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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARCUS GRANT, Defendant and Appellant.	B295685 (Los Angeles County Super. Ct. No. TA139078)

APPEAL from an order of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed with directions.

Mary Jo Strnad, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Stacy S. Schwartz and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Marcus Grant appeals from the trial court's order denying his motion to strike the Penal Code section 12022.53[1] firearm enhancements to his convictions for murder (§ 187) and attempted murder (§§ 187, 664).[2] Appellant contends the trial court (1) failed to comply with our previous direction on remand to consider the firearm enhancements for *both* of his convictions; (2) was unaware of its discretion to impose a shorter, lesser-included firearm enhancement; (3) abused its discretion in not striking the previously imposed firearm enhancements; and (4) erred in not striking the superfluous firearm and gang enhancements. We affirm the trial court's order. We order the trial court to correct the abstract of judgment to reflect its decision at the original sentencing hearing to impose and stay the section 12022.53, subdivisions (b) and (c) firearm enhancements to the murder conviction and the section 12022.53, subdivision (b) firearm enhancement to the attempted murder conviction.

BACKGROUND

In October 2016, a jury convicted then 18-year-old appellant of the first-degree murder of young teenaged Jose A. and the willful, deliberate and premeditated attempted murder of Jose's father, Federico A. The jury found true the allegations that appellant used a firearm in the commission of the murder within the meaning of section 12022.53, subdivisions (b), (c), (d) and (e)(1) and in the commission of the attempted murder within

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[1] Further undesignated statutory references are to the Penal Code.

[2] We grant appellant's request to augment the record on appeal with the record in the prior appeal, case No. B280057.

the meaning of section 12022.53, subdivisions (b), (c), and (e)(1); the jury also found true the allegations that the offenses were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C). The trial court sentenced appellant to a total term of 85 years to life in prison, consisting of 25 years to life for the murder conviction; 25 years to life for the section 12022.53, subdivision (d) firearm enhancement on the murder conviction; 15 years to life for the attempted murder conviction; and 20 years to life for the section 12022.53, subdivision (c) enhancement on the attempted murder conviction.

Appellant appealed. While his appeal was pending, Senate Bill No. 620 (2017-2018 Reg. Sess.) (hereinafter, Senate Bill No. 620) became law; it amended section 12022.53, subdivision (h) to give trial courts discretion to strike firearm enhancements. (Stats. 2017, ch. 682, §2.)

We affirmed the judgment of conviction but remanded the case to the trial court to exercise its discretion and determine whether the firearm enhancements should be stricken. After a hearing, the trial court declined to strike the previously imposed firearm enhancements.

Appellant committed the offense with another man, Mr. Hunter. At resentencing, the trial court summarized the facts of the case as follows: "In this situation, the evidence showed that there was talk beforehand. The two of them purposely had a loaded firearm, walked into the rival gang territory. There's a video of them walking down the street together. They actually pass the victim, who was sitting next to his father, just enjoying an evening. [¶] As they pass, the gun was presented to [appellant]. [Appellant] walked back, peered over a wall, and

shot at both of the individuals, shooting a 13-year-old in the head, and then ran off."

The court also summarized appellant's priors as "when he was a juvenile . . . theft of personal property, minor in possession of a concealable firearm. And then, as an adult, he managed to have a taking of a vehicle without the owner's consent."

The court then issued its ruling: "And while I appreciate his age and the court – the law now does certainly take into consideration with regard to age, and that's why he's going to be eligible for parole when he is going to be eligible for parole. [¶] But the court still recognizes that the defendant, albeit young, he certainly wanted to be in the Campanella Park gang, and he was showing his loyalty to that gang. And Mr. Hunter testified to that. He wasn't a great guy either, certainly. But the both of them executed a 13-year-old child. [¶] So the court does not find, under these particular circumstances, that it is going to exercise its discretion, because I think, in the interest of justice, the sentence fits of 50-years-to-life, at least as to the count 1, murder. I know he got additional charges for the second – the attempted murder. [¶] So the court will not exercise its discretion and strike the gun allegation."

DISCUSSION

I. The Trial Court Complied With Our Order To Consider Whether To Strike The Enhancements For Both Counts.

Appellant contends the trial court did not comply with our order to consider the firearm enhancements for *both* his convictions. He maintains the trial court failed to consider whether to strike the enhancement to the attempted murder conviction.

When an appellate court remands a matter with directions governing the proceedings on remand, those directions are binding on the trial court and *must* be followed. (*People v. Ramirez* (2019) 35 Cal.App.5th 55, 64.) Any material variance from the directions is unauthorized and is void. (*Ibid*.) Whether the trial court correctly interpreted the appellate court's remand order is a question of law which is reviewed de novo. (*Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 313.)

It is undisputed that we directed the trial court to reconsider the firearm enhancements for both the murder and attempted murder convictions. We find the trial court complied with our directions.

As appellant points out, the parties and the trial court all referred to the "gun allegation" in the singular throughout the hearing. This does not indicate to us that the trial court or the parties were confused about the purpose of the hearing or the scope of the remand. Only one firearm enhancement was imposed and executed per count, so using the singular would be natural.

Although the initial focus of the hearing, as framed by the parties' arguments, was on the count 1 murder conviction, the court's ruling as a whole indicates it considered but rejected striking the firearm enhancement for the count 2 attempted murder conviction. The court first stated, "So the court does not find, under these particular circumstances, that it is going to exercise its discretion, because I think, in the interest of justice, the sentence fits of 50-years-to-life, at least as to the count 1, murder." This is a straightforward statement by the trial court that it is not striking the firearm enhancement to the count 1

murder conviction. The court then turned its attention to the attempted murder conviction, stating, "I know he got additional charges for the second – the attempted murder. [¶] So the court will not exercise its discretion and strike the gun allegation." In context we understand these last two sentences to be communicating the trial court's decision not to strike the firearm allegation for the count 2 attempted murder conviction.

While not determinative, we note appellant's trial counsel did not make a separate argument about the attempted murder firearm enhancement and did not in any manner suggest to the trial court that it had overlooked ruling on the attempted murder firearm enhancement. This suggests counsel, too, understood the court ruled on both firearm enhancements.[3]

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[3] Appellant contends the trial court erred because it did not re-evaluate appellant's sentence as a whole and did not order an updated probation report before resentencing appellant. We disagree. As we discuss in more detail in section IV below, the trial court considered a broad range of sentencing factors, re-evaluating appellant's sentence as a whole.

The trial court did not abuse its discretion in proceeding without an updated probation report. (See *People v. Bullock* (1994) 26 Cal.App.4th 985, 990 [no abuse of discretion where defendant did not request update and there was no indication trial court acted on incomplete information or incorrectly believed it could not order update].) Further, appellant did not object to the absence of an update and so " 'should not be allowed to stand silent when the court proceeds without a supplemental probation report, gamble that a trial court will impose a lesser term of imprisonment and then urge reversal for the failure to obtain the report without being required to make some showing that he was prejudiced thereby.' " (*People v. Johnson* (1999) 70 Cal.App.4th 1429, 1433 [also noting that not all defendants want an update].)

II. Existing Law Permitted The Trial Court To Impose A Lesser Included Firearm Enhancement.

Section 12022.53 sets out three different sentence enhancements for the personal use of a firearm in the commission of certain enumerated felony offenses: subdivision (b) provides for a 10-year enhancement for the personal use of a firearm; subdivision (c) provides for a 20-year enhancement for the personal and intentional discharge of a firearm; and subdivision (d) provides for a 25-year-to-life enhancement for the personal and intentional discharge of a firearm causing great bodily injury or death. Where more than one enhancement per person is found true, subdivision (f) directs the trial court to impose the enhancement with the longest term of imprisonment. Before the enactment of Senate Bill No. 620, section 12022.53, subdivision (h) expressly prohibited trial courts from striking section 12022.53 enhancements. Senate Bill No. 620 amended section 12022.53, subdivision (h) to give trial courts discretion, in the interest of justice pursuant to section 1385, to strike or dismiss enhancements otherwise required to be imposed under section 12022.53. (*People v. Morrison* (2019) 34 Cal.App.5th 217, 221-222 (*Morrison*).) Here the jury found true enhancements under subdivisions (b), (c), and (d) for the murder conviction and enhancements under subdivisions (b) and (c) for the attempted murder conviction.

Appellant contends the matter must be remanded for a new hearing because the trial court was unaware it had the authority to strike the longest enhancement and then impose a lesser included enhancement. We do not presume error from a silent record. (See, e.g., *People v. Carmony* (2004) 33 Cal.4th 367, 377.) Further, appellant did not object to the trial court's sentencing

choices and has forfeited any claim the trial court failed to consider the lesser-included firearm enhancements previously found true by the jury. (See *People v. Scott* (1994) 9 Cal.4th 331, 353 [failure to object forfeits any "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices."].)

Appellant contends an objection was unnecessary because, at the time of resentencing, case law did not support imposing lesser included firearm enhancements. We disagree. The enhancements were all found true by the jury and were before the court on resentencing. Had the trial court decided to strike or dismiss the greater enhancements, the lesser included enhancements would have then been on the table for the court's consideration as well. This is not a new concept.

Morrison, cited by appellant, acknowledges as much. *Morrison* explained that "[i]n a case where the jury had also returned true findings of the lesser enhancements under section 12022.53, subdivisions (b) and (c), the striking of an enhancement under section 12022.53, subdivision (d) would leave intact the remaining findings, and an enhancement under the greatest of those provisions would be mandatory unless those findings were also stricken in the interests of justice." (*Morrison, supra,* 34 Cal.App.5th. at p. 222.)[4]

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[4] *Morrison* itself is inapposite. The novel issue in *Morrison* was "what if, as here, enhancements under section 12022.53, subdivisions (b) and (c) were not also alleged? May the court impose one of those lesser enhancements in lieu of the greater enhancement under section 12022.53, subdivision (d) if the court finds it is in the interests of justice to do so?" (*Morrison*, *supra,* 32 Cal.App.5th at p. 222.) The court answered in the affirmative. (*Id*. at pp. 222–223.) Here, the trial court never had to ponder

III. The Lesser Firearm Enhancements Were Properly Stayed By The Trial Court.

Appellant contends that after the passage of Senate Bill No. 620, the trial court must strike lesser firearm enhancements rather than stay them, as it did here. Appellant acknowledges the California Supreme Court has held that lesser section 12022.53 firearm enhancements should be stayed. (*People v. Gonzalez* (2008) 43 Cal.4th 1118 (*Gonzalez*).) Nevertheless, he argues *Gonzalez* is no longer good law after the passage of Senate Bill No. 620. We disagree.

As the court explained in *Gonzalez,* section 12022.53, subdivision (f) requires imposition and execution of only one enhancement and it must be the longest firearm enhancement found true by the jury. (*Gonzalez*, *supra*, 43 Cal.4th at p. 1128.) The court acknowledged that striking the lesser enhancements was prohibited by section 12022.53, subdivision (h), but added that "[i]n any event, a contrary interpretation [which permitted striking] 'would disserve the public safety policy that . . . underlies the legislative intent reflected in the statute' [citation], by making it more difficult, if not impossible, to impose and execute the term of imprisonment for an initially prohibited firearm enhancement in the event the section 12022.53 enhancement with the longest term of imprisonment is invalidated on appeal." (*Gonzalez*, *supra*, at p. 1128.) The court found that staying lesser firearm enhancements would be in harmony with "the Judicial Council's general rule that sets forth

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whether it could sentence appellant on enhancements never pled or found true by the jury because the jury found true multiple enhancements under section 12022.53, subdivisions (b), (c), and (d).

the procedure courts should follow when pronouncing sentence on any prohibited enhancement. (Cal. Rules of Court, rule 4.447.)" (*Ibid.*) That rule "provided, in pertinent part, that '[n]o finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds limitations on . . . the imposition of multiple enhancements. The sentencing judge shall impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay shall become permanent upon the defendant's service of the portion of the sentence not stayed.' (Former rule 447, as amended eff. Jan. 1, 1991.)" (*Ibid.*)[5] The court also noted that "staying rather than striking the prohibited firearm enhancements serves the legislative goals of section 12022.53 by making the prohibited enhancements *readily* available should the section 12022.53 enhancement with the longest term be found invalid on appeal." (*Id.* at p. 1129.)

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[5] In section III of his Opening Brief, appellant purports to quote from California Rules of Court, rule 4.447; appellant's quote is not taken from the current version of the rule or its immediate predecessors. It seems to be a paraphrase taken from another unidentified source. We do not consider the quote.

We see nothing in Senate Bill No. 620 which undermines the reasoning in *Gonzalez*. After Senate Bill No. 620, the trial court is still limited to imposing one firearm enhancement per conviction. The imposition of a firearm enhancement can still be found invalid on appeal, including for the new reason that a trial court abused its discretion in deciding not to strike the enhancement. Thus, staying a lesser section 12022.53 enhancement serves the same purpose that it did before Senate Bill No. 620 became law.

Although appellant contends in a section heading that the trial court should use its "new authority" to strike the superfluous gang enhancements as well, appellant provides no legal argument or authority to support this specific claim, and so it is forfeited. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286–287.)

IV. The Trial Court Did Not Abuse Its Discretion In Declining To Strike The Previously Imposed Firearm Enhancements.

Appellant contends the court relied on impermissible factors and failed to consider the legislature's intent in granting new discretion to the trial courts, and so abused its discretion when it declined to strike the firearm enhancements. He claims the Legislature amended section 12022.53, subdivision (h) because firearm enhancements are "adding to . . . already long sentences" with little benefit to public safety, and so the question for a trial court in sentencing a defendant is whether a compelling reason exists to impose the longest possible term. Thus, appellant's argument is that a trial court should normally strike a firearm enhancement pled and found true by a jury, unless the trial court finds that the interest of justice requires the imposition of the enhancement. The language of subdivision (h) is

clear and unambiguous; a resort to legislative history is unnecessary.[6] Appellant's argument is not supported by that language.

A. Recourse To Legislative Intent Is Unnecessary.

In interpreting a statute, we "look to the statute's words and give them their usual and ordinary meaning." (*Gonzalez*, *supra*, 43 Cal.4th at p. 1126.) "The statute's plain meaning controls the court's interpretation unless its words are ambiguous." (*Green v. State of California* (2007) 42 Cal.4th 254, 260.) When the language of a statute is clear, resort to legislative history is unnecessary. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29.)

Section 12022.53, subdivision (h), as amended, provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any

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[6] Appellant has provided only very brief excerpts from the legislative history of Senate Bill No. 620 and had not requested we take judicial notice of any legislative history documents. Accordingly, even if we were inclined to consider legislative history, it would not be appropriate to do so on such a limited record. As respondent points out, there are other remarks in the legislative history which do not support appellant's position. For example, the Legislature stated that under the Senate Bill No. 620 amendments, " 'relief would be available to a *deserving* defendant.' " (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1082, quoting Sen. Com. on Public Safety, Rep. on Sen. Bill 620 (2017–2018 Reg. Sess.) Apr. 25, 2017, p.7, italics added.) This statement is contrary to appellant's premise.

resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2(h).) This plain language authorizes the trial court to strike an enhancement when the striking is in the interests of justice. There is nothing ambiguous in this language and nothing that suggests that the trial court *must* strike the enhancement *unless* it is in the interests of justice to impose it.

The remainder of section 12022.53 is unchanged, and Senate Bill No. 620 did not provide any new sentencing guidelines specifically for the imposition of firearm enhancements. We agree with our colleagues in Division 1 of this District Court of Appeal that in resentencing a defendant under the Senate Bill No. 620 amendments, "factors that the trial court must consider when determining whether to strike a firearm enhancement under section 12022.53, subdivision (h) are the same factors the trial court must consider when handing down a sentence in the first instance." (*People v. Pearson* (2019) 38 Cal.App.5th 112, 117 (*Pearson*).) Thus, a trial court should consider the enhancement-specific considerations described in California Rules of Court, rule 4.428(b),[7] the general sentencing factors listed in rule 4.410 and the circumstances in aggravation

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[7] California Rules of Court, rule 4.428(b) provides: "If the court has discretion under section 1385(a) to strike an enhancement in the interests of justice, the court also has the authority to strike the punishment for the enhancement under section 1385(c). In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration."

and mitigation listed in rules 4.421 and 4.423. (*Pearson*, at p. 117.)

B. The Trial Court Did Not Abuse Its Discretion.

We also agree with our colleagues that the trial court's decision to strike a firearm enhancement is reviewed for an abuse of discretion. (*Pearson*, *supra,* 38 Cal.App.5th at p. 116; *People v. Carmony, supra*, 33 Cal.4th at p. 378 [denial of a motion to dismiss pursuant to section 1385 is reviewed for abuse of discretion].)

The burden is on the party attacking the sentence " ' " 'to clearly show that the sentencing decision was irrational or arbitrary.' " ' " (*Pearson*, *supra,* 38 Cal.App.5th at p. 116) Unless the record affirmatively shows otherwise, the trial court is presumed to have considered the factors enumerated in the rules of court. (*Id*. at p. 117.)

Here, the record affirmatively demonstrates the trial court considered applicable sentencing factors. Specifically, the court referred to several aggravating circumstances related to the crime. The court's statement that appellant "executed a . . . child" is reasonably understood as referring to factors that the "crime involved great violence . . . or other acts disclosing a high degree of cruelty, viciousness, or callousness" and appellant "engaged in violent conduct that indicates a serious danger to society." (Cal. Rules of Court, rule 4.421(a)(1), (b)(1).) It also could be reasonably understood as describing the victim as "particularly vulnerable." (*Id.*, (a)(3).)

The court acknowledged appellant's youth as a mitigating factor. The trial court also referred to appellant's non-extensive juvenile record, also a mitigating factor, although one of the juvenile incidents was possession of a firearm. (Cal. Rules of Court, rule 4.423(b)(1).) The court recognized another person involved in the crimes "wasn't a great guy." It is a mitigating circumstance if a defendant plays a minor or passive role in in the crime, or has no predisposition to commit the crime but is induced by others to participate. (*Id*., (a)(1) & (a)(5).) However, as the court pointed out, appellant did not play a minor role in the crimes: he was the shooter. Further, there was evidence appellant was predisposed to commit the crime: he wanted to be in the gang and was showing his loyalty.

Appellant has not identified any specific factor which he believes was present but which the court failed or refused to consider. Appellant simply disagrees with the weight the trial court gave the factors it considered. That is insufficient to show an abuse of discretion.

DISPOSITION

The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting the trial court's decision to stay the lesser firearm enhancements found true by the jury. We affirm the trial court's order denying appellant's motion.

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STRATTON, J.

We concur:

BIGELOW, P. J.

WILEY, J.