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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. VICTOR ALFONSO MARTINEZ, Defendant and Appellant.	B292537 (Los Angeles County Super. Ct. No. BA441998)

APPEAL from the Judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed in part, reversed in part and remanded with directions.

Edward H. Schulman, 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, Margaret E. Maxwell and Shezad H. Thakor, Deputy Attorneys General for Plaintiff and Respondent.

INTRODUCTION

A unanimous jury convicted defendant and appellant Victor Alfonso Martinez of the first-degree murder of Adrian E. Posueloz, and of being a felon in possession of a firearm. The jury additionally found appellant committed the murder with a firearm, and for the benefit of a criminal street gang.

The information also alleged that appellant had suffered three prior felony convictions, and "a term was served as described in Penal Code section 667.5 for said offense(s) . . . ."[1] Appellant waived his right to a trial regarding these prior prison terms and admitted he had been convicted of two previous felonies. He did not specifically admit to serving two separate prison terms.

Based on the foregoing, the trial court sentenced appellant to 50 years to life for murder, and enhanced that sentence with an additional 25 years under section 12022.53, subdivision (d),[2]

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[1] In relevant part, Penal Code section 667.5, subdivision (b) permits the court to enhance the defendant's sentence with one consecutive year for each separate prison term that a defendant has served for a prior felony. All further statutory references are to the Penal Code.

[2] Section 12022.53, subdivision (d) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) [which includes section 187] personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

and an additional five years under section 667, subdivision (a).[3] The trial court sentenced appellant to six years for being a felon in possession of a firearm, and enhanced that sentence with an additional three years under section 186.22, subdivision (b)(1)(A),[4] and an additional two years under section 667.5, subdivision (b).[5]

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[3] Section 667, subdivision (a) provides: "(1) Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

[4] Section 186.22, subdivision (b)(1)(A) provides: "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . [¶] . . . by an additional term of two, three, or four years at the court's discretion."

[5] Section 667.5, subdivision (b) provides: "Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows: [¶] . . . [¶] . . . where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony . . . ."

Appellant makes five contentions on appeal: (1) the enhancement of two years under section 667.5, subdivision (b) must be reduced to one year, because appellant admitted only to having been convicted of two prior felonies, not to having served two separate prison terms, and the probation report suggests he served only one separate prison term; (2) Senate Bill 1393, passed after appellant had been sentenced, gives courts discretion to strike the five-year enhancement under section 667, subdivision (a), and remand is appropriate to permit the trial court to exercise its newly awarded discretion; (3) the trial court was unaware it had discretion to strike the firearm enhancement under section 12022.53, subdivision (d), and therefore remand is appropriate to permit the court to exercise its discretion; (4) despite controlling precedent to the contrary, the enhancement under section 12022.53, subdivision (d) violates the "'multiple conviction rule'" as well as double jeopardy principles; and (5) the abstract of judgment conflicts with the sentence actually imposed and should therefore be corrected.

Because appellant's admission does not unequivocally establish that he served separate prison terms, we remand for the trial court to hold a retrial on this limited issue. We further remand to permit the court to exercise its discretion to strike the five-year enhancement under section 667, subdivision (a). Lastly, we direct the court to ensure the new abstract of judgment conforms with the sentence imposed. We affirm the remainder of the judgment.

STATEMENT OF RELEVANT FACTS

A. *The Murder*

Because the facts of this case play no part in the issues appellant raises on appeal, we only briefly summarize the crime and evidence.

On the night of November 28, 2015, Adrian Posueloz and four friends were preparing to go out. Ricky Interiano was elected to drive the group, and the others stood around Ricky's car as he moved things from the backseat to the trunk so they could all fit in the car. The group was standing on Mercury Avenue between territory claimed by the 18th Street gang and the Rose Hills gang. Neither Posueloz nor his friends were affiliated with either gang. Appellant was a member of the 18th Street gang.

As the group stood there, a green Toyota Corolla pulled up slightly in front of Ricky's car, and an individual got out of the passenger side, holding a handgun. This individual wore a hooded sweatshirt with the hood up, but one of the friends, Erik Garcia Sanchez, testified the hood fell off, permitting Sanchez to get a look at the individual's features.

The individual asked the group, "Where are you from?" which was understood in that context to mean "[W]hat gang are you from[?]" One friend answered, "Nowhere" -- meaning they were not part of a gang -- and at the same time, Posueloz ran up Mercury Avenue, away from the group. The individual walked to the middle of the street and fired a single shot at Posueloz, striking him in the back. The shooter then returned to his vehicle, which drove off. Posueloz died from the gunshot wound later that night.

B. *The Information*

Appellant was held over for trial after a preliminary hearing, and the People filed an information with two counts. The first count alleged that appellant committed murder in violation of section 187, subdivision (a). It was further alleged appellant used a firearm within the meaning of section 12022.53, subdivisions (b), (c), and (d) in committing murder, and the murder was committed for the benefit of, at the direction of, or in association with a criminal gang pursuant to section 186.22, subdivision (b)(1)(C). The second count alleged appellant possessed a firearm while a felon, in violation of section 29800, subdivision (a)(1), and did so for the benefit of, at the direction of, or in association with a criminal gang pursuant to section 186.22, subdivision (b)(1)(A).

Pursuant to section 667, subdivision (a)(1), the information also alleged appellant had previously been convicted of a serious felony. Finally it, alleged "pursuant to Penal Code section 667.5(b) . . . the defendant, VICTOR ALFONSO MARTINEZ, has suffered the following prior conviction(s):" followed by a list of three different case numbers, and details about each case such as charge code and conviction date "and that a term was served as described in Penal Code section 667.5 for said offense(s), and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term."

Appellant pled not guilty to all charges and denied all special allegations.

C. *Trial on Murder and Being a Felon in Possession of a Firearm*

At trial, the People introduced several pieces of evidence against appellant, including Sanchez's identification of him as the shooter, cell phone data showing appellant was in the area of the shooting when it occurred, and a .40 caliber bullet -- the same type used to kill Posueloz -- found in a green Toyota Corolla driven by appellant's girlfriend. Forensic data suggested this bullet was cycled through the same gun that fired the bullet that killed Posueloz. The People also presented evidence showing the shooting was intended to benefit the 18th Street gang, as well as incriminating statements appellant made to an undercover agent posing as a fellow inmate. Appellant's counsel cross-examined most of the witnesses, but called no witnesses. Appellant did not testify.

On July 6, 2018, after less than an hour of deliberation, the jury returned a verdict of guilty on all counts. It found, as to the charge of murder, that appellant used a handgun, causing great bodily harm and death. As to both counts, the jury found appellant committed the crimes for the benefit of, at the direction of, and in association with a criminal street gang.

D. *Admission of the Priors*

Subsequent to the trial, on July 24, 2018, appellant waived his right to have a jury determine whether he had suffered the previous felony convictions alleged. On August 15, 2018, appellant indicated through counsel he intended to admit the previous convictions. Upon so hearing, the Court addressed appellant directly:

"THE COURT: Mr. Martinez, you do have a right to have a trial. You previously waived your right to have a jury trial, but you do have a right to have a court trial on the issue of whether or not you suffered the prior convictions alleged in the information. And that is the convictions for the 245(a)(1) in case BA428650 on October 15th, 2014; for a 487(a) on September 23rd, 2013, in PA076446; and for 11377 back on October[] 15th, 2014

"Those [are] all alleged pursuant to 667.5(b).

"The 245(a)(1) priors are also alleged as a five-year prior, and 667(a)(1) as a strike under 667(d) and 1170.12(b).

"At a trial you have a right to confront and cross-examine any witnesses, present evidence in your own behalf, and to testify if you choose to.

"Do you understand your right to have a trial on the issue of the priors?

"THE DEFENDANT: Yes.

"THE COURT: Do you give up your right to have a trial on that matter?

"THE DEFENDANT: Yes.

"THE COURT: Do you admit you suffered a prior conviction in case BA428650 for a violation of 245(a)(1), assault with a deadly weapon, within the meaning of Penal Code Section 1170.12(b), 667(d) and 667(a)? Do you admit those allegations?

"THE DEFENDANT: Yes.

"THE COURT: To the allegation that you suffered prior prison commitments in the three cases that I previously listed: the 245 (a)(1), the 487, and the 11377 -- it looks to me like two of them merged. So let's just say the 11377 and the 487, within the meaning of Penal Code Section 667.5(b), do you admit those priors, those state prison priors?

"THE DEFENDANT: Yes.

"THE COURT: Counsel join in those admissions?

"MS. KANG: Yes, your Honor.

"THE COURT: The court finds that the defendant has expressly, knowingly, understandingly and intelligently waived his constitutional rights as to the admissions of the priors. The court accepts the admissions."

After listening to victim impact statements from Posueloz's mother and father, the court sentenced appellant as follows: On the first count, murder in violation of section 187, subdivision (a), 25 years to life. The court doubled that sentence to 50 years to life per section 1170.12. The court further enhanced this sentence by 25 years under section 12022.53, subdivision (d), and an additional five years under section 667, subdivision (a).[6] On

[6] Originally, the court also doubled the 25-year enhancement, but at some point realized this was impermissible, and corrected it sua sponte 12 days later.

the second count, being a felon in possession of a firearm in violation of section 29800, subdivision (a)(1), the court selected the upper term of three years, doubled to six years. The court further enhanced this sentence by three years because the crime was committed in connection with a gang, and an additional two years, based on the two prior felony convictions that appellant admitted. The sentences were to be served consecutively.

E. *Comments Made by the Trial Court Toward Appellant*

Just before sentencing appellant on the second count, the court remarked: "I'm afraid the defendant had chosen to steep himself in a lifestyle that led him to where he knew he was going, based on his own statements in the jail."

Appellant timely appealed.

DISCUSSION

A. *Appellant's Admission Was Insufficient to Enhance the Sentence for Two Years Under Section 667.5(b)*

On appeal, appellant argues his admission to two prior felony convictions was insufficient to permit the trial court to enhance his sentence for two years under section 667.5, subdivision (b), because he never admitted to serving two separate prior prison terms. Appellant further argues, from the probation report provided in this case, it is apparent he served only one separate prior prison term, and therefore we should reduce appellant's sentence by one year.

As explained below, we agree appellant's admission was insufficient to permit a two-year enhancement under section 667.5, subdivision (b). We decline his request to conclude from

the probation report that he served only one prior prison term and instead remand the matter to the trial court for further proceedings.

B. *Each One-Year Enhancement Under Section 667.5(b) Requires a Separate Prison Term*

The relevant portion of section 667.5, subdivision (b) states that when a defendant is sentenced to prison for a felony, "in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony . . . ."

A "prior separate prison term" is defined as "a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration." (§ 667.5, subd. (g).)

"The plain language of subdivision (g) indicates after a defendant is committed to state prison, additional concurrent or consecutive sentences imposed in the same or subsequent proceedings are deemed to be part of the same prison term." (*People v. Cardenas* (1987) 192 Cal.App.3d 51, 56; see also *People v. Grimes* (2016) 1 Cal.5th 698, 739 (*Grimes*) [under subdivision (g) "'a defendant who has served concurrent or consecutive prison sentences on various commitments is deemed to have served only one prior prison term for the purpose of the enhancement provisions of Penal Code section 667.5'"].)

C. *Appellant Did Not Admit to Two Separate Prison Terms*

Appellant waived trial on whether he had served two separate prison terms. Instead, when asked by the Court whether he had suffered two "state prison priors" "within the meaning of Penal Code Section 667.5(b)," he responded that he had.

In *People v. English* (1981) 116 Cal.App.3d 361, the court held that unless the information alleges the defendant served *separate* prison terms for the prior felony convictions, an admission to prior felony convictions cannot alone be deemed an admission of separate prison terms for those convictions. (*Id.* at p. 372 ["By his admissions of the two prior felony convictions, defendant here can only be held to have admitted as great a charge as is contained in the amended information. (*In re Tartar* (1959) 52 Cal.2d 250, 256 [339 P.2d 553].) Absent an allegation in the amended information that defendant served 'separate' terms for the prior convictions, his admission of the allegations cannot be construed as an admission to that effect"]; see also *People v. James* (1978) 88 Cal.App.3d 150, 162 ["While the information need not necessarily charge that the defendant served separate sentences if it appears from the record in some manner that such is the fact or if the court has so found, where the record does not so show and the accusation does not so charge, the additional punishment may not be imposed"].)

Here, the information did not allege appellant served separate terms for his prior convictions -- indeed, it specifically alleges "a term was served as described in Penal Code section 667.5 for said offense(s)." (Underscoring added.)

Citing this court's decision in *People v. Carrasco* (2012) 209 Cal.App.4th 715, 725 (*Carrasco*), the People argue the information "alleged that appellant suffered the prior convictions and served a term 'as described in Penal Code section 667.5 for said offense(s)[.]' . . . [which] necessarily implies that the prison terms were served separately." However, neither *Carrasco* nor the language of the statute supports the People's argument.

The relevant portion of subdivision (b) of section 667.5 states "the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony." It does not follow that an admission to two felony convictions also constitutes an admission to a separate prison term for each such felony conviction. As our Supreme Court has held, "'a defendant who has served concurrent or consecutive prison sentences on various commitments is deemed to have served only one prior prison term for the purpose of the enhancement provisions of Penal Code section 667.5.'" (*Grimes*, *supra*, 1 Cal.5th at p. 739.) Therefore, a person who has been convicted of multiple felonies may still have served only one prior prison term for purposes of section 667.5.

In *Carrasco*, *supra*, 209 Cal.App.4th 715, this Court held a defendant's admission to his two prior convictions was sufficient to encompass two separate prison terms when: (1) "The information alleged that appellant had suffered two prior convictions, one in 2006 and another in 2009, that 'a term was served as described in Penal Code section 667.5 for said offense(s), and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony

conviction during, a period of five years subsequent to the conclusion of said term'"; (2) "The court referred back to the information when it held a court trial on 'the unresolved prior felony convictions which were bifurcated from the trial,' noting specifically that '[t]hese are both state prison priors pursuant to 667.5, subdivision (b)'"; and (3) "When asked whether he understood that he could be sentenced to serve an additional one year for each of the two state prison priors, appellant responded that he did, and then admitted the priors." (*Id.* at p. 724.)

Here, only two of these elements are present -- the language in the information, and the trial court's reference to state prison priors pursuant to section 667.5, subdivision (b). The trial court never asked appellant whether he understood he could be sentenced to serve an additional year for each of the two state prison priors. Such an inquiry, answered in the affirmative as it was in *Carrasco*, would have made clear that appellant was being asked to admit he had served two separate prison terms for two felony convictions, not whether he had previously been convicted of two felonies for which he served prison time. While the court did reference section 667.5, subdivision (b), assuming appellant understood what this meant, his admission acknowledged only that he was convicted of both felonies and served two consecutive or concurrent sentences for those felonies, equaling one separate prison term under section 667.5, not two.[7]

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[7] The People also cite *People v. Ebner* (1966) 64 Cal.2d 297 for the proposition that "'Defendant's admission of the prior convictions is not limited in scope to the fact of the convictions but extends to all allegations concerning the felonies contained in the information.'" In *Ebner*, the information alleged the defendant had been convicted of

(*Fn. is continued on the next page*.)

Appellant's admission was insufficient to warrant the imposition of two one-year enhancements.[8]

D. *The People Are Entitled to Prove the Existence of Separate Prison Terms*

When the prosecution fails to prove the existence of a prior conviction allegation, and the matter is reversed on appeal for insufficient evidence, "the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." (*Monge v. California* (1998) 524 U.S. 721, 734; see also *People v. Barragan* (2004) 32 Cal.4th 236, 241 [citing *Monge* and confirming that "retrial of a prior conviction

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one felony in Utah, one in Arizona, and one in California, and he had served a term in state prison for each of the three convictions. (*Id.* at p. 303.) The defendant admitted the prior convictions, and our Supreme Court found this sufficient to establish defendant had served separate prison terms. (*Id.* at p. 304.) But a defendant who is convicted in three separate states and served state prison terms for each conviction obviously served three separate prison terms, because each state has its own prison system. In appellant's case, both felonies were in California; thus appellant's admission of both convictions did not itself establish that he had served a separate prison term for each.

[8] The People also noted "[d]efense counsel did not object at any point [to the imposition of two one-year enhancements]." Though the People do not expressly argue waiver, "[o]bviously an appellate challenge to the sufficiency of the evidence to sustain a criminal conviction or enhancement is not an evidentiary objection within the meaning of that rule [that evidentiary objections cannot be raised for the first time on appeal]." (*People v. Jones* (1988) 203 Cal.App.3d 456, 461.)

allegation does not violate the double jeopardy protections of either the federal Constitution or the California Constitution"]; *People v. Marin* (2015) 240 Cal.App.4th 1344, 1366 [affirming viability of *Monge* after *Apprendi v. New Jersey* (2000) 530 U.S. 466 and confirming double jeopardy does not preclude retrial on prior conviction allegation].)

Having found appellant's admission insufficient to warrant two enhancements under section 667.5, we decline his invitation to reduce his sentence by one year based on the probation report accompanying the record. While the probation report arguably suggests appellant may have served multiple sentences in a manner constituting only one prior separate prison term under section 667.5, this is unclear. Moreover, "[i]n determining the truth of a prior conviction allegation the trier of fact may look to the entire record of that conviction, but no further." (*People v. Henley* (1999) 72 Cal.App.4th 555, 564.) The probation report prepared for this case is not part of the record of conviction for the previous felonies.[9]

Because we are remanding for further proceedings regarding the number of prior separate prison terms appellant has served, we need not address his claim of ineffective

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[9] Appellant cites *People v. Trujillo* (2006) 40 Cal.4th 165 and *People v. Reed* (1996) 13 Cal.4th 217 (*Reed*) for the proposition that "probation reports" might be part of the "record of conviction." The probation reports in *Trujillo* and *Reed* were probation reports from the prior conviction at issue. (*People v. Trujillo*, *supra*, 40 Cal.4th at p. 171; *Reed*, *supra*, 13 Cal.4th at 220-221.) Here, appellant asks us to look at the probation report from the current conviction, which is not part of the record of the prior convictions.

assistance of counsel for failure to point out to the trial court that appellant served only one prior separate prison term. Any prejudice that may have occurred from the purported ineffective assistance will be cured on remand.

E. *The Trial Court Must Exercise Its Discretion Whether to Strike the 667(a) Enhancement*

Section 667, subdivision (a)(1) states: "Any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." "Prior to 2019, trial courts had no authority to strike a serious felony prior that is used to impose a five-year enhancement under section 667, subdivision (a)(1). Senate Bill 1393 removed this prohibition. (Stats. 2018, ch. 1013, §§ 1, 2.) The legislation became effective January 1, 2019. (Cal. Const., art. IV, § 8, subd. (c).)" (*People v. Jones* (2019) 32 Cal.App.5th 267, 272.) "Absent evidence to the contrary, amendments to statutes . . . such as Senate Bill 1393, apply to all defendants whose judgments are not final as of the amendment's effective date." (*Ibid.*)

The parties agree remand is required unless the court "clearly indicated" it would not have exercised its discretion to strike the enhancements. (See also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken" the enhancement].) There is insufficient indication here.

In imposing sentence on the second count (felon in possession), the trial court stated: "I'm afraid the defendant ha[s] chosen to steep himself in a lifestyle that led him to where he knew he was going, based on his own statements in the jail. [¶] The court will select the high term of three years, doubled for six, plus three for the gang enhancement, plus two years for the prior."

Respondent argues the court's statement regarding appellant's decision to "'steep himself in'" the gang lifestyle, its imposition of the maximum sentence for the felon-in-possession count, and its failure to strike any of the other enhancements it had discretion to strike "clearly indicate the court would not have dismissed [appellant's] five-year prior serious felony enhancement." We are not persuaded. "[S]peculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.) Further, the court's statement regarding appellant's choice to "steep himself" in a certain lifestyle does not materially inform us how the court would exercise its discretion.[10] In remanding, we express no view on whether the court should strike the enhancement in question.

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[10] *People v. Jones*, *supra*, 32 Cal.App.5th 267, on which the People rely, is distinguishable. There, the trial court stated in sentencing defendant: "'This gives me obviously, as you know, great satisfaction in imposing the very lengthy sentence here today.'" (*Id.* at p. 274.) The court further stated that the defendant had "'earned the sentence here today'" and that "there was 'no shortage' of aggravating factors that supported the upper term. . . ." (*Ibid.*) The trial court's statements here are not comparable.

F. *Remand Is Unnecessary to Reconsider Striking the Firearm Enhancement*

Appellant requests we also remand with instructions to the trial court to consider striking the 25-year firearm enhancement, because "the trial court [did not] appear to recogniz[e] this discretionary authority to strike the jury's firearm use finding." No such remand is warranted.

Appellant acknowledges that "'[i]n the absence of evidence to the contrary, we presume that the court "knows and applies the correct statutory and case law."'" (*People v.* Thomas (2011) 52 Cal.4th 336, 361, quoting *People v. Coddington* (2000) 23 Cal.4th 529, 644.) The contrary "evidence" appellant points to is the trial court's initial impermissible doubling of the 25-year enhancement to 50 years. As appellant recognizes however, "[t]welve days after its original pronouncement of judgment, the trial court realized that it's [*sic*] doubling the term on the firearm use enhancement was erroneous under existing law and modified the judgment accordingly."

Appellant argues the trial court's initial error in doubling the firearm enhancement is affirmative evidence the trial court did not know it had discretion to strike the firearm enhancement. Appellant's conclusion does not follow his premise. Indeed, the trial court's correcting of its initial error arguably is evidence of its understanding of the law regarding the firearm enhancement, and what the court could do regarding it. "[R]emand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1229.) At worst, the record here is silent. At

best, it indicates the trial court understood the law. Neither scenario warrants a remand.

G. *Imposing the Enhancement Specified in Section 12022.53(d) Violates Neither the "Multiple Conviction Rule" Nor Double Jeopardy Principles*

While acknowledging California Supreme Court precedent is to the contrary, appellant argues the imposition of the enhancement under section 12022.53, subdivision (d) violates the multiple conviction rule because "the factual element essential to establishing that particular enhancement in order to increase the maximum punishment on the underlying murder by an additional 25 years-to-life is necessarily subsumed within the elemental components of the murder – the proximately caused death of the victim" and we should treat the enhancement as an offense. He further argues that the sentence violates double jeopardy, which "'protects against multiple punishments for the same offense.'"

H. *Separate Sentences for Violation of Sections 187(a) and 12022.53(d) Do Not Violate the Multiple Conviction Rule*

Our Supreme Court has expressly held that enhancements cannot be considered when applying the multiple conviction rule to charged offenses. (*People v. Sloan* (2007) 42 Cal.4th 110, 114 (*Sloan*) ["enhancements are neither recognized nor considered in determining whether the defendant can be convicted of multiple charged crimes based on necessarily included offenses"]; *People v. Izaguirre* (2007) 42 Cal.4th 126, 134 ["To the extent defendant claims enhancements should be considered when applying the

multiple conviction rule to charged offenses, our holding in *Reed*, *supra*, 38 Cal.4th 1224, controls. They may not"]; *People v. Wolcott* (1983) 34 Cal.3d 92, 101 ["an allegation of firearm use under section 12022.5 should not be considered in determining lesser included offense"].)

Appellant argues that our Supreme Court's distinction between "'offenses'" and "'enhancements'" "is precisely the distinction which the [United States Supreme] Court in *Apprendi* [*v. New Jersey, supra,* 530 U.S. 466] and *Sattazahn* [*v. Pennsylvania* (2003) 537 U.S. 101] found no longer acceptable." Neither case assists appellant. *Sattazahn* stands for the proposition that where an enhancement is adjudicated in a trial-like proceeding, an "'acquittal'" gives rise to double jeopardy principles should a retrial occur for the underlying crime. (*Sattazahn v. Pennsylvania*, *supra*, 537 U.S. at p. 112.) *Apprendi* stands for the proposition that enhancements that lengthen the maximum sentence for a crime must be proved beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) Here, there was no "acquittal" regarding any enhancement alleged against appellant, and all enhancements -- excepting the allegation of separate prior prison terms -- were either proved beyond a reasonable doubt or admitted by appellant.

I. *Double Jeopardy Does Not Apply*

"'[T]he Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." [Citation.]'" (*Sloan*, *supra*, 42 Cal.4th at

pp. 120-121, quoting *Brown v. Ohio* (1977) 432 U.S. 161, 165, italics omitted.) Here, there was no second prosecution. As to whether section 187, subdivision (a) and section 12022.53, subdivision (d) are the "same offense," appellant himself admits "'[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. [Citation.]' (*Blockburger v. United States* (1932) 284 U.S. 299, 304 [52 S. Ct. 180, 182, 76 L.Ed. 306, 309].)" Section 187, subdivision (a) and section 12022.53, subdivision (d) both require proof of an additional fact which the other does not.[11] They are not the same offense.[12]

J. *The Abstract of Judgment Must Be Corrected*

Appellant correctly points out that the Abstract of Judgment reflects a term of four years, not three, on the gang

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[11] Section 187, subdivision (a) requires "malice aforethought" while section 12022.53, subdivision (d) does not. Section 12022.53, subdivision (d) requires "discharge[of] a firearm" while section 187, subdivision (a) does not.

[12] Appellant also argues that sentencing him under both section 187, subdivision (a) and section 12022.53, subdivision (d) is permissible "*only if* the Legislature specifically authorizes cumulative punishment." Here, the Legislature *has* specifically authorized cumulative punishment. (§ 12022.53, subd. (d) ["any person who, in the commission of a felony specified in subdivision (a) . . . personally and intentionally discharges a firearm and proximately causes great bodily injury . . . shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life"].)

enhancement, and one year, not two, on the section 667.5, subdivision (b) enhancement, which conflicts with the sentence the court actually imposed. Respondent agrees. "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385, citing *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

Because we remand this case for further sentencing proceedings, a new abstract of judgment will be created. The new abstract of judgment should reflect a term of three years on the enhancement under section 186.22, subdivision (b)(1)(A), and either a term of one or two years under the section 667.5, subdivision (b) enhancement, depending on the outcome of the hearing thereon.

DISPOSITION

The matter is remanded to the trial court for proceedings consistent with this opinion. On remand, the People shall have the opportunity to prove the allegations under 667.5, subdivision (b), unless appellant admits to having served two separate prior prison terms for the felony convictions. In addition, on remand, the court shall exercise its discretion whether to strike the five-year enhancement under section 667, subdivision (a). The court shall also issue a new abstract of judgment that conforms to the actual sentence imposed, and forward the new abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.