. There can be no cumulative error if the challenged rulings were not erroneous." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1382 [finding that to the extent any errors occurred, they were minor and "[e]ven considered collectively" they did not result in prejudice].)

5. The Sentencing Issues

Defendant raises four issues related to his sentence. Respondent concedes remand for resentencing is appropriate. We agree remand for a new sentencing hearing is warranted for the following reasons.

The 10-year gang enhancement was improperly imposed and must be stricken. Because defendant was sentenced on count 2 to a life term with a minimum parole eligibility of 15 years, the 10-year enhancement should not have been imposed

as an additional term. (See, e.g., *People v. Lopez* (2005) 34 Cal.4th 1002, 1004.) Because the court's imposition of the enhancement may have impacted how it exercised its discretion as to the remainder of defendant's sentence, remand is warranted to allow the trial court to strike the enhancement and then exercise its discretion anew. (*People v. Salvador* (2017) 11 Cal.App.5th 584, 594.)

Further, during the pendency of this appeal, Senate Bill 1393 (2017-2018 Reg. Sess.) became effective. As relevant here, Senate Bill 1393 amended provisions of Penal Code section 667 and section 1385, granting discretion to trial courts to strike a prior serious felony conviction in connection with imposition of the five-year enhancement set forth in section 667, subdivision (a)(1). (Stats. 2018, ch. 1013, § 1, § 2.) At the time defendant was sentenced, imposition of the enhancement was mandatory. Defendant is entitled to the benefit of the amendatory provisions. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745.)

On remand, the trial court shall exercise its newly granted sentencing discretion pursuant to Senate Bill 1393. The trial court shall consider the factors enumerated in California Rules of Court, rule 4.428(b) in making its determination whether to strike, dismiss or impose the five-year enhancement. We express no opinion on how the court should exercise its discretion.

It appears the court erred in failing to award defendant two additional days of presentence custody credits (1,417 instead of 1,415) to account for the fact 2016 was a leap year and to include both the date of arrest and the date of sentencing. On remand, the court is directed to correct defendant's credits for actual days served prior to imposition of sentence.

Finally, respondent does not oppose the court allowing defendant to present evidence on remand as to his alleged inability to pay the fines and fees imposed by the court in accordance with statutory authority. Defendant has forfeited his challenge on appeal to the imposition of fees and fines by failing to object in the trial court, but the trial court has discretion to consider the claim on remand.

DISPOSITION

The judgment of conviction is affirmed.

The matter is remanded for a new sentencing hearing. The superior court is directed to strike the 10-year gang enhancement and award two additional days of presentence custody credits (a total of 1,417). In resentencing defendant, the superior court is directed to exercise its discretion to strike or impose statutory fees and to exercise its newly granted discretion pursuant to Senate Bill 1393 to strike or impose the five-year enhancement pursuant to Penal Code section 667, subdivision (a)(1). At the resentencing hearing, defendant has the right to be present and be represented by counsel. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 34-35.)

Following resentencing, the superior court is directed to prepare and transmit a modified abstract of judgment to the Department of Corrections and Rehabilitation.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. STRATTON, J.