

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH SALAZAR,

Defendant and Appellant.

B293946

(Los Angeles County
Super. Ct. No. BA430772)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Reversed conditionally and remanded with directions.

Mark Yanis, 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, Steven D. Matthews and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Joseph Salazar of second degree murder and found true the allegations that appellant intentionally discharged a firearm causing death and that the crime was committed for the benefit of a criminal street gang. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d), 186.22, subd. (b)(1)(C).)¹ In a prior appeal, we affirmed the conviction and, as pertinent here, we rejected appellant's argument that the case must be remanded to make a record relevant to his future youthful offender parole hearing under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). (*People v. Salazar* (April 30, 2018, B275477) 2018 Cal.App.Unpub. LEXIS 2933 (*Salazar I*)). However, we remanded for the trial court to exercise its discretion under section 12022.53, subdivision (h) whether to strike the firearm enhancement. On remand, appellant asked the trial court to strike or reduce the firearm enhancement and to allow him to supplement the record with evidence for his eventual *Franklin* hearing. The court declined both requests. Although we affirm the court's order, appellant argues, and the People concede, that the judgment should be conditionally reversed and the matter remanded to the juvenile court for a transfer hearing pursuant to *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299 (*Lara*). We conditionally reverse the judgment and remand to the juvenile court for a transfer hearing, as required by *Lara*.

¹ Unspecified statutory references will be to the Penal Code.

BACKGROUND²

Appellant was convicted by jury of second degree murder. He was 16 years old at the time of the crime and 22 years old at the time of trial and sentencing. The sentencing hearing originally was scheduled for May 26, 2016. However, the trial court continued the hearing to June 9, 2016, in anticipation that the *Franklin* decision would soon be filed.

In *Franklin*, the California Supreme Court held that “juvenile offenders [must] have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination” under sections 3051 and 4801. (*Franklin, supra*, 63 Cal.4th at p. 286.) Because it was “not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing,” the court remanded for the trial court to determine whether he did have such opportunity. (*Id.* at p. 284.)

As we explained in the prior appeal, “at appellant’s sentencing hearing on June 9, 2016, defense counsel stated that he had read and understood the *Franklin* decision. He thereafter made a record of relevant factors. He stated: ‘Based on the *Franklin* case, which the court has cited, at this point I wish to state some things for the record regarding Mr. Salazar. [¶] First of all, the jury found him guilty of second-degree murder versus first-degree murder, which I think is a mitigating factor. [¶] And Mr. Salazar’s parents were divorced. He

² We need not set forth the facts of the underlying offense except as relevant to this appeal.

was—basically, came from a broken family. His father did time in prison. And from a very young age, he was influenced by the gang culture. His older brother is in a gang. I believe his father was in the gang culture. [¶] And based on, you know, what we know scientifically and socially about youth, I would ask that some time down the road the parole board takes these matters into consideration.” (*Salazar I, supra*, 2018 Cal.App.Unpub. LEXIS 2933, at pp. *35-*36.) We held that, although “defense counsel’s statement of relevant youth-related factors was brief and general,” it was not necessary to remand because the trial court expressly found that the statement complied with *Franklin*. (*Id.* at pp. *36-*37.) We therefore affirmed the judgment but remanded for the trial court to exercise its discretion under section 12022.53, subdivision (h). (*Id.* at p. *41.)

On remand to the trial court, appellant asked the court to strike the firearm enhancement. He argued that his conviction of second degree murder rather than first degree murder indicated the jury’s belief that he was “less culpable.” Appellant also relied on his age at the time of the offense, arguing that courts and legislators “have repeatedly recognized” that juveniles have diminished moral culpability and that societal interests would be served by reducing his sentence. Appellant also moved to supplement the record for purposes of his eventual youth offender parole hearing.

The trial court denied appellant’s requests to strike the firearm enhancement and to supplement the record. Appellant timely appealed.

DISCUSSION

Appellant contends the trial court abused its discretion in refusing to allow him to provide *Franklin* evidence mitigating his culpability because that evidence is relevant to whether the firearm enhancement should be stricken. He further contends that the court's refusal to allow him to provide *Franklin* evidence was an abuse of discretion because the request was "so modest and all equities point in favor of granting the request." We conclude the trial court did not abuse its discretion.³ In supplemental briefing, appellant contends, and the People concede, that he is entitled to a transfer hearing under Proposition 57, pursuant to our supreme court's holding in *Lara*.

The trial court's sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) We "reverse only when there is a clear showing the sentence is arbitrary or irrational. [Citation.]" (*People v. Ogg* (2013) 219 Cal.App.4th 173, 185.) "The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.)

³ The People contend that appellant forfeited his contentions. We disagree and address appellant's contentions on the merits. We therefore do not address appellant's ineffective assistance of counsel argument.

I. *Denial of Requests to Strike Enhancement and Supplement Record*

On remand, the trial court complied with our directions by holding a resentencing hearing to consider whether to exercise its discretion to strike or dismiss the firearm enhancement under section 12022.53, subdivision (h). The court explained that after “careful consideration of the circumstances and the factual scenario that gives rise to the criminal charges that the defendant stands convicted of, as well as the overall evidence presented in the trial, the overall record, and counsel’s points and authorities in support of striking the enhancement in question, this Court elects not to exercise its discretion to strike and/or dismiss the firearms enhancements that the defendant stands convicted of.” The court therefore held that “all sentencing terms previously imposed in this matter shall stand.” The trial court further declined to allow appellant to supplement the record for his eventual youthful offender parole hearing, relying on our conclusion in the prior appeal that there was no need to remand because the court previously provided sufficient opportunity for defense counsel to make a record regarding the *Franklin* factors.

“On appeal, we presume that a judgment or order of the trial court is correct, “[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.” [Citation.]” (*People v. Giordano* (2007) 42 Cal.4th 644, 666.) The record indicates that the trial court carefully considered appellant’s request to strike the firearm enhancement. The court’s denial of his request was not an abuse of discretion. Nor did the court abuse its discretion in denying appellant’s request to supplement

the record. We already had considered the request in the prior appeal and found that appellant had sufficient opportunity to make a record for his eventual youthful offender parole hearing.

Appellant relies on *People v. Woods* (2018) 19 Cal.App.5th 1080 (*Woods*), in which the court held that the defendant “already had sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing, but . . . agree[d] that remand [was] necessary to allow the trial court to exercise its discretion as to whether to strike the firearm enhancement under . . . section 12022.53.” (*Id.* at p. 1083.) Appellant cites the following statement in *Woods* to support his contention that the *Franklin* evidence should have been permitted because it would be relevant to the decision whether to strike the firearm enhancement: “Although we are remanding the case specifically to allow the trial court to exercise its discretion under the recent amendment to subdivision (h) of Penal Code section 12022.53, our determination that defendant is not entitled to remand under *Franklin* does not necessarily preclude the trial court from supplementing the record for purposes of defendant’s eventual youth offender parole hearing, should defendant ask to do so and should the trial court determine that such supplementation would be appropriate. Indeed, it may well be that information offered to the trial court to assist in its determination of whether to exercise its discretion to strike the firearm enhancement will be the same sort of information that would be offered under a *Franklin* remand in any event. Accordingly, we leave it to the trial court in the first instance to decide what

additional information may be entered into the record on remand.” (*Id.* at p. 1091, fn. 3.)

Although the court in *Woods* noted that the *Franklin* information might assist the trial court in determining whether to strike the firearm enhancement, the court did not require the trial court to consider the information. To the contrary, the appellate court specifically stated that the decision was left to the trial court. (*Woods, supra*, 19 Cal.App.5th at p. 1091, fn. 3.) *Woods* accordingly did not require the trial court to allow appellant to present further evidence regarding the *Franklin* factors. As we previously stated, “[d]efense counsel stated that he understood the [*Franklin*] decision. He did not state that he had had insufficient time to gather requisite evidence, and did not request a continuance. Rather, he listed the factors he believed relevant for a future youthful offender parole hearing. The trial court expressly found that defense counsel’s statement complied with *Franklin*. Thus, there is no need to ‘remand the matter to the trial court for a determination of whether [appellant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.’ [Citation.] The trial court already made that determination.” (*Salazar I, supra*, 2018 Cal.App.Unpub. LEXIS, at pp. *36-*37.) The court did not abuse its discretion in denying appellant’s request to supplement the record.

II. *Proposition 57*

Proposition 57, the Public Safety and Rehabilitation Act of 2016, was passed and took effect in November 2016. (*Lara, supra*, 4 Cal.5th at pp. 303-304.) “Proposition 57 prohibits prosecutors from charging juveniles with crimes directly in adult court. Instead, they must commence the action in juvenile court. If the prosecution wishes to try the juvenile as an adult, the juvenile court must conduct . . . a ‘transfer hearing’ to determine whether the matter should remain in juvenile court or be transferred to adult court. Only if the juvenile court transfers the matter to adult court can the juvenile be tried and sentenced as an adult. [Citation.]” (*Id.* at p. 303.) *Lara* held that Proposition 57 applies retroactively “to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted.” (*Id.* at p. 304.)

Pursuant to *Lara*, appellant is entitled to a transfer hearing. His conviction and sentence “will be conditionally reversed and remanded to the juvenile court for a fitness/transfer hearing. If [he] is retained under juvenile court jurisdiction, the juvenile court will impose an appropriate disposition.” (*People v. Hargis* (2019) 33 Cal.App.5th 199, 210.) “If, after conducting the juvenile transfer hearing, the court determines that it would have transferred [appellant] to a court of criminal jurisdiction because he is “not a fit and proper subject to be dealt with under the juvenile court law,” then [appellant’s] conviction[] and sentence are to be reinstated. [Citation.]” (*Lara, supra*, 4 Cal.5th at p. 310.)

DISPOSITION

The conviction and sentence are conditionally reversed and the matter is remanded to the juvenile court with directions to conduct a juvenile transfer hearing. If the juvenile court determines that it would have transferred appellant to a court of criminal (adult) jurisdiction, his conviction and sentence are to be reinstated. If the juvenile court finds that it would not have transferred appellant to a court of criminal jurisdiction, it shall treat his conviction as a juvenile adjudication and impose an appropriate disposition.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.