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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. TINA MARIE MONSIVAIS, Defendant and Appellant.	B280865 (Los Angeles County Super. Ct. No. TA126401)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick Connolly, Judge. Affirmed.

Jerome McGuire, 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, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

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Tina Marie Monsivais had been convicted of willful, deliberate, and premeditated attempted murder and sentenced to an indeterminate term of 40 years to life. A gang enhancement (Pen. Code,[1] § 186.22, subd. (b)(1)(C)) was found true. Although another enhancement under section 12022.53, subdivision (e)(1), also was found true, that enhancement was reversed in the prior appeal, and the case was remanded for resentencing. (*People v. Ifopo* (Feb. 16, 2016, B255922) [nonpub. opn.].)

This appeal follows resentencing. The sole issue is whether Monsivais's absence from the resentencing hearing prejudiced her. We conclude that the error was harmless beyond a reasonable doubt. We therefore affirm the judgment.

BACKGROUND

In the prior appeal, we remanded the case to the trial court to resentence Monsivais. On August 26, 2016, the court held a resentencing hearing. Monsivais's counsel appeared at the hearing and stated that Monsivais was "not present, but is in custody."

The court struck the section 12022.53, subdivision (e)(1), enhancement and sentenced Monsivais to 15 years to life. The 15-year minimum is required by section 186.22, subdivision (b)(5), part of the gang enhancement.

DISCUSSION

It is undisputed that it was error to hold the resentencing hearing without securing Monsivais's presence. (§ 1193; *People v. Rodriguez* (1998) 17 Cal.4th 253, 257; *People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1417.) "A defendant convicted of a felony has the right to be present at the pronouncement of judgment (Pen. Code, § 1193); to be represented by counsel [citations]; and

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[1] Undesignated statutory citations are to the Penal Code.

to receive a hearing at which he may present evidence with respect to mitigation of sentence [citation]." (*In re Cortez* (1971) 6 Cal.3d 78, 88.) Additionally, "a discretionary sentencing decision rendered by a judge who did not understand what he was doing would not be sustainable as a proper exercise of discretion." (*In re Large* (2007) 41 Cal.4th 538, 550.) It is undisputed that a defendant's failure to be present at a critical stage of proceedings is *not* structural error and prejudice must be demonstrated to warrant reversal. (*People v. Santos* (2007) 147 Cal.App.4th 965, 974 (*Santos*); see *People v. Robertson* (1989) 48 Cal.3d 18, 62 (*Robertson*).)

The parties dispute whether Monsivais suffered prejudice. Monsivais argues that she suffered prejudice because in *People v. Fuentes* (2016) 1 Cal.5th 218, 222 (*Fuentes*), the Supreme Court held that a trial court has discretion to strike a gang allegation. She further claims that she could have argued that the trial court should have struck the gang allegation and that she had no opportunity to address the court on this issue.

Monsivais's argument that the trial court had discretion to strike the gang allegation is correct. Prior to her resentencing hearing, our Supreme Court reached that conclusion in *Fuentes, supra,* 1 Cal.5th at page 222. However, the fact that the court had discretion to strike the gang enhancement does not demonstrate prejudice.

Several reasons support the foregoing conclusion, and the record reveals no basis to reach a different conclusion. Monsivais was represented by counsel, who did not argue that the court should strike the gang allegation. There was no indication that

the trial court misunderstood the nature of its discretion.[2] The trial court expressed no inclination to treat Monsivais leniently. Monsivais's argument that this court should assume the trial court was unaware of *Fuentes* because it was then recently decided is not persuasive. Nothing in the record supports the conclusion that the trial court was unaware of *Fuentes* or unaware of its discretion.

Significantly, Monsivais identifies no way that her presence at the resentencing hearing would have made a difference. (Cf. *Santos, supra,* 147 Cal.App.4th at p. 973 ["defendant does not identify how his presence, or that of his counsel, would have had a reasonably substantial relation 'to the fullness of his opportunity to defend against the charge' "].) The record does not suggest that Monsivais had evidence in mitigation that she would have presented had she been present at the hearing. The record does not suggest that Monsivais would have demonstrated remorse or pled for leniency. The record does not support the conclusion that Monsivais would have influenced the court by her

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[2] Both parties claim that *People v. Fuhrman* (1997) 16 Cal.4th 930 (*Fuhrman*) supports their position. In *Fuhrman*, the Supreme Court held that a trial court could strike a prior strike conviction. Prior to its opinion in *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, a trial court may not have been aware of its discretion, and there was a disagreement among the Courts of Appeal. (*Fuhrman*, at p. 945.) The high court held that in such " 'silent record' " case, resentencing was not appropriate. (*Ibid.*) The circumstances of this case are not the same as *Fuhrman* because our Supreme Court had issued its opinion explaining the scope of the trial court's discretion prior to Monsivais's resentencing hearing. Thus, if anything, *Fuhrman* supports the conclusion that resentencing is not appropriate in this case.

presence. Although Monsivais emphasizes certain facts discussed in the prior appeal such as the gang expert's conclusion that she was an associate of a gang (as opposed to a member), the trial court was aware of this court's opinion and relied on it in striking the enhancement. In short, because the error in holding the hearing without Monsivais's presence was harmless beyond a reasonable doubt, reversal is not warranted. (*Robertson, supra,* 48 Cal.3d at p. 62; cf. *People v. Bradford* (1997) 15 Cal.4th 1229, 1357; *People v. Medina* (1990) 51 Cal.3d 870, 903.)

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.