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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILFREDO CRUZ,

Defendant and Appellant.

B275506

(Los Angeles County
Super. Ct. No. YA091980)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed and remanded with directions.

Jean Ballantine, 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. Yarle, Margaret E. Maxwell and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Wilfredo Cruz appeals from his conviction and sentence for the murder of Norman Earl Edwards. Cruz contends the prosecutor committed misconduct in her closing argument by misstating the law defining deliberation and premeditation and by arguing facts she had not proved. Cruz also contends his trial lawyer was constitutionally ineffective in failing to object to this misconduct. In a supplemental brief, Cruz asks us to remand his case to the trial court for the court to consider whether to strike the firearm enhancement under Senate Bill 620, which took effect on January 1, 2018.

We find no error in the prosecutor's closing argument, and therefore affirm Cruz's conviction. We remand the case to the trial court for the court to exercise its discretion to strike or to decline to strike the punishment imposed for Cruz's intentional discharge of a firearm causing Edwards's death.

BACKGROUND

A. The Shooting and its Aftermath

On January 29, 2015, around 3:30 in the afternoon, Shawn Straughter came out of her home on 97th Street in Los Angeles to walk to the corner store for some bananas. Straughter looked left and right as she approached the sidewalk because she lived in an area where gangs were active. Straughter saw a man walking down 97th Street toward her. The man had "some type of black scarf around his neck." Straughter also saw her neighbor, Norman Earl Edwards outside his residence. Straughter chatted with Edwards in the middle of the street. As she began to walk away, Straughter saw the same man she had seen moments earlier by a bush. The man kept tugging at his black scarf. He seemed to be hesitating, trying to make up his mind about something. Straughter thought maybe the man was hesitant to

approach the store because of a group of older men outside the store. Straughter told the man not to be afraid, that he could walk with her to the store. The man looked at Straughter but did not reply.

The man and Edwards then began to converse. They were very close to one another, face to face. Straughter could not hear what they were saying. The man then shot Edwards four times. Edwards fell to the ground. The man and Straughter were facing one another. The man looked directly at Straughter and she looked directly at him. The man ran away and Straughter ran in the opposite direction.

Police arrived and interviewed Straughter. Authorities took Straughter to the hospital because she was eight months pregnant and having trouble breathing. Police found two .9 millimeter cartridge cases at the scene.

That night, Los Angeles Police Department patrol officer Mario Cardona saw defendant Wilfredo Cruz leaving an apartment complex at about 10:10 p.m. The complex was a hangout for the 8-Trey Gangster Crips, a rival gang to the Rollin' 90s. Cardona saw the butt of a gun sticking out of Cruz's pocket. Cruz ran into the apartment complex but tripped. The gun fell from his pocket. He picked it up and kept running. Authorities apprehended Cruz within minutes. In a nearby backyard, police found a .9 millimeter handgun and clothing Cruz had shed while running. Cardona arrested Cruz for possession of a handgun.

Cardona spoke with Cruz in his police car on the way to the station. At the time, Cardona did not know about the shooting on 97th Street. Cruz told Cardona he had bought the gun a couple of weeks earlier for \$600. According to Cardona, Cruz said he was happy no one was at the apartment complex because he

would have put any 8-Trey gangsters in “sleeping boxes.”¹ Cardona had never heard that term before, but he assumed Cruz meant coffins. Cruz told Cardona he was a member of Rollin’ 90s with a moniker of J Stone.

Five days after Edwards was shot and killed, detectives showed Straughter a photographic six-pack. Straughter chose the photograph of Cruz. On February 11, 2015, Straughter attended a live line-up. Again, Straughter identified Cruz as the shooter. Before making her identification, Straughter asked the detectives to ask each man in the lineup to put his arm over his face as if it were a scarf. Straughter was “positive” about her identification.

Before and after the line-up, authorities put Cruz in a cell with two undercover deputies posing as fellow inmates. Cruz and the deputies discussed what evidence the police might have. Cruz was the first in the group to refer to the victim of the shooting as an 8-Trey gang member.² Cruz told the undercover deputies there were no cameras that could have captured the shooting, because it happened down the street from the corner store, in front of the victim’s house. Cruz said the police “at first [had tried] to spook [him] and say people [saw him],” but that “it’s only one lady.” A detective had told Cruz that an eyewitness had identified him, but the detective had not said whether the witness was male or female.

¹ In his testimony at trial, Cruz denied making that statement. The jury seems to have believed Cardona, not Cruz.

² In fact, Edwards was not a gang member.

Ballistics testing showed the gun police found in the backyard on the night of January 29 was not the gun used to shoot Edwards. Authorities never found the gun used in Edwards's murder.

An autopsy determined Edwards died from a gunshot wound that entered his chest; went through his heart, aorta, and a lung; and fractured ribs and a vertebra. Edwards also suffered a nonlethal wound to his thumb. The coroner saw stippling on that wound. Stippling is red pinpoint abrasions caused by unburned particles of gunpowder striking the skin. The presence of stippling means the gun was within 18 inches of the victim's flesh. The coroner also saw a black area on Edwards's thumb that may have been soot. Soot appears when a gun is fired within six inches of the victim's skin.

B. The Charges, Trial, and Verdict

The People charged Cruz with Edwards's murder. The People alleged Cruz had personally and intentionally discharged a firearm in the commission of the crime, causing Edwards's death within the meaning of Penal Code section 12022.53(d). The People also charged Cruz with two counts of being a felon in possession of a firearm: the gun used in the murder, and the gun Cruz tossed as he ran on the night of January 29. The People alleged Cruz committed all three crimes for the benefit of, at the direction of, or in association with a criminal street gang. The People also alleged Cruz had a prior strike, a juvenile adjudication for robbery in 2009.

The case proceeded to trial in February 2016. Cruz's defense was identity. Cruz admitted being a member of the Rollin' 90s gang with monikers of Peso and J Stone. Cruz testified that he was not on 97th Street that afternoon nor did he

ever shoot anyone. Cruz testified on direct examination -- and initially on cross-examination -- that he had spent January 29 with his fiancée at her home, and that later he went with a fellow gang member to an apartment building in 8-Trey territory to hang out, smoke, and just socialize. The prosecutor then confronted Cruz with call records for his cell phone. Those records showed that Cruz and his fiancée had exchanged texts on the afternoon of January 29, and that she had been at work and at a doctor's appointment, not at home with Cruz. Cruz then admitted he had not been with his fiancée that day. He said he did not remember where he had been. Cruz's cell phone records also showed he had called fellow gang members Slim 90 at 3:15 p.m. and Cowboy at 3:19 p.m. on January 29. The log showed no call activity from 3:19 p.m. to 4:19 p.m. and no text activity from 2:07 p.m. to 4:32 p.m.

On direct examination, Cruz denied owning or wearing a black beanie or a black scarf. On cross-examination, however, Cruz admitted having told one of the undercover deputies in the jail cell that he had torn the top off of his beanie and was wearing it around his neck. Cruz admitted at trial that his point, in telling the undercover officer that, was the eyewitness should not have been able to see his face.

The prosecution's gang expert testified that the location where Edwards was shot -- on 97th Street between Halldale and Normandie -- was in 8-Trey territory. Cruz testified it was in Rollin' 90s territory, and that Normandie was the border between the two gangs' turfs. The prosecution's gang expert also testified Cruz had a number of gang tattoos, including one on the right side of his neck.

At the conclusion of the testimony, the court instructed the jury. The court gave CALCRIM instructions Nos. 520 and 521. Those instructions define first and second degree murder and “malice aforethought.” The instructions also explain how jurors are to decide if a murder is first or second degree. The court instructed the jury:

“The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts that caused death.

“The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly,^[3] impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.”

³ The reporter’s transcript says “rationally.” Respectfully, we believe this to be a typographical error. The instruction uses the word “rashly,” and we believe that is the word the trial court read to the jury.

In her closing argument, the deputy district attorney devoted almost all of her time to the identity issue. Her argument that Cruz was the perpetrator of the murder consumes more than 30 pages of the reporter's transcript. Eventually, the prosecutor turned to "malice aforethought" and what a "willful, deliberate, and premeditat[ed]" murder is. The prosecutor told the jury:

"So then your next question as a jury to deliberate is, does this get bumped up to a first? How do you get to a first? You would need to find that there was what's called willful, deliberate, and premeditation. Again, you've probably heard these terms on T.V. What they mean here in the courtroom is just that willful means intended to kill, which we already just talked about a second ago. Deliberate means you thought about it. And premeditated thought means you did it -- you thought about doing it before you did it. Premeditation and deliberation is something you folks do all the time and you don't even realize it. I'll give you an example in a second.

"But I want to remind you of the court's instruction about these terms, deliberation and premeditation. It's not about the length of time that someone spends deciding whether or not to kill somebody. It's whether or not that decision was made rashly and impulsively as opposed to being given careful consideration. Any cold, calculated decision to kill can be reached quickly. He doesn't need to spend ten days planning this murder. He can do it pretty quickly. He can make that decision very fast. The test is not how long it took, but the extent of the reflection.

“The example that I like to use and probably all of you can relate to is that you deliberate and premeditate every time you go through a crosswalk or an intersection, right? What do you do? You look to the left, you look to the right, you make sure it’s safe. And then you hop off the sidewalk and cross the street. That’s deliberate and premeditated. It can happen quickly.

“Let’s talk about how we know that this defendant was deliberate and premeditated and willful in his actions. He got a gun. He made sure that gun was loaded. He made sure he brought that gun with him. He made sure that he went into rival territory. Or his own territory, if you believe him. He’s armed. He made sure to wear the hat and the scarf around his neck to cover that tattoo he’s got. To hopefully obscure who he is. He identifies who he wants as his victim, right, because he sits in that bush and he waits. He didn’t keep walking down the street to go shoot somebody at the store on Normandie and 97th. He stops at that bush. He waits for that victim. He waits for Norman Earl Edwards to be done talking to Shawn Straughter.

“And then he talks to the victim. He approaches the victim. He pulls out that gun, he aims that gun and he fires multiple shots. This wasn’t a warning shot to the air. This wasn’t a shot to the kneecap. This was multiple shots and shots to the chest. That tells you, all of these facts add up to being willful, deliberate, and premeditated.”

Defense counsel did not object, nor did she address the difference between first and second degree murder in her closing argument. Instead, she argued that Straughter -- though sincere -- was mistaken and that the photographic and live line-ups had been poorly constructed and unduly suggestive. Defense counsel played parts of Straughter's recorded interview with police, arguing they had pressured and led her. She alluded to testimony presented by the eyewitness identification expert she had called. She conceded Cruz was guilty of possessing the gun Cardona had seen him with on the night of January 29, but concluded, "[H]ere sits Mr. Cruz who didn't shoot anybody."

Outside the jury's presence, Cruz admitted his strike prior as well as prior felony convictions for corporal injury to a spouse and for being a felon in possession of a firearm.

The jury convicted Cruz of murder and found it to be in the first degree. The jury also found the gun and gang allegations to be true. In addition, the jury convicted Cruz on both counts of being a felon in possession of a firearm. The court sentenced Cruz to an indeterminate term of life with a minimum eligible parole date of 80 years. The court doubled the 25-years-to-life sentence for the first degree murder because of Cruz's strike prior. The court added 25 years to life for Cruz's personal and intentional discharge of a firearm causing Edwards's death. The court stayed the sentence on one of the felon-in-possession-of-a-firearm counts. On the second count for that offense, the court imposed a sentence of five years -- the middle term of two years, doubled because of the strike prior, plus one year for a prison prior -- to be served consecutively to the indeterminate term. The court stayed the 10 year punishment on the gang allegation.

DISCUSSION

A. The Prosecutor's Closing Argument Did Not Amount to Misconduct

Cruz contends the prosecutor's use of the "crosswalk or intersection" example in her closing argument "grossly misstated the law." Cruz also asserts the prosecutor committed misconduct by arguing facts not in evidence. Cruz argues his attorney was ineffective in not objecting to the prosecutor's closing argument.

The People contend Cruz forfeited any claim about the prosecutor's argument because he failed to object and request an admonition. " 'When a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them to the court's attention by a timely objection. Otherwise no claim is preserved for appeal.' " (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1019, quoting *People v. Morales* (2001) 25 Cal.4th 34, 43-44.) In their brief, however, the People then proceed to address the merits. We choose to address them as well, in light of Cruz's contention of ineffective assistance of counsel. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 887-888; *People v. Mattson* (1990) 50 Cal.3d 826, 854.)

1. The prosecutor's "crosswalk" example was within reasonable bounds of advocacy

"A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080, citing Penal Code section 189.) "To prove [a] killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." (Penal Code section 189.) " 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation'

means thought over in advance.” (*Koontz*, at p. 1080.) “The process of premeditation and deliberation does not require any extended period of time. ‘The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly’” (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) “The lack of evidence of extensive planning does not negate a finding of premeditation.” (*People v. Brady* (2010) 50 Cal.4th 547, 563, citing *People v. Millwee* (1998) 18 Cal.4th 96, 134.) “Premeditation can be established in the context of a gang shooting even though the time between the sighting of the victim and the actual shooting is very brief.” (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.)

Cruz relies on *People v. Boatman* (2013) 221 Cal.App.4th 1253 (*Boatman*). In that case, Boatman shot his girlfriend in the face with a single bullet. (*Id.* at p. 1257.) There was some evidence the two had exchanged words just before the shooting, but Boatman consistently maintained the shooting was an accident. (*Id.* at pp. 1258-1260.) Boatman told a bystander to call the police, tried to give the victim mouth-to-mouth resuscitation, and asked police to call an ambulance. (*Id.* at pp. 1258, 1261.) In the 9-1-1 call, Boatman was crying and saying, “‘[n]ooo,’ ‘baby.’” (*Id.* at p. 1261.)

The *Boatman* court concluded that, although there was substantial evidence of a killing with malice aforethought, the evidence was insufficient to show premeditation and deliberation. (*Boatman, supra*, 221 Cal.App.4th at p. 1262.) The court noted there was no evidence of planning and little or no evidence of motive. The shooting could not be described as “‘execution-style.’” Boatman’s behavior after the shooting, the court said,

was that of “someone horrified and distraught about what he had done, not someone who had just fulfilled a preconceived plan.” (*Id.* at p.1269.)

Here, by contrast, Cruz stood by a nearby bush, fiddling with the black garment around his neck. He then approached the victim and they conversed. The eyewitness, Straughter, did not hear any raised voices; there was no evidence of an argument or quarrel. Cruz then took out a gun -- one he plainly had with him -- and shot Edwards not once but four times. The first two shots were “back to back.” Then Cruz fired two more shots and Edwards fell to the ground. Obviously, the shooting was not an accident, as claimed in *Boatman*. Moreover, the gunshots that pierced the victim’s thumb were inflicted from a distance of less than 18 inches. Cruz then looked Straughter “dead in [her] face” and ran away. Cruz did not seek to help Edwards nor did he call for assistance. Cruz later told police that if there had been any rival gang members at the apartment building where he went that night, he would have put them in sleeping boxes. In a cell with two undercover officers, Cruz told them the victim of the shooting was an 8-Trey member.

On these facts, the prosecutor’s example of stopping, thinking, and deciding whether to proceed before entering a crosswalk or intersection was not misconduct. The prosecutor seems to have been trying to choose a scenario with which most ordinary people would be familiar to give the jurors an understanding of the legal terms “premeditation” and “deliberation.” The prosecutor repeated the instruction the court had just read to the jury, emphasizing the “test is not how long it took, but the extent of the reflection.”

Moreover, as noted above, substantial evidence supported the jury's verdict that Cruz's murder of Edwards was of the first degree. (See, e.g., *People v. Brady*, *supra*, 50 Cal.4th at pp. 561-565 [defendant on supervised release shot officer during traffic stop; defendant's interaction with victim, though brief, was more than momentary; rational jury could have concluded that defendant, knowing he illegally possessed firearm, rapidly and coldly formed the idea to kill officer and therefore acted after a period of reflection rather than on unconsidered or rash impulse]; *People v. Romero* (2008) 44 Cal.4th 386, 400-401 [defendant gang member brought gun to video store and without warning shot member of rival gang at point-blank range; no indication of struggle]; *People v. Hawkins* (1995) 10 Cal.4th 920, 956-957 [sufficient evidence of deliberation and premeditation where defendant shot victim twice, one of the shots was fired from close range, and there was no evidence of struggle, even though evidence of planning and motive was minimal].)

2. *The prosecutor did not argue facts not in evidence*

Nor did the prosecutor argue facts she had not proved. Rather, the prosecutor argued reasonable inferences from the testimony and other evidence at trial. Plainly, Cruz had a loaded gun with him when he walked down 97th Street and encountered first Straughter and then Edwards. There was no evidence that Cruz found or retrieved the gun at the scene, or that he loaded it there on 97th Street before he shot Edwards. The location of the shooting was either in rival 8-Trey territory (according to the prosecution's gang expert) or in Rollin' 90s territory, very close to the border between its turf and 8-Trey territory (according to Cruz himself). Cruz told the undercover officers in the jail cell that he thought Edwards was an 8-Trey member. Cruz denied at

trial having worn a scarf that afternoon but he told the undercover deputies he had torn the top of his beanie and pulled it down around his neck. The prosecutor's argument that Cruz did this to hide the gang tattoo on his neck was reasonable. Cruz and the undercover deputies in the jail cell spent some time discussing how the eyewitness could identify the shooter if he was wearing something over his face.⁴ Evidence also supported the prosecutor's argument that Cruz shot Edwards in the chest and that he fired multiple shots. "[T]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn [from that evidence]." (*People v. Sims* (1993) 5 Cal.4th 405, 463, quoting *People v. Mitcham* (1992) 1 Cal.4th 1027, 1052.) We rely on jurors to decide what facts are in evidence, what has and has not been proved.

3. *Cruz's counsel was not ineffective in failing to object to the prosecutor's closing*

Cruz also contends his trial lawyer's "failure to object to the prosecutor's misstatements of the law and creation of facts not in the record . . . encouraged the jury to find premeditation based both on an erroneous legal standard and on facts not in evidence." "[A] defendant seeking relief on the basis of ineffective

⁴ Cruz said, "But so how -- if there was somethin' on somebody's face, how is it they're gonna point out who it was?" He continued, "But you -- you can't tell who exactly it is if -- if [¶] . . . [¶] [t]here's somethin' on their face." A minute or two later, Cruz said that anybody in the area might think he looked familiar because "[t]hat's my hood," adding "and then, on top of that, they just said -- obviously when they made us do this [put an arm over the face during the live line-up], it means some -- they had something over their face." "So you mean to tell me you're able to tell who it was with somethin' over their face?"

assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623, citing *People v. Fosselman* (1983) 33 Cal.3d 572, 584; see also *Strickland v. Washington* (1984) 466 U.S. 668.) "[T]here is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) A decision to object or not to comments a prosecutor makes in closing argument is "highly tactical" and within defense counsel's discretion. (*People v. Padilla* (1995) 11 Cal.4th 891, 942, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; cf. *People v. McDermott* (2002) 28 Cal.4th 946, 993 [trial lawyer's decision not to object to questions during cross-examination is "within counsel's discretion and rarely implicate[s] ineffective assistance of counsel"].)

One obvious tactical reason for a defense attorney not to object is that the objection would be groundless. (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 674, fn. 8; *People v. Zavala* (2008) 168 Cal.App.4th 772, 780.) Even when a defendant claims prosecutorial misconduct in closing argument, counsel may choose not to object for strategic reasons, and "the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) Here, as discussed above, the prosecutor's closing argument was not misconduct. Accordingly, Cruz's attorney was not ineffective in not objecting to the argument because any objection would have been meritless. Cruz's counsel appears to have made a sound strategic decision to

argue that Straughter was mistaken about her identification of Cruz and that no physical evidence tied him to the crime.

B. The Case Must Be Remanded for Consideration of Any Request To Dismiss the Firearm Enhancement

In a supplemental brief, Cruz asks us to remand his case to the trial court for the court to consider whether to strike the 25-years-to-life firearm enhancement it imposed. The People concede that new legislation authorizing the court to strike a firearm enhancement is retroactive, but contend remand is unnecessary because no reasonable trial court would have stricken Cruz's enhancement for using a gun to kill Edwards.

In October 2017 the Governor signed Senate Bill 620. That legislation ended the statutory prohibition on a sentencing court striking a firearm enhancement under Penal Code section 12022.53 (as well as Penal Code section 12022.5) in the interest of justice. The new legislation -- effective January 1, 2018 -- gives a sentencing court discretion to "strike or dismiss an enhancement otherwise required to be imposed by this section." (Pen. Code, § 12022.53(h).)

Senate Bill 620 applies to all defendants whose judgments are not yet final as of January 1, 2018. (*People v. Robbins* (2018) 19 Cal.App.5th 660; see also *In re Estrada* (1965) 63 Cal.2d 740, 742-748; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Nasalga* (1996) 12 Cal.4th 784, 792 [*Estrada* rule applies to statutes governing penalty enhancements as well as those governing substantive offenses].) The People argue, however, that remand is inappropriate here because the record shows the trial court would not have exercised its discretion to lessen Cruz's sentence. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

Here, the trial court had no discretion at the time of sentencing in April 2016 to strike the firearm enhancement. Accordingly, Cruz's counsel did not ask the court to strike the 25 years to life nor did the court consider any such request. It may well be that the trial court exercises its discretion to deny any such motion on remand. At sentencing, after Cruz's attorney read to the court a letter Cruz's siblings had written, the court said, "I feel really bad for the defendant's family." The court observed that, because of Cruz's actions, his own family, as well as the victim's family, were suffering. The court went on, "[T]his is just another senseless, stupid act of gang violence." The court noted Cruz had committed the crime for his gang yet not one fellow gang member had come to court to support him. The court then stated, "The defendant is not deserving of any leniency. This murder was coldblooded."

Nevertheless, we cannot say the record affirmatively demonstrates that the trial court would not have dismissed the enhancement had it had the discretion to do so. (Compare *People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896 [no remand necessary where court indicated it would not have exercised its discretion to lessen sentence under *Romero*⁵] with *People v. Francis* (1969) 71 Cal.2d 66, 79 [remand for resentencing was required after retroactive amendment to drug statute gave court discretion to impose alternative sentence].) Accordingly, we remand the case to the trial court for consideration of any motion by Cruz to dismiss his firearm enhancement.

⁵ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISPOSITION

We affirm Cruz’s conviction. We remand the case for the trial court to exercise its discretion to deny or grant any request by Cruz to dismiss the enhancement under Penal Code section 12022.53(d) for his personal and intentional discharge of a firearm killing Edwards.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.*

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