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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MIKE RUIZ, Defendant and Appellant.	B283540 (Los Angeles County Super. Ct. No. TA140932)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tammy Chung Ryu, Judge. Affirmed in part and remanded with directions.

A. William Bartz, Jr., 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, Scott A. Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Mike Ruiz appeals the judgment entered following a jury trial in which he was convicted of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 664, 187, subd. (a); count 1),[1] carrying a loaded unregistered handgun (§ 25850, subd. (a); count 2), shooting at an occupied motor vehicle (§ 246; count 3), and assault with a semiautomatic firearm (§ 245, subd. (b); count 4). The jury found true the firearm enhancement allegations that appellant personally used and intentionally discharged a handgun. (§§ 12022.53, subds. (b) & (c), 12022.5, subds. (a), (d).) The trial court imposed a sentence of life in prison on count 1, plus 20 years for the firearm enhancement under section 12022.53, subdivision (c), and concurrent or stayed sentences on all other counts.

Appellant contends the trial court committed prejudicial error by allowing the prosecution to present testimony about appellant's gang affiliation. We disagree and affirm the judgment of conviction. However, we remand the matter to the trial court for reconsideration of the imposition of the gun enhancement in light of the recent change in the law governing firearm enhancements under sections 12022.5 and 12022.53. (Sen. Bill No. 620 (2017-2018 Reg. Sess.), Stats. 2017, ch. 682, §§ 1 & 2.)

FACTUAL BACKGROUND

Prosecution

On his way to work the morning of August 4, 2016, Arturo C. was driving on the Pacific Coast Highway, preparing to

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[1] Undesignated statutory references are to the Penal Code.

turn onto the northbound 110 freeway. At the left turn signal before the onramp, appellant cut Arturo off, forcing him to swerve to avoid a collision with appellant's vehicle. Appellant was driving a yellow work van and appeared to be talking on a cell phone when he nearly side-swiped Arturo. When Arturo came to a stop in the lane to the right of appellant's van, Arturo yelled at appellant to "get the hell off [the] phone" and pay attention to the road.

After the traffic light changed, Arturo merged into the lane a few cars ahead of appellant. Appellant then immediately changed lanes and came to a stop to the right of Arturo, leaving a gap of four or five car lengths ahead of him. With Arturo's passenger window and appellant's driver's window rolled down, the two men began yelling and cursing at each other. Arturo shouted at appellant, "Get the hell on, youngster." Appellant responded with a smirk and said, "Man, where you from?" Arturo understood the question as a gang threat, which he interpreted to mean appellant was from a gang and was trying to intimidate him by "gang bang[ing]" him. Arturo responded that he was not afraid—he was "from the streets," not from a gang.

Appellant still did not move forward, prompting Arturo to challenge him: "you want me that bad, there's a parking lot right here. You can pull over. And we can handle it like men." The light changed and appellant pulled forward. As they merged onto the freeway, appellant was two cars ahead of Arturo and purposely driving slowly. Arturo pulled into the adjacent left lane to pass, but appellant began to speed up to stay alongside Arturo's vehicle. Appellant was still yelling at Arturo as they drove side-by-side on the freeway. Arturo shouted back that

appellant had missed his chance to fight when they were at the traffic light, and called appellant a "pussy."

Appellant then raised a small chrome handgun, which he pointed at Arturo's face. Arturo saw appellant looking through the gun sight as he appeared to aim at Arturo. Arturo immediately ducked his head down and accelerated away from appellant. Arturo heard a loud pop and his right rear passenger window shattered. The bullet missed Arturo's head by a few inches and ricocheted off the steering wheel, with a fragment exiting the steering column and landing on the floorboard.

Arturo called 911 and exited the freeway. Police quickly located appellant in his van. A search of the van turned up a .380-millimeter gun stashed behind the passenger seat inside a bag of gravel. The bullet fragment found in Arturo's vehicle was determined to have been fired from the gun recovered from appellant's van.

Defense

Appellant testified in his own behalf. At the time of the incident, appellant was attending Cerritos College and had been employed for four years by Service Master Clean, a water and fire mitigation company. He had never been arrested or convicted of any crime, nor had he ever been in trouble in high school or college. Appellant explained that he had purchased the gun about a month before the incident for protection because his job often had him working in unsafe areas.

On the morning of August 4, 2016, appellant was talking on his cell phone as he drove his company van to a job in the city of Carson. While appellant was stopped at a light to the 110 freeway onramp, Arturo pulled up on the right and yelled at appellant for cutting him off and almost hitting his car. Arturo

had a passenger in the front seat who was leaning back as Arturo leaned forward to yell at appellant. When the light changed appellant ignored Arturo and drove off. Appellant was driving slowly when Arturo pulled up next to him and challenged appellant to a fight. Appellant felt threatened and scared, but still did not say anything. He specifically denied asking Arturo, "Where you from?" and he averred that the phrase had no significance to him.

As appellant proceeded up the onramp, he heard Arturo yelling, "Move along, youngster. Move along, pussy." Appellant proceeded onto the freeway in the slow lane with Arturo behind him shouting insults. Then Arturo pulled alongside appellant on the left, and seemed to be trying to ram appellant's van to push him off the road. As Arturo continued to yell at appellant, appellant saw him leaning toward the passenger seat and pointing a gun at appellant. Terrified and believing his life to be in danger, appellant took his gun out of his backpack and, without taking time to aim, fired a shot to scare Arturo away. Arturo immediately sped away, and appellant exited the freeway to go to his job site where he was apprehended by police.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Admitting Limited Evidence Concerning Appellant's Gang Affiliation

Appellant contends the trial court committed prejudicial error when it allowed the prosecution to present evidence concerning appellant's gang affiliation to impeach his credibility in the absence of any gang allegation or evidence of gang involvement. He asserts the evidence was irrelevant and unduly prejudicial, and its admission rendered the trial fundamentally

unfair thereby resulting in a denial of due process of law. (Evid. Code, § 352; *People v. Albarran* (2007) 149 Cal.App.4th 214, 230–232 (*Albarran*).) We find no abuse of discretion in the trial court's admission of the limited testimony about appellant's gang affiliation.

A. *Relevant proceedings*

Before trial the People sought to present evidence of appellant's admitted gang affiliation and the meaning of the phrase, "Where you from?" in gang culture through the testimony of Los Angeles County Sheriff's Deputy Joshua Bohnert. The trial court excluded the evidence on the ground that in the absence of any gang allegations or evidence of gang involvement, the evidence was minimally probative and highly prejudicial. However, the court stated that gang evidence might be permitted if appellant testified and opened the door to such evidence in some way.

On direct examination, Arturo testified that when appellant shouted "Where you from?" he "took that to mean [appellant] was trying to gang bang on me and intimidate me, that he's from some gang and I should be afraid or something like that." On cross-examination, Arturo reiterated that he had interpreted the question as a gang threat. However, when appellant testified, he denied shouting anything or even knowing the meaning of the gang challenge. Instead, appellant maintained that the barrage of threats and insults from Arturo stemming from a minor traffic incident, Arturo's brandishing of a gun, and Arturo's attempt to run appellant off the road left appellant in fear for his life.

Following appellant's testimony, the prosecution asked the court to reconsider its prior ruling. Specifically, the People

sought to introduce Deputy Bohnert's testimony that appellant had admitted he was a gang member, and that the question "Where you from?" by a gang member constitutes a threat in gang culture. The prosecutor argued that this gang evidence was relevant to appellant's credibility, motive, and malice. And because Arturo had already testified that appellant had issued a gang threat, the evidence was not substantially more prejudicial than probative. Defense counsel countered that nothing had changed to justify reconsideration of the prior ruling: Arturo's testimony was just as the court had anticipated when it ruled to exclude the gang affiliation evidence, and appellant had not opened any door with his testimony—the gang affiliation evidence remained irrelevant and unduly prejudicial.

The trial court ruled that limited evidence of appellant's gang affiliation was admissible to impeach appellant's testimony denying that he said or knew the meaning of the phrase, "Where you from?" The court restricted the gang affiliation evidence to testimony about the meaning of the phrase in gang culture, and that appellant had admitted to Deputy Bohnert that he was a gang member.

B. *The trial court's admission of limited evidence concerning appellant's gang affiliation*

" 'Only relevant evidence is admissible (Evid. Code, § 350; [citations]), and, except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).)' " (*People v. Bivert* (2011) 52 Cal.4th 96, 116.) Evidence Code section 210 defines relevant evidence as evidence that has " ' "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the

evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. . . .' [¶] [A d]efendant place[s] all material issues in dispute by pleading not guilty." (*Bivert*, at pp. 116–117; *People v. Tully* (2012) 54 Cal.4th 952, 1010.)

"A trial court has 'considerable discretion' in determining the relevance of evidence. [Citation.] Similarly, the court has broad discretion under Evidence Code section 352 to exclude even relevant evidence if it determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects." (*People v. Merriman* (2014) 60 Cal.4th 1, 74; *People v. Jones* (2017) 3 Cal.5th 583, 609.) " 'For purposes of Evidence Code section 352, evidence is considered unduly prejudicial if it tends to evoke an emotional bias against the defendant as an individual and has a negligible bearing on the issues.' " (*People v. Suff* (2014) 58 Cal.4th 1013, 1073.) We review the trial "court's rulings regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion. [Citation.] We will not reverse a court's ruling on such matters unless it is shown ' "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Merriman*, *supra*, at p. 74; *People v. Jones*, *supra*, at p. 609.)

The potentially prejudicial effect of evidence of gang membership has long been recognized by California courts. (*Albarran*, *supra*, 149 Cal.App.4th at p. 223.) For this reason, our Supreme Court has held that in cases not involving the gang enhancement, trial courts should carefully scrutinize and exclude such evidence if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; *People v. Williams*

(1997) 16 Cal.4th 153, 193.) On the other hand, " 'evidence of gang membership is often relevant to, and admissible regarding, the charged offense.' " (*People v. Becerrada* (2017) 2 Cal.5th 1009, 1022.) Evidence of the defendant's gang affiliation may be used for impeachment or to prove certain material facts, including motive, specific intent, or other matters pertinent to guilt of the charged crime if the evidence is not more prejudicial than probative and is not cumulative. (*People v. Hernandez*, *supra*, at p. 1049; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 241.)

The trial court here did not abuse its discretion by permitting limited testimony about the meaning of the phrase "Where you from?" in gang culture and that appellant had admitted membership in a gang. This evidence was highly relevant to several material issues in the case. First, the evidence tended to impeach appellant's credibility in denying that he made the gang threat or even knew what the phrase means in gang culture. (See *People v. Ayala* (2000) 23 Cal.4th 225, 277 [no error in admitting limited gang evidence, which affected witnesses' credibility]; *People v. Ruiz*, *supra*, 62 Cal.App.4th at pp. 241–242 [evidence of gang membership admissible for impeachment of declarant's statement].) Of course, "[b]y taking the stand, defendant put his own credibility in issue and was subject to impeachment in the same manner as any other witness." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139; *People v. Doolin* (2009) 45 Cal.4th 390, 438.) The limited evidence of appellant's gang affiliation was highly relevant to rebutting appellant's claim that he did not know what this common gang threat meant.

The evidence also corroborated Arturo's testimony that appellant issued the gang challenge before the shooting.[2] As the victim and only eyewitness to the shooting other than appellant, Arturo's credibility was highly relevant, and appellant's entire theory of the case depended on challenging the victim's credibility. Once the defense attacked Arturo's credibility by denying appellant made the statement or knew what it meant, the prosecution was entitled to present evidence that supported the witness's testimony.

Finally, the evidence of appellant's gang affiliation and the gang threat were relevant to the jury's evaluation of appellant's claim of self-defense. Appellant asserted that Arturo's aggression and challenge to fight scared him. In assessing this claim, the jury had to determine whether appellant's fear was credible. Certainly, evidence that appellant was a member of a gang and

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[2] Appellant maintains that Arturo's testimony regarding the question, "Where you from?" and his interpretation of the phrase should have been excluded as lacking foundation and unduly prejudicial. But appellant only objected to this testimony on "narrative" grounds, and when the prosecutor asked about the remark again, Arturo repeated—*without objection*—that appellant had asked the question and Arturo understood it as a gang threat. Appellant then elicited further testimony on the subject in Arturo's cross-examination. Because appellant failed to object at trial on the grounds he now asserts, he forfeited the argument on appeal. (Evid. Code, § 353; *People v. Valdez* (2012) 55 Cal.4th 82, 138–139 [objections that testimony was irrelevant and lacked foundation insufficient to preserve appellate argument that evidence was inadmissible under Evid. Code, § 352].)

yelled gang threats at Arturo was relevant to countering appellant's claim that he was so frightened by Arturo's conduct as to believe he was in mortal danger, and justified in responding with deadly force.

In sum, the gang-related evidence presented on rebuttal was certainly "not so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of [appellant's] actual guilt." (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1051.) Its admission also did not pose an intolerable risk to the fairness of the trial or the reliability of the outcome. (*People v. Edwards* (2013) 57 Cal.4th 658, 713.) Accordingly, we find no denial of appellant's rights to due process of law or a fair trial.

II. Senate Bill No. 620

Appellant contends, and the Attorney General concurs that the case must be remanded for resentencing due to a recent change in the law governing firearm enhancements. We agree.

At the time of appellant's sentencing, imposition of a firearm enhancement under section 12022.53 was mandatory, and trial courts had no authority to strike the enhancement in the interest of justice pursuant to section 1385 or any other provision of law.[3] (*People v. Sinclair* (2008) 166 Cal.App.4th 848, 852–853.) Removing that prohibition, Senate Bill No. 620 (effective January 1, 2018) granted the trial court discretion to strike a firearm enhancement in the interest of justice.

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[3] Former section 12022.53, subdivision (h) provided that "the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

Subdivision (h) of section 12022.53 now 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 resentencing that may occur pursuant to any other law."

The trial court sentenced appellant to life in prison, plus 20 years pursuant to section 12022.53, subdivision (c). The court stayed the other enhancements under sections 12022.53, subdivision (b) and 12022.5, subdivisions (a), (d). Because this case is not yet final on appeal, both appellant and respondent agree that Senate Bill No. 620's amendment to section 12022.53, subdivision (h) applies retroactively to appellant. (*In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*); *People v. Francis* (1969) 71 Cal.2d 66, 75–76.) They further agree that the matter must be remanded to enable the trial court to consider whether to exercise its discretion under section 12022.53, subdivision (h) to strike or dismiss the firearm enhancement in this case.

While amendments to the Penal Code generally do not apply retroactively (see § 3), an exception exists for a statutory amendment that reduces punishment for a specific crime or gives trial courts discretion to impose lower sentences. (See *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Francis*, *supra*, 71 Cal.2d at pp. 75–76.) And absent evidence to the contrary, courts presume "that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*Brown*, *supra*, at p. 323; *Estrada*, *supra*, 63 Cal.2d at p. 745.) " '[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for

petitioning for a writ of certiorari in the United States Supreme Court has passed.' " (*People v. Vieira* (2005) 35 Cal.4th 264, 306.)

At sentencing in this case, the trial court made findings as to the exercise of its discretion when it imposed sentence, noting that its discretionary sentencing choices were quite limited. The court also specifically stated that it lacked any discretion but to "automatically" impose 20 years for the firearm enhancement. Thus, while the court exercised its discretion to run the sentence on count 2 concurrently with (rather than consecutively to) the sentence on count 1, it did not consider striking the section 12022.53, subdivision (c) enhancement, nor did it address whether imposition of the enhancement under the facts and circumstances of the case would be in furtherance of justice pursuant to section 1385. "Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228; *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

The trial court in this case was statutorily prohibited from considering whether to exercise its discretion when it imposed the section 12022.53 enhancement, and it made no discretionary sentencing findings that would eliminate the need for a remand in this case. Appellant is entitled to a sentencing decision that includes the exercise of the " 'informed discretion' " of the sentencing court. (*People v. Belmontes*, *supra*, 34 Cal.3d at

p. 348, fn. 8.) But where, as here, the court is unaware of the scope of its discretionary authority, it "can no more exercise that 'informed discretion' than [where the] sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*Ibid.*; see *People* v. *Ruiz* (1975) 14 Cal.3d 163, 168.) Accordingly, we remand the matter for the trial court to determine whether to exercise its new statutory discretion to strike the firearm enhancement in this case under section 12022.53, subdivision (h).

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to exercise its sentencing discretion under section 12022.53, subdivision (h), as amended by Senate Bill No. 620. In all other respects, the judgment of conviction is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.