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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO CORTEZ WHEATLEY,

Defendant and Appellant.

B280397

(Los Angeles County
Super. Ct. No. MA066057)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joel L. Lofton, Judge. Affirmed and remanded with directions.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ricardo Cortez Wheatley (defendant) appeals from the judgment entered after he was convicted of attempted murder and other offenses. He challenges only the imposition of gang and recidivist enhancements, and asks that the case be remanded to permit the court to exercise its discretion whether to strike the firearm enhancement under the recent amendments to Penal Code sections 12022.5 and 12022.53.¹ We reject defendant's claim that substantial evidence did not support the gang enhancement, but we vacate the sentence to permit the trial court to exercise its discretion with regard to the firearm enhancements, and order the trial court not to reimpose the unauthorized five-year recidivist enhancements as to count 7. We affirm the judgment of conviction.

BACKGROUND

Defendant was charged with six felonies and one misdemeanor. Defendant was charged with the willful, deliberate, and premeditated attempted murder of Jermaine Logan (count 1) and James Logan (count 2), in violation of sections 664 and 187, subdivision (a).² Counts 3 and 4 alleged assault with a semiautomatic firearm, in violation of section 245, subdivision (b). In count 5 defendant was charged with shooting at an occupied vehicle, in violation of section 246, and in count 6 with misdemeanor dissuading a witness from reporting a crime, in violation of section 136, subdivision (b)(1). In count 7 defendant was charged with possession of a firearm by a felon in violation of section 29800, subdivision (a)(1).

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

² As the two victims and one of the witnesses all share the surname Logan, we refer to them by their first names after first reference, in order to avoid confusion.

As to counts 1, 2, and 5, the information alleged that defendant personally used firearm, and personally and intentionally discharged a firearm, within the meaning of section 12022.53, subdivisions (b) and (c), and that he personally and intentionally discharged a firearm, causing great bodily injury within the meaning of section 12022.53, subdivision (d). The information alleged to as to counts 3, 4, and 6, that defendant personally used a firearm, within the meaning of section 12022.5, subdivision (a). The information also alleged that in all but count 7, the crimes were committed by defendant for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(B) (counts 3, 4 & 6) and subdivision (b)(4) (counts 1, 2 & 5). It was further alleged pursuant to the “Three Strikes” Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), that defendant had suffered two prior serious or violent felony convictions. The same two prior serious or violent felony convictions were also alleged pursuant to section 667, subdivision (a)(1).

At the conclusion of the prosecution’s case-in-chief, the trial court granted defendant’s section 1118.1 motion for judgment of acquittal of count 6. The jury found defendant guilty of the remaining counts as charged. Defendant waived trial on his prior convictions and admitted them. The jury found true the remaining special allegations. On January 24, 2017, the trial court sentenced defendant on count 1 to prison for life with a minimum parole eligibility period of 15 years, tripled under the Three Strikes law to a period of 45 years, plus 25 years to life pursuant to section 12022.53, subdivision (d), and two consecutive terms of five years each, pursuant to section 667, subdivision (a)(1). The court imposed an identical term as count 2, but ordered it to be served concurrently with the sentence for count 1, and imposed but stayed under section 654 a 50 years to

life term as to counts 3 and 4, and a 75 years to life term as to count 5. The court also imposed a concurrent term of 16 years as to count 7, comprised of the high term of six years doubled, plus two five-year enhancements pursuant to section 667, subdivision (a)(1). The trial court credited defendant with 622 days for actual time served and 93 days of conduct credit, and ordered defendant to pay mandatory fines and fees.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

The shooting

Jermaine Logan testified that on the afternoon of March 29, 2015, he went to the home of someone he knew as the mechanic. The mechanic lived about two blocks away from Jermaine on Avenue K11 and 38th Street. When Jermaine arrived, he saw that a car had collided with the front yard fence of the mechanic's house and had damaged the gate. Several people were there, and someone said that it had been a hit and run; that "Fab" had hit the gate; and that the landlord was going to call the police.

Jermaine was acquainted with defendant's brother, knew defendant by sight, and knew that defendant was called Fab in the neighborhood. Jermaine crossed the street and spoke with defendant who was there with another group of people, warning him that the landlord, who would call the police, was being contacted. Jermaine told defendant that he should fix the gate so he did not have to go to jail for something as petty as the gate. Defendant then began fixing the gate. After a relative of the mechanic's arrived, a three or four minute verbal confrontation between the relative and defendant ensued. Defendant then got into a tan Chevy Malibu and left without having fixed the gate. About 20 to 30 minutes later a uniformed deputy sheriff arrived

in a marked car. The mechanic's landlord came out and inspected the gate with the deputy, who was on the scene for a total of about 10 to 15 minutes. While the deputy was there, Jermaine saw defendant circle the block, driving by two or three times. After the deputy left defendant returned, got out of the car holding a gun and walked toward the mechanic's house, where Jermaine observed defendant point the gun toward the house, and say, "Oh, you guys called the police." Defendant also used the word, "snitch," but not to anyone in particular. Neither Jermaine nor any of the 10 to 15 people within his earshot responded. Defendant then got back into the car and left.

Jermaine stayed at the mechanic's house until about 10:00 p.m. and then drove straight home. Once there, Jermaine's brother James got into the passenger seat and the two of them sat in the car smoking marijuana for about 20 to 30 minutes. A Honda Pilot SUV drove past them, and then returned and blocked Jermaine's driver's door. From the driver's seat of the Honda, defendant looked at Jermaine and James, said "What's up" about four or five times, and then pulled out a gun, which he pointed for about five seconds. Jermaine started his car and defendant fired in Jermaine's direction. Jermaine started to drive away, but James said he was shot. Jermaine then returned to the house and called his mother and sister for help. By then defendant was gone. James had been shot in the right foot, and Jermaine had been shot twice in the left arm and once in the liver.

At the hospital Jermaine told a detective that he did not know who had shot them. Jermaine was afraid to tell the detective because some of the people who had been with defendant earlier that day had come to Jermaine's house after the shooting. Jermaine knew that there were Grape Street Crip gang members in the area although he had never interacted with

any of them, nor had he had any prior problems with them. After he was released from the ICU, Jermaine told police who had shot him and identified defendant's photograph.

Jermaine's brother James, testified that as he sat in the passenger seat of his brother's parked car, he saw a gray Honda Pilot pass by and make a U-turn to return. As the Honda pulled up a man's voice said, "What's up?" and shooting started. James was shot in the foot. Their sister, Jaynie Logan, was inside the house that night and through a window she saw her brothers sitting in the parked car. She also saw a 2005 or 2006 gray Honda Pilot drive by them with the driver's side window down. She did not see anyone else in the car with the driver, who she saw pull out a gun and fire it toward her brothers. She heard five or six gunshots as her brothers screamed for help and tried to call 911. Jaynie had never seen defendant before that night, but she saw the gunman's face and was able to identify defendant as the gunman in a photographic lineup and in court.

About six weeks later, while driving a white Chevy Malibu, defendant was stopped by Sheriff's deputies and the car was searched. On the front passenger floorboard a folder containing papers with defendant's name on them and a firearm were found.³ Defendant told the deputies that he bought the gun on the street about two months earlier for protection, because someone had been sending him threatening texts. In an interview later that day, defendant told Detective Daniel Welle that he bought the gun in mid-March due to the threatening texts, but he could not produce the text messages because he had dropped the phone, broken the screen, and it no longer worked.

³ A firearms analyst later determined that the bullets which wounded Jermaine and James came from this gun.

Gang evidence

Los Angeles County Deputy Sheriff Detective Welle testified as the prosecution's expert on criminal street gang culture, gang investigation, and the Grape Street gang. The detective was assigned to the Operation Safe Streets Bureau, also known as the Gang Unit, working primarily in the Lancaster-Palmdale area of the Antelope Valley. Detective Welle testified that although Los Angeles County gangs typically have territories, Antelope Valley is known as a "transient gang area," meaning that gang members have come from other areas of the County and have no defined territory in the Antelope Valley.

Detective Welle explained that the three top motivations for gang members are money, power, and respect, and gang members consider respect the most important. Fear is the kind of respect gang members seek. It is achieved by intimidating people in their neighborhoods, and may consist of behavior such as making people move out of their way as they walk with other gang members, pointing guns at people, or committing various crimes. Gang members earn money for the gang by committing crimes such as narcotics sales, burglaries to obtain property to sell on the street, sometimes including firearms, and car theft. Maintaining fear in gang members' neighborhoods is useful for discouraging victims and witnesses from reporting the gang's crimes or otherwise cooperating with law enforcement. When community members are too frightened to cooperate with law enforcement, the gang is able commit crimes with impunity. Gang members send a "message" to people believed to be "snitches." Such messages may range from wearing T-shirts to court which say, "Stop snitching," to shooting at the homes of witnesses, depending on the desired level of intimidation. These types of acts by gang members benefit the gang by allowing its members to remain on the street to bring in money for the gang.

The individual gang member is also benefitted by a member's ability to continue his criminal activities for the gang. Detective Welle testified that whenever a member of the community threatens to call law enforcement or confronts a Grape Street gang member publicly over property damage caused by the member, the gang member would consider that to be "disrespectful" to him personally as well as to his gang. As the detective explained, "How dare they call the police on this gang member?" The arrival of the police would confirm that someone has snitched on the gang member who then would feel compelled to retaliate by shooting the person who had snitched. The gang member could not bear the perception that he or his gang was weak, or to be looked upon as a "punk."

The parties stipulated that the Grape Street Crip gang is a criminal street gang within the meaning of section 186.22. Detective Welle was familiar with the Grape Street Crip gang, which was also known by other names, including the Grape Street Watts Crips gang, Grape Street Crips, and simply Grape Street. Grape Street has existed since the late 1960's and at the time of trial had about 150 active members who had been identified by both the Sheriff's Department and the Los Angeles Police Department (LAPD). The gang claimed a territory around Grape Street in Watts that bordered 103rd Street. Members commonly identified themselves by wearing such tattoos as the letter "G," the word "Watts," the number "103," and pictures of grapes, as well as with hand gestures to create the letter "G."

Detective Welle explained that gang members used nicknames or "monikers" within the gang, in order to maintain a level of anonymity from law enforcement and other government agencies. A gang member would usually choose a moniker that indicates a personality trait, for example "Sneaky" or "Sniper." Detective Welle also explained the multiple uses of field

identification cards by law enforcement.⁴ LAPD Officer Charles Garcia testified that in 2005, he conducted a pedestrian stop of defendant near 102nd Street in Los Angeles, and filled out an F.I. card. Officer Garcia testified to having come into contact with Grape Street gang members hundreds of times in Southeast Los Angeles, and was familiar with their unique signs, symbols, and tattoos. He noted his observations on the F.I. card, including the following tattoos: the letter G on defendant's left tricep and the letter W on his right tricep, both made with a picture of fingers forming the letters; and a picture of grapes on defendant's right forearm. Officer Garcia observed other tattoos on defendant related to Grape Street Crip gang, including "Baby Locs" (the name of a clique of the gang) on the right arm. The F.I. card reflected that defendant admitted to the officer that he was a Grape Street Crip gang member with the moniker "Fabolous."

Deputy Robert Springer testified that in May 2009, defendant told the deputy that he was a member of the Grape Street Crips and that his nickname was Fab. Deputy Springer observed defendant's visible tattoos, including the words, "Grape Street." Officer Springer recorded this information and defendant's gang membership on an F.I. card.

Deputy Dawn Crosby testified that she reported a contact with defendant in Palmdale by filling out an F.I. card in November 2011. Defendant admitted being a member of the Grape Street gang. He gave his nickname as "Ricky."

Detective Anthony Delia interviewed defendant at the sheriff's station in Palmdale during January 2012. When

⁴ When a law enforcement officer comes into contact with a gang member, a report of the contact is made on a two-sided 3 x 5 inch card, with as many details about the person as possible, such as name, moniker, identifying features, including tattoos, and gang affiliation. These cards are often called "F.I. cards."

defendant was asked whether he belonged to a criminal street gang, he replied that he belonged to Grape Street. Defendant also told the deputy that he was involved in a “beef” with Blood gang members at that time.

Detective Welle took photographs of defendant after his May 2015 arrest, and identified 11 of them for the jury. He testified that the photographs depicted various parts of defendant’s body on which many tattoos were visible. He explained which tattoos were related to the Grape Street Crip gang. The gang-related tattoos included one on the right pectoral spelling out “Peter Roll Squad” (or “Peda Roll Squad” according to Officer Garcia), the name of a subset of Grape Street Watts. Across defendant’s upper abdomen, “Grape Street Watts” was spelled out. On one bicep the number 103 is written, and on the other, “Street,” signifying one of the gang’s boundaries. There was an image of a masked gang member and the Watts Towers on defendant’s right shoulder, and the image of a bunch of grapes with “Watts” under it on defendant’s right forearm.

The prosecutor asked Detective Welle his opinion of the gang status of a person based upon the hypothetical premise that the person had admitted his membership in the Grape Street Crip gang multiple times and had multiple visible Grape street gang related tattoos. In Detective Welle’s opinion, such a person was an active member of the gang. In response to the prosecutor’s hypothetical question mirroring the facts in evidence in this case, Detective Welle gave his opinion that the hypothetical shooting benefitted the shooter’s gang. He explained that confronting the gang member in public and calling the police would be perceived as disrespectful of the gang and the gang member, and a failure to take action would erode the gang’s ability to discourage people from becoming witnesses. The shooting benefitted the gang by dispelling any perception of

weakness and by increasing the gang's notoriety, thus allowing the gang to operate its criminal activities more efficiently and without police involvement.

Defense evidence

Defendant testified that he was driving an unregistered BMW that he bought from a friend when the brakes snapped and he ran into the fence. After being asked by a woman from the house to fix the fence, defendant and his brother were trying to make the repairs when a short, stocky dark-skinned man pulled up in a P.T. Cruiser and threatened that unless defendant fixed the fence, there would be an "issue." Defendant testified that the man pulled out a gun, pointed it at defendant, and told him to fix the gate or he would be shot. Defendant challenged the man to shoot, but another man stepped between them and grabbed the gun. Defendant then drove off in the car with the failed brakes. As defendant arrived at a friend's house around the corner, a detective was waiting and gave him a ticket for leaving the scene of an accident without leaving his personal information. Defendant's car was towed and he was driven home by his girlfriend. Defendant later drove his brother to Palmdale and had dinner at home with his girlfriend at about 9:00 p.m. Defendant claimed that he did not leave his girlfriend's home again that night.

Defendant admitted the tattoos on his body and face were gang-related. He also admitted that snitches were not looked at "very kindly" by the Grape Street Crip gang, and that the public was not encouraged to report the gang's crimes to the police. Defendant testified that he joined the Grape Street Crip gang as a teenager, and quit the gang several years before the gate incident. Defendant said he never told law enforcement officers that he was member of the gang, but instead always denied it. In particular defendant claimed never to have told Detective Welle

he was a member of the gang. As for guns, defendant claimed that he had never used a gun before buying the one found in his car; did not know how to use it; and he did not know the gun was loaded when he bought it. Defendant also admitted having been convicted of being a felon in possession of a firearm in 2012.

Defendant's brother, Antonio Maiden, testified that he did not know either Jermaine or James, and that he was across the street when the gate was hit in March 2015. He believed his brother's brakes failed, because he heard a loud snap just before the collision. He heard the woman at the house with the gate ask defendant to fix the damage and he and defendant tried. He recalled a short, stocky, dark-skinned man with tattoos pull up in a P.T. Cruiser, yell and point a gun at defendant. Maiden and defendant then left the scene in the car without brakes. Later that night defendant drove Maiden to Palmdale, and Maiden did not see defendant again before that day in court.

Rebuttal Evidence

The part of defendant's recorded interview with Detective Welle where defendant admitted that he was "from" Grape Street was played for the jury.

DISCUSSION

I. Substantial evidence to support gang enhancement

Defendant contends that the gang enhancement must be stricken as unsupported by substantial evidence.

The finding of a gang enhancement is reviewed under the same substantial evidence standard as any other conviction. (See *People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).) Thus, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every

fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.] (*Ibid.*)

Section 186.22, subdivision (b)(1), authorizes a sentence enhancement for felonies "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." The gang enhancement finding has two prongs: (1) the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; see *Albillar, supra*, 51 Cal.4th at pp. 67-68.) A gang finding may be based upon circumstantial evidence, and "[i]t is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. [Citation.]" (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

To support his claim that the evidence was insufficient, defendant relies on two cases that found expert testimony insufficient to support gang allegations, in the absence of direct testimony of the gang motive in the particular case, such as a public declaration of the gang's involvement or the exhibition of gang signs, colors, or tattoos. (See e.g., *People v. Ramon* (2009) 175 Cal.App.4th 843, 851 [the gang "expert simply informed the jury of how he felt the case should be resolved"]; *In re Frank S.*

(2006) 141 Cal.App.4th 1192, 1199 [“expert simply informed the judge of her belief of the minor’s intent”].) Since the publication of such cases, the California Supreme Court has made it clear that “[e]xpert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

“Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of section 186.22(b)(1). [Citations.]” (*Albillar, supra*, 51 Cal.4th at p. 63.) Similar expert testimony provided substantial evidence that the Grape Street gang was benefited in this case. Detective Welle testified that criminal street gangs earn money by committing crimes such as selling narcotics and stolen firearms, proceeds from burglaries, and car theft. In order to freely commit their crimes, gangs discourage victims and witnesses from cooperating with law enforcement by intimidating and frightening the residents of the communities in which gang members live.⁵ For the same reason, gang members use violence to send a “message” to those believed to be “snitches.” The violence may range from pointing a gun at people to murder. In response to a hypothetical question, Detective Welle was of the opinion that the crime benefited the gang in this way. A reasonable inference from this opinion is that the crime was committed for the benefit of the gang. (See *Albillar, supra*, 51 Cal.4th at p. 63; *People v. Vang, supra*, 52 Cal.4th at p. 1048.)

⁵ Although the Grape Street gang’s normal territory is in Southeast Los Angeles, many gang members have relocated to the Antelope Valley.

The hypothetical facts presented to the gang expert were properly rooted in the evidence presented at trial. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618, disapproved in part not relevant here by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) The parties stipulated that the Grape Street gang was a criminal street gang. Thus, its members have engaged in a “pattern of criminal gang activity.” (§ 186.22, subd. (f).) The evidence which established that defendant was a Grape Street gang member was overwhelming as he admitted same to law enforcement officers in 2005, 2009, 2011, 2012, and in 2015, after the shooting in this case. A mere three years before the shooting defendant demonstrated his active membership in the gang to Deputy Delia when he said that he was involved in a “beef” with Blood gang members. Further, defendant wore multiple, visible Grape Street gang-related tattoos, as well as admitting that his nickname was Fab or Fabolous. These admissions and gang-related tattoos were tracked as part of the hypothetical question Detective Welle answered by concluding that such a person would be an active member of his gang.

Defendant points out that gang membership alone is insufficient to show that he acted with the specific intent to promote, further, or assist in any criminal conduct by gang members. (See *People v. Gardeley, supra*, 14 Cal.4th at p. 623.) He suggests that because he acted alone, a reasonable alternative theory would be that he was simply a violent individual who was personally offended by Jermaine’s actions. “If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation]” (*Albillar, supra*, 51 Cal.4th at pp. 59-60.) “Direct evidence of the mental state of the accused is rarely available except through his or her testimony [which the jury] must be free

to disbelieve . . . and to infer that the truth is otherwise when such an inference is supported by circumstantial evidence regarding the actions of the accused.’ [Citation.]” (*People v. Carr* (2010) 190 Cal.App.4th 475, 488-489.)

As discussed above, substantial evidence supported the finding that the crimes were committed for the benefit of defendant’s gang by discouraging cooperation with law enforcement. Defendant was convicted in this case of attempted murder with the use of a firearm, criminal activity which is consistent with that undertaken by members of the gang, especially when snitching is suspected. Defendant’s active participation in the gang, the stipulated pattern of criminal activity by the gang, the expert’s testimony regarding the gang’s commission of firearm related crimes and even murder to silence witnesses, victims and snitches, all provide adequate circumstantial evidence that defendant had knowledge of the gang’s activities and motives. (See *People v. Carr, supra*, 190 Cal.App.4th at p. 489.) Further, when defendant pointed the gun toward the house, said, “Oh, you guys called the police,” and uttered the word, “snitch,” he demonstrated that he shared the gang’s motives. Thus, defendant knew that his retaliation would serve both his own and the gang’s common interest in promoting “respect” from the neighborhood through fear and intimidation in order to further the ability of the gang’s members to commit crimes with impunity. From these facts arises the reasonable inference that defendant intended his acts to have the desired result. We conclude that substantial evidence supported both prongs of the gang enhancement.

II. Remand for resentencing

Defendant originally asked that the matter be remanded for resentencing because the trial court failed to expressly state how it calculated the 50 years to life term as to counts 3 and 4,

and the 75 years to life term as to count 5. In supplemental briefing defendant requests remand for resentencing under Senate Bill No. 620, which amended sections 12022.5 and 12022.53. (See Stats. 2017, ch. 682, §§ 1, 2.) Section 12022.5, subdivision (c), and section 12022.53, subdivision (h), now grant the trial court discretion to strike the enhancements in the interest of justice pursuant to section 1385.

Respondent acknowledges the amendment applies retroactively to judgments which were not final on January 1, 2018, under the reasoning of *In re Estrada* (1965) 63 Cal.2d 740, because the amendment gave trial courts new sentencing discretion to lessen punishment. (See *People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) In general, when new statutory discretion is applied retroactively a defendant is entitled to resentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) “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.]” (*Ibid.*) The general rule is not without exception. Remand for resentencing may be “denied if the record shows that the sentencing court . . . clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations. [Citation.]” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13 (*Romero*).)

Here, the trial court made no comments at sentencing which would indicate how it would have exercised its discretion if it had such authority at that time. No exception to the general rule requiring resentencing can thus be discerned from the

record. We therefore vacate the sentence and remand for the limited purpose of allowing the trial court to exercise its newly granted discretion.

III. Recidivist enhancements

Defendant contends that the trial court erred in enhancing the sentence for count 7 (felon in possession of a firearm) with two five-year terms pursuant to section 667, subdivision (a)(1). Respondent agrees, as the offense of felon in possession of a firearm is not subject to that enhancement. (See *People v. Prieto* (2003) 30 Cal.4th 226, 276.) Respondent also observes that the information did not allege the enhancements as to count 7. We direct the trial court not to reimpose them.

DISPOSITION

The sentence is vacated and the case is remanded to give the trial court the opportunity to exercise its discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h). The trial court is further directed not to reimpose the two five-year enhancements upon the sentence for count 7, previously imposed pursuant to section 667, subdivision (a). The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT