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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN MICHAEL PIEPOLI II, Defendant and Appellant.	B289309 (Los Angeles County Super. Ct. No. GA088733)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

Verna Wefald, 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, Shawn McGahey Webb, Michael C. Keller and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant John M. Piepoli II (appellant) was convicted of first degree murder (Pen. Code, § 187, subd. (a)),[1] attempted second degree robbery (§§ 664, 211), and conspiracy to commit robbery (§ 182, subd. (a)(1)). The special circumstance that the murder was committed while appellant was engaged in the commission of a robbery (§ 190.2, subd. (a)(17)) and firearm and gang enhancements were found true. Appellant was sentenced to life without the possibility of parole (LWOP), plus an additional 25 years to life.

In appellant's first appeal (*People v. Piepoli* (Nov. 29, 2016, B260138) [nonpub. opn.] (*Piepoli I*)), we concluded that the evidence was insufficient to support the true finding on the special circumstance and, therefore, reversed appellant's LWOP sentence. We affirmed the judgment in all other respects.

On remand, appellant received 25 years to life on the murder count and an additional and consecutive 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1), for an aggregate term of 50 years to life.

In this second appeal, appellant argues that the trial court abused its discretion by declining to strike the firearm enhancement. In a supplemental brief filed with our permission, he argues that the matter must be remanded because the court did not understand the extent of its discretion under Senate Bill Number 620 (2017-2018 Reg. Sess.) (SB 620) to strike the 25-year-to-life firearm enhancement but to still impose a lesser enhancement of either 10 or 20 years under section 12022.53,

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

subdivision (b) or (c). We disagree with both contentions and affirm.

FACTUAL BACKGROUND

The underlying facts of appellant's conviction were summarized as follows in our prior opinion.

"Robbery and Shooting

"On the afternoon of January 15, 2013, 21-year-old Zane Goldstein (Zane) took his older brother Zachary Goldstein (Zachary) with him to sell marijuana to a new buyer. When they conducted drug deals, Zane would drive his Jeep while Zachary rode in the backseat. The buyer would join Zachary in the back. After the buyer handed the money to Zane, Zachary would provide the marijuana.

"At around 2:00 p.m., Zane drove to an apartment complex near the corner of Holliston Avenue and Maple Street in Pasadena, California. Kevin Cabrera (Cabrera) came out to the curb and directed Zane to park in an empty space in the carport. Zachary thought this seemed strange, but Cabrera said the neighbors were nosy. Peter Parra (Parra) sat crouched in the bushes. Zane pulled in and kept the Jeep's engine running. Cabrera got into the backseat with Zachary. At that point, Raymond Conchas (Conchas) came out from behind the front tire of the adjacent parked car. Conchas was holding a short, sawed-off shotgun aimed at Zane's window. Conchas said, 'Don't move or I'll blast you.' Zane immediately put the car in reverse and backed out of the driveway.

"Zane drove a couple blocks, then stopped the car. He and Zachary screamed at Cabrera to get out of the car. Cabrera said, 'Where is the weed at?' and 'If you don't give me the weed, do you want your homie to get blasted[?]' Zachary tried to push Cabrera

out of the car but Cabrera fought back, holding onto the driver's seat. Eventually, Cabrera was pushed out. A tan sedan then pulled up next to Zane's driver's side window. A shot was fired at Zane by someone in the other car. Zane died at the hospital from a gunshot wound to the head.

"Police Investigation

"Pasadena Police Officer David Duran searched Zane's Jeep after the shooting. A canister containing approximately one ounce of marijuana was found inside a bag. Two cell phones were also recovered. One belonged to Zane and the other belonged to Conchas. Officer Duran knew Conchas from previous contacts.

"An examination of the text messages and phone log on Conchas's phone revealed how the drug deal was set up. Two days before the murder, on January 13, 2013, at 1:42 p.m., Conchas's phone received a text message from 'White John' saying, '710-0431, . . . a white boy that sells weed. He lives near Connels [Restaurant].'[2] Conchas texted back, 'What's his name and tell him I know who?' White John responded, 'Zane. You know Rafa.' Conchas responded, 'Rafa from where,' and White John responded, 'He lives on Buckeye.'

"On the day of the murder, January 15, 2013, there was a two-minute phone call from Conchas to White John at 11:48 a.m. Conchas called White John again at 12:48 p.m. for 30 seconds. Conchas then texted Zane saying, 'What's up my boy? This is Rafa. Homie Chris, how much for the half?' Zane responded, '150.' Between 12:20 p.m. and 1:46 p.m. Conchas and Zane

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[2] "The phone number for the contact 'White John' was appellant's cell phone."

negotiated further on a price and Zane agreed to sell one ounce of marijuana for $290. They also agreed on the location for the sale.

"At 2:06 p.m., Zane texted Conchas that he had arrived at the location and was waiting outside in his Jeep. Meanwhile, at 2:02, 2:10 and 2:39 p.m. there were missed calls from White John's phone to Conchas. At 2:11 p.m., White John texted Conchas saying, 'What's good?'

"Appellant's Interviews

"At 5:30 a.m., the day after the murder, Pasadena Homicide Detectives William Broghamer, Keith Gomez and Grant Curry went to interview 19-year-old appellant at his father's house. All three officers wore suits and were armed. Detective Broghamer wore a recording device and the recorded interview was played for the jury. The interview lasted about an hour. Appellant told the detectives that his friend Michael Pena was using his phone to text Conchas who was going to try to 'take weed' from Zane. The plan was for Conchas to call Zane and reference 'Rafa,' an associate known to Zane. When the buyer got into the car he would bully Zane, maybe with a knife, to take the marijuana. Appellant said the plan was to 'take advantage of the guy,' because he would not call the police to report that his marijuana had been stolen.

"Following the interview in the house, appellant agreed to show the detectives where Michael Pena lived. After driving around to two locations without finding the house, appellant admitted that his friend's name was Ward Lacey (Lacey), not Michael Pena.[3]

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3 "It appears that later the same day, appellant agreed to wear a microphone and speak with Lacey at a park. Afterward, Lacey was arrested. Lacey, Conchas, Cabrera and Parra were all

"Appellant then agreed to go with the detectives to the police station, where Detective Broghamer interviewed him again. The recorded interview, which began at 8:38 a.m., was played for the jury. Appellant began by stating, 'I'm done with this lying bullshit . . . I'm ready to get to it.' Appellant stated that he knew Conchas because appellant went to school with Conchas's sister Ruby. Conchas is part of the Northside Pasadena gang and controls the drug sales in northern Pasadena. Anyone who sells marijuana in his territory gets 'taxed.' Ruby told appellant about a month earlier that Zane 'had an encounter' with Conchas because Zane refused to pay taxes. According to Ruby, Conchas told Zane, '[N]ext time I see you it's not going to be pretty.'

"Lacey used appellant's phone to text Conchas about stealing Zane's marijuana. Lacey had bought drugs from Zane before. Lacey had a mutual friend with Conchas, and gave Conchas Zane's number in exchange for a cut of the stolen marijuana. Appellant was also hoping to get some of the marijuana. After Conchas obtained Zane's information, Conchas 'took control.' Lacey told appellant that Conchas said, 'I'm going to have one of my friends get in the car and basically kind of punk him for his weed and say hey, man, give me – give me the fucking dope.' Conchas said if Zane did not provide the weed, then Conchas was going to pull a knife out and say, 'Hey, give it to me.' Nothing was ever said about bringing a gun or shooting Zane.

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charged as codefendants with appellant. Conchas, Cabrera and Parra were tried separately from appellant."

"Twenty minutes into the interview, Detective Broghamer stopped the recording and left the room. The recording was started again at an unknown time during the conversation, and lasted another 12 minutes. Appellant became emotional and said that he and Lacey provided Zane's contact information to Conchas because Conchas threatened to shoot appellant and his family if he did not. Appellant said that he had been in Conchas's car when Conchas made the threat, and Conchas set a gun down between the two front seats as he spoke. Appellant said he was in fear of Conchas because 'I know he has guns and I know he has people.'

"Gang Evidence

"Pasadena Police Officer David Garcia testified as an expert on the Hispanic gang known as the Northside Pasadena gang. The gang has allegiance to the Mexican Mafia and claims the territory where the shooting occurred. Neither appellant nor Lacey are members of the gang. However, Conchas, Cabrera and Parra are all gang members with multiple gang tattoos. Conchas's gang moniker is 'Little Duke' and his father goes by 'Big Duke.'

"A tax is a fee that gang members charge for selling narcotics in the gang's territory. Hypothetically, there could be two consequences for someone acting as a 'traveling marijuana salesman' in gang territory without permission. The first consequence could be a 'soft candy green light,' which is a form of discipline where one is physically assaulted by the gang for failing to pay taxes or breaking a gang rule. The second option is a 'hard candy green light,' which is basically a 'death sentence.' A gang member is ordered to kill someone who did something to the gang, crossed the gang or snitched. In Officer Garcia's opinion, a

hypothetical mirroring the facts of this case sounded like a 'classic . . . dope rip,' where gang members lure a person to an area and then try to steal the person's narcotics because the person does not have permission to sell in that area. Gang members cannot show weakness when the victim tries to get away. It is not uncommon for gang members to solicit nongang members for information." (*Piepoli I*, *supra*, B260138, at pp. 3–6.)

PROCEDURAL BACKGROUND

Trial and Original Sentencing

A jury convicted appellant of first degree murder, attempted second degree robbery, and conspiracy to commit robbery, and found the special circumstance and firearm and gang enhancements to be true. On the murder count, appellant received an LWOP sentence, plus a 25-year-to-life firearm enhancement. The trial court imposed and stayed other firearm and gang enhancements, as well as prison terms for the robbery and conspiracy counts.

Piepoli I

In appellant's previous appeal, we concluded that under the factors set forth in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) "there was insufficient evidence that appellant was a major participant in the underlying robbery." (*Piepoli I*, *supra*, B260138, at p. 19, fn. omitted.) "[A]ppellant did not plan the crime, did not supply any weapons, was unaware that lethal force would be used, was not present at the scene, and was unaware that the victim had been shot." (*Id.* at p. 20.) We therefore vacated the special circumstance true finding and the LWOP sentence and remanded for resentencing on the felony-murder count. (*Id.* at p. 28.)

Resentencing on Remand

On remand, appellant requested to continue his resentencing so that it could take place at the same time as his hearing under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).[4] Appellant argued that the *Franklin* materials he would present would also "provide the [c]ourt with necessary information to strike the enhancements." The trial court granted appellant's request.

Appellant submitted a sentencing memorandum, with reports by psychologist Edward F. Fischer and licensed clinical social worker Angela Mason (Mason) attached as exhibits.

Dr. Fischer's report noted appellant's impaired judgment and lack of insight. Appellant scored toward the bottom of the normal range of adult intelligence on the Wechsler Adult Intelligence Scale-IV. Dr. Fischer diagnosed appellant as having attention deficit disorder with hyperactivity, but opined that

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[4] The purpose of a *Franklin* hearing is to allow a defendant to "place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and [for] the prosecution [to] likewise . . . put on the record any evidence that demonstrates the [youthful] offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the [youthful] offender's characteristics and circumstances at the time of the offense so that the [parole b]oard, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' . . . [citation]." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

appellant was competent to stand trial and "capable of rationally assisting his attorney in putting on a defense and laying the preparations for a later parole hearing review of the outcome of the effects of his sentencing."

Mason characterized her report as "detail[ing]" appellant's "multigenerational social history" as well as "the impact that growing up in a conflictual abusive home environment, rife with emotional neglect, alcohol and substance abuse, had on his development." Mason opined that appellant "had no idea what the consequences of his actions would be[,]" "acted out of a pure juvenile impulse[,]" and "was also motivated by fear and duress." According to Mason, appellant's "friends and family members agree that [appellant] is a good-hearted millennial who, due to his naïve immaturity, made impulsive decisions that led to the instant offense."

At resentencing appellant's trial counsel argued that factors such as "What is the [appellant's] participation?" and "What did the person do?" needed to be taken into consideration in striking the firearm enhancement, and that appellant "wasn't a major player at all" in the underlying crime.

According to the People, "whether or not [appellant] was likely to have been calling the shots or running the show" was irrelevant. What mattered instead was "whether or not he falls within the spirit of the gun enhancement statute." The People argued that appellant did fall within the spirit of the enhancement for several reasons. First, appellant inconsistently claimed that "he didn't know what was going to happen to the victim; he thought that the gangsters were just going to kind of take advantage of him; suggesting he didn't know violen[ce] could result or that weapons would be used." Yet he also claimed "that

he was intimidated by these gang members and that they were dangerous, suggesting, in fact, he very well knew that violence could result from [his] actions . . . ." Second, the People pointed to appellant's rejection of a plea bargain in which he would have received a 30-year determinate sentence. And, finally, the People identified ways that appellant could have prevented the shooting, such as warning the victim of the set-up or notifying the police.

The trial court stated that it had "read and considered" the probation officer's report,[5] defense sentencing memorandum, and the *Franklin* materials. It explained that it gave "no weight" to appellant's rejection of a plea deal and gave "little weight to the *Franklin* memorandum" in regards to striking the firearm enhancement. (Italics added.) Rather, the court was "more concerned about [appellant's] juvenile history and the fact that after he . . . had a disposition on a sustained petition for burglary, just one year and three months later the instant offense was committed."[6]

The trial court denied appellant's motion, "find[ing] no good cause under . . . section 1385 to strike any firearm

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[5] The trial court had previously ordered a supplemental probation sentencing report, which was prepared in July 2017. The probation officer's report identified no circumstances in mitigation.

[6] Appellant had two sustained juvenile petitions: one for second degree robbery (§ 211) when he was 16 years old and another for burglary (§ 459) when he was 17. Zane's murder occurred one year, 10 months after appellant's juvenile petition for burglary was sustained. Although the trial court miscalculated the time between these events, we find this error immaterial.

enhancements." Appellant was sentenced to 50 years to life: 25 years to life on the murder count and an additional and consecutive 25 years to life for the firearm enhancement under section 12022.53, subdivisions (d) and (e)(1). The court imposed and stayed other gang and firearm enhancements—including lesser firearm enhancements under section 12022.53, subdivisions (b) and (c)—as well as prison terms for the other charged offenses.

This timely appeal followed.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion by Declining to Strike the Firearm Enhancements.

A. *Relevant law and standard of review*

Section 12022.53, subdivision (d) imposes an additional and consecutive term of 25 years to life to the sentence of an offender who, in the commission of a felony such as murder, "personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death . . . ." (§ 12022.53, subd. (d).) Subdivision (e)(1) "imposes vicarious liability . . . on aiders and abettors who commit crimes in participation of a criminal street gang. [Citation.]" (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171 (*Garcia*).) Thus, "when the offense is committed to benefit a criminal street gang, [section 12022.53]'s additional punishments apply even if, as in this case, the defendant did not personally use or discharge a firearm but another principal did." (*People v. Brookfield* (2009) 47 Cal.4th 583, 590.)

SB 620, effective January 1, 2018, amended section 12022.53, subdivision (h), giving trial courts discretion to strike a section 12022.53 enhancement "in the interest of justice pursuant

to [s]ection 1385 and at the time of sentencing . . . ." (§ 12022.53, subd. (h).)

We review the decision whether to strike a section 12022.53 enhancement for abuse of discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 371 (*Carmony*) [holding that "the trial court's decision *not* to dismiss or strike a sentencing allegation under section 1385 . . . . should be reviewed under the deferential abuse of discretion standard"].) "Where, as here, a discretionary power is . . . by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316 (*Jordan*).)

B. *Analysis*

Appellant was resentenced shortly after section 12022.53, subdivision (h), was amended pursuant to SB 620. The trial court was clearly aware of its new discretion to strike the firearm enhancements but declined to exercise it, after having read and considered the probation officer's report, defense sentencing memorandum, and the *Franklin* materials, which included the reports by Mason and Dr. Fischer, and listening to oral argument.

In reaching its decision not to strike any firearm enhancement, the trial court focused on appellant's criminal juvenile history and, specifically, the relatively short duration between the sustained juvenile petition for burglary and the instant offense. Appellant argues that the trial court failed to acknowledge that his juvenile dispositions for burglary and robbery did not involve guns or violence. But this minimizes the

seriousness—regardless of whether a gun was used—of these felonies, which appellant committed within less than three and a half years preceding his participation in Zane's murder. It was not "arbitrary, capricious or patently absurd" (*Jordan*, *supra*, 42 Cal.3d at p. 316) for the court to be influenced by appellant's juvenile history and escalating criminal conduct.

Appellant also contends that the trial court abused its discretion by failing to consider appellant's role in the murder, specifically that he did not supply the murder weapon or know that a gun would be used. The record does not support appellant's contention. The court stated that it had "read and considered the defense sentencing memorandum[,]" which characterized appellant's involvement in Zane's murder as "minimal compared to the actual perpetrators" and urged the court to strike the enhancement for the same reasons that we vacated the special circumstance true finding—that under *Banks*, *supra*, 61 Cal.4th 788 appellant was not a major participant in the underlying crime. Appellant's trial counsel reiterated these points to the court at the sentencing hearing.

While the trial court did not explicitly address these arguments when it declined to strike the enhancements, there is no affirmative evidence in the record that it did not consider them. (See *People v. Myers* (1999) 69 Cal.App.4th 305, 310 ["the fact that the court focused its explanatory comments on the violence and potential violence of appellant's crimes does not mean that it considered only that factor"].) Because "[t]he court is presumed to have considered all relevant factors unless the record affirmatively shows the contrary" (*People v. Kelley* (1997) 52 Cal.App.4th 568, 582), we must assume that it did so here.

Moreover, even if there was affirmative evidence in the record suggesting that the trial court failed to consider that appellant was not a major participant in the underlying robbery—which there was not—appellant would still not meet his burden as "the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.]" (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

Unlike the special circumstance statute that extends LWOP eligibility to a felony murderer who is "not the actual killer" provided that the offender was "a major participant" and acted "with reckless indifference to human life" (§ 190.2, subd. (d); see also *Banks*, *supra*, 61 Cal.4th at p. 798)), the firearm enhancement statute contains no such requirement with respect to nonshooting aiders and abettors of offenses committed to benefit a criminal street gang (§ 12022.53, subd. (e)(1)).

Section 12022.53, subdivision (e)(1), "provides a 'clear expression of legislative intent' [citation] to 'severely punish aiders and abettors to crimes by a principal armed with a gun committed in furtherance of the purposes of a criminal street gang. It has done so in recognition of the serious threats posed to the citizens of California by gang members using firearms.' [Citation.]" (*Garcia*, *supra*, 28 Cal.4th at p. 1172.) A nonshooter who does not supply the firearm or specifically know that a firearm will be used still falls within the intent of this legislation, which is consistent with the fact that the true finding on the gang enhancement under section 186.22, subdivision (b)(1), was not disturbed by the previous appeal.

Appellant's argument that the trial court erred by failing to consider the evidence presented in the *Franklin* materials regarding appellant's troubled upbringing is also meritless.

"[T]he particular characteristics of the offender are relevant to the harshness of the penalty and a defendant's culpability" (*People v. Mendez* (2010) 188 Cal.App.4th 47, 65), and, here, the court explicitly stated that it considered the *Franklin* materials but gave them "little weight[.]" How much weight to afford appellant's background was well within the court's discretion, which we will not second guess. (See *People v. Willover* (2016) 248 Cal.App.4th 302, 323 (*Willover*) [trial courts have "discretion to accord different weight to each factor" considered in a sentencing decision].)

In conclusion, nothing in the record indicates that the trial court's refusal to strike the firearm enhancements was "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, 33 Cal.4th at p. 377.) Nor was it "inconsistent with the letter and spirit of the law, or based on 'circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision.' [Citation.]" (*Willover*, *supra*, 248 Cal.App.4th at p. 323.) Accordingly, we find no abuse of discretion.

II. The Record Indicates That the Trial Court Understood the Extent of Its Discretion Under SB 620.

In the alternative, appellant argues that the matter should be remanded for resentencing because the trial court did not understand that its discretion under section 12022.53, subdivision (h), as amended by SB 620, allowed it to strike the 25-year-to-life firearm enhancement under subdivision (d) but still impose a lesser enhancement of either 10 years under subdivision (b) or 20 years under subdivision (c). "Rather," appellant asserts, "the issue was approached as if the only

options were all or nothing[.]" We disagree that remand is required.

"'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*).)

Here, we agree that it was within the trial court's discretion to strike the firearm enhancement under section 12022.53, subdivision (d), and then either impose one of the lesser firearm enhancements under subdivisions (b) and (c), or strike them as well. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 428.) However, the record reflects that the court was aware of this and exercised that "'informed discretion'" (*Gutierrez*, *supra*, 58 Cal.4th at p. 1391) when it declined to strike, in the court's words, "*any* firearm enhancements." (Italics added.)

Appellant's reliance on *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*) is misplaced. In that case, the trial court declined to strike a section 12022.53, subdivision (d) firearm enhancement after SB 620 became effective. (*Morrison*, *supra*, at p. 220.) Unlike here, where the jury found true three different charged firearm enhancements under section 12022.53, subdivisions (b), (c), and (d), in *Morrison* the operative information only charged, and the jury only found true, a single firearm enhancement under subdivision (d). (*Morrison*, *supra*, at p. 221.)

The Court of Appeal held that the trial court had the discretion to impose a lesser, uncharged firearm "enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under section 12022.53, subdivision (d), if such an outcome was found to be in the interests of justice under section 1385." (*Morrison*, *supra*, 34 Cal.App.5th at p. 223.) Because the record did not reflect that the trial court had understood that this option was available, and, at the time of sentencing, "no published case had held an uncharged lesser firearm enhancement could be imposed in lieu of an enhancement under section 12022.53, subdivision (d) in connection with striking the greater enhancement[,]" the matter was remanded. (*Morrison*, *supra,* at p. 224.) Crucially, *Morrison*'s holding permitting the imposition of uncharged lesser firearm enhancements was explicitly limited to "cases where those enhancements *have not* been charged in the alternative and found true[.]" (*Id*. at p. 225, italics added.)

In contrast, appellant in this appeal was also charged with the lesser firearm enhancements, which the jury found to be true. The trial court here would have known that striking the 25-year-to-life enhancement under section 12022.53, subdivision (d), "would leave intact the remaining findings, and an enhancement under the greatest of [the] provisions [under subdivisions (b) and (c)] would be mandatory unless those findings were also stricken in the interests of justice." (*Morrison*, *supra*, 34 Cal.App.5th at p. 222; see also § 12022.53, subd. (f); *Gutierrez*, *supra*, 58 Cal.4th at p. 1390 ["Absent evidence to the contrary, we presume that the trial court knew and applied the governing law. [Citation.]"].)

Accordingly, we decline to depart from "the usual presumption that a sentencing court correctly applied the law" (*Morrison*, *supra*, 34 Cal.App.5th at p. 225) and therefore will not remand.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT