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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DIANE C. ASBURY,

Defendant and Appellant.

B284220

(Los Angeles County
Super. Ct. No. MA 052970)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed in part, reversed in part.

Law Offices of Dennis A. Fischer, Dennis A. Fischer, and John M. Bishop for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Susan Sullivan Pithey and Esther P. Kim,
Deputy Attorneys General, for Plaintiff and Respondent.

In an earlier opinion (*People v. Asbury* (2016) 4 Cal.App.5th 1222 (*Asbury I*)), we reversed defendant and appellant Diane C. Asbury's conviction for second degree murder and remanded the case to the trial court, giving the prosecution the option either to retry Asbury for murder or to accept a modification of the judgment to reflect a conviction for voluntary manslaughter. (*Id.* at p. 1232.) The prosecution chose the latter option, and the trial court resentenced Asbury to 21 years in prison. The court selected the high term of 11 years, plus a 10-year enhancement pursuant to Penal Code section 12022.5, subdivision (a)¹ for personal use of a firearm in the offense.

Asbury contends that the trial court abused its discretion in sentencing her by relying on improper factors as justification for the high term. Most notably, Asbury argues that the court improperly relied on facts consistent with the prosecution's theory that Asbury was guilty of murder, but inconsistent with manslaughter under a heat-of-passion theory. For example, the court stated that Asbury engaged in "stalking behavior," and suggested that she prepared to kill her victim by purchasing bullets and practicing at a shooting range about one month before the killing. Asbury also contends that the trial court lacked authority to impose an enhancement on the manslaughter conviction because the imposition of an enhancement was outside the scope of our instructions in remanding the case and because the jury's only finding with respect to an enhancement pertained to the use of a firearm in committing murder, but not as to manslaughter. (See §§ 12022.5, 12022.53.)

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

Finally, Asbury contends that if we do not strike the enhancement, we must nevertheless remand the case for resentencing in light of Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620), which gives trial courts discretion to strike firearm enhancements for purposes of sentencing.

We agree with Asbury with regard to Senate Bill No. 620, but we otherwise affirm.

FACTS AND PROCEEDINGS BELOW

We described the circumstances of Asbury's killing of her longtime ex-boyfriend Anthony Simiele in detail in our earlier opinion in this case. (See *Asbury I, supra*, 4 Cal.App.5th at pp. 1224–1226.) Simiele came to Asbury's house to pick up some possessions he had left there. According to Asbury, Simiele arrived at a time when she was trying to sleep, one day earlier than she had agreed to allow him in. The two argued, and Simiele followed Asbury upstairs to her bedroom. Asbury picked up a gun she kept in her bedroom and shot Simiele. In an unpublished portion of the opinion, we held that the trial court erred by refusing to instruct the jury on voluntary manslaughter on a heat of passion theory.

In our earlier opinion, we provided the following instructions: “On remand, the prosecution shall have the option to retry Asbury for second degree murder, or to accept a modification of the judgment to reflect a conviction for voluntary manslaughter. If the prosecution elects to accept the modification of the judgment, the trial court shall resentence Asbury in accordance with the modified judgment.” (*Asbury I, supra*, 4 Cal.App.5th at p. 1232.) The prosecution elected to accept a modification of the judgment to voluntary manslaughter.

At resentencing, Asbury argued that, due to the unusual circumstances of the case, the trial court should grant her

probation. Failing that, Asbury requested that the court sentence her to the low term of three years for voluntary manslaughter. (See § 193, subd. (a).) She argued that the court lacked authority to impose a handgun enhancement, but if it elected to impose one, Asbury requested that the court choose the low term of three years. (See § 12022.5, subd. (a).) The prosecution argued for the high term of 11 years for voluntary manslaughter, and the high term of 10 years on the handgun enhancement. The trial court agreed with the prosecution and sentenced Asbury to 21 years in prison.

DISCUSSION

Asbury contends that the trial court abused its discretion by imposing the maximum allowable sentence, arguing that the court relied on improper justifications for selecting the high term for voluntary manslaughter. Next, Asbury alleges that the trial court erred by imposing a firearm enhancement because such an enhancement was not allowed under the terms of our remittitur, and because the jury made no finding of an enhancement with respect to manslaughter. Finally, Asbury contends that if we do not order the enhancement stricken, we must nevertheless remand the case in light of Senate Bill No. 620, which gives trial courts discretion to strike certain handgun enhancements. We agree with Asbury's argument with respect to Senate Bill No. 620, but we otherwise affirm.

A. Propriety of the Firearm Enhancement

Asbury contends that the trial court was without authority to impose a sentence enhancement for her personal use of a firearm in committing manslaughter. At trial, the jury found true an allegation pursuant to section 12022.53, subdivision (d), that Asbury personally and intentionally discharged a firearm and

caused serious bodily injury in murdering Simiele. Enhancements under section 12022.53 apply only to certain enumerated felonies, including murder but not including manslaughter. In our disposition in our prior opinion in this case, we gave the prosecution the option on remand to accept a conviction for manslaughter in place of second degree murder, but we did not state what should become of the enhancement. (See *Asbury I*, *supra*, 4 Cal.App.5th at p. 1232.) When the prosecution accepted the reduction in sentence to manslaughter, the trial court imposed a new enhancement pursuant to section 12022.5, subdivision (a), on the ground that Asbury used a firearm in committing manslaughter. Asbury contends that this was in excess of the trial court's jurisdiction because the new enhancement was outside the scope of our remittitur. She also argues that the trial court was without authority to impose an enhancement because the jury did not make a finding pursuant to section 12022.5. We are not persuaded.

In granting the prosecution the option either to accept a reduction in Asbury's conviction to voluntary manslaughter, or to retry her for murder, we acted pursuant to section 1260, which provides that an appellate court is not limited to reversing or affirming the judgment of a trial court, but may also "reduce the degree of the offense or attempted offense or the punishment imposed." (§ 1260.) Courts exercise this authority "where there was error in failing to instruct on lesser included offenses but the evidence clearly establishes guilt of a lesser degree of the offense for which he was convicted." (*People v. Alexander* (1983) 140 Cal.App.3d 647, 666, disapproved on another ground by *People v. Swain* (1996) 12 Cal.4th 593, 605.) So long as the prosecution produced sufficient evidence of the greater offense at trial, the

prosecution is granted the option either to retry the defendant for the greater offense, or to accept a reduction to the lesser offense. (*People v. Edwards* (1985) 39 Cal.3d 107, 118.)

In this case, the evidence clearly established that Asbury shot and killed Simiele. As we explained in our earlier opinion, however, the evidence at trial raised a question as to whether Asbury acted “upon a sudden quarrel or heat of passion.” (§ 192, subd. (a).) We concluded that, if the jury had been instructed accordingly, there was a reasonable probability that the jury would have convicted Asbury of voluntary manslaughter, rather than murder.

In addition to convicting her of murder, the jury also found true an allegation that, in committing murder, Asbury “personally and intentionally discharge[d] a firearm and proximately cause[d] great bodily injury.” (§ 12022.53, subd. (d).) An enhancement under section 12022.53 applies only to certain enumerated felonies, including murder but not including manslaughter. (See § 12022.53, subd. (a).) A defendant who uses a firearm to commit manslaughter, however, could receive a sentence enhancement pursuant to section 12022.5, subdivision (a), which imposes additional prison time on “any person who personally uses a firearm in the commission of a felony or attempted felony.” (§ 12022.5, subd. (a).)

An enhancement under section 12022.5, subdivision (a) may be viewed as a sort of “lesser included enhancement” of an enhancement under section 12022.53, subdivision (d).² In order to

² Strictly speaking, it is inaccurate to describe an enhancement as a lesser included offense because enhancements “‘do not define a crime or offense but relate to the penalty to be imposed under certain circumstances.’” (*People v. Strickland*

“personally and intentionally discharge[] a firearm and proximately cause[] great bodily injury” in the commission of an enumerated felony (§ 12022.53, subd. (d)), a defendant by definition must have “personally use[d] a firearm in the commission of a felony or attempted felony.” (§ 12022.5, subd. (a).) As our Supreme Court described it in a similar context in *Strickland*, “‘section [12022.5, subdivision (a)] would be applicable in any case in which [section 12022.53, subdivision (d)] applies. Basically [section 12022.53, subdivision (d)] is a limited application of section [12022.5, subdivision (a)] with a heavier penalty.’” (*Strickland*, *supra*, 11 Cal.3d at p. 961.)

Thus, by finding that Asbury personally and intentionally discharged a firearm in murdering Simiele (§ 12022.53, subd. (d)), the jury found every fact necessary to determine that she used a firearm in the commission of a felony. (§ 12022.5, subd. (a).) Indeed, the evidence that Asbury used a firearm to kill Simiele was overwhelming—she admitted as much when calling 911 to report the shooting and in later interviews with the police, and she has not denied doing so at any point in this case, either at trial or in her two appeals. Nothing about the question of whether she acted in a heat of passion while killing Simiele—the basis of our conditional reversal of her murder conviction—alters that. To substitute an enhancement under section 12022.5, subdivision (a) in place of the enhancement under section 12022.53, subdivision (d)

(1974) 11 Cal.3d 946, 961 (*Strickland*).) Nevertheless, other cases use the term “lesser included enhancements” (e.g., *People v. Fialho* (2014) 229 Cal.App.4th 1389, 1397), and we follow their lead because we agree with the logic of these opinions and are not aware of a better term.

is a natural and logical corollary of substituting a conviction for voluntary manslaughter in place of a conviction for murder.

Courts have routinely allowed the substitution of lesser included enhancements pertaining to manslaughter in place of those pertaining to murder. Thus, our Supreme Court in *Strickland, supra*, 11 Cal.3d 946 addressed a situation in which a jury convicted the defendant of manslaughter, but found true an allegation of a firearm enhancement applicable to murder. As a remedy, the Court substituted an enhancement applicable to manslaughter in place of the murder enhancement.³ (See *id.* at pp. 961-962.) The Court reasoned that the jury had found all the facts necessary for the lesser manslaughter enhancement, and that because the defendant was charged with the greater murder enhancement, he “had notice that his conduct [could] also be in violation of” the lesser enhancement. (*Id.* at p. 961.) Similarly, in *People v. Thomas* (2013) 218 Cal.App.4th 630, 633-634, the court gave the prosecution the option either to retry the defendant for murder or to accept a reduction to voluntary manslaughter. If the prosecution accepted the reduction, “the judgment [would] be modified to reflect his conviction of voluntary manslaughter enhanced for his use of a firearm.” (*Id.* at p. 634.)

Asbury nevertheless contends that the trial court’s imposition of an enhancement under section 12022.5 was improper under section 1170.1, subdivision (e), which provides that “[a]ll enhancements shall be alleged in the accusatory pleading and

³ Although the enhancements served similar purposes to those in this case, at the time of *Strickland* they were listed in different sections of the Penal Code. The enhancement for use of a firearm in certain enumerated felonies was then section 12022.5, and the enhancement applicable to all felonies occurred at section 12022. (See *Strickland, supra*, 11 Cal.3d at pp. 959, 961, fn. 3.) The Court’s reasoning in *Strickland* applies equally to the current sentencing scheme.

either admitted by the defendant in open court or found to be true by the trier of fact.” (§ 1170.1, subd. (e).) We disagree. Every case that we are aware of that has addressed this issue has held that this provision does not prevent a court from imposing a lesser included enhancement, so long as the defendant had notice of the greater enhancement and the trier of fact found all elements of the enhancement true. (See, e.g., *People v. Fialho*, *supra*, 229 Cal.App.4th at pp. 1394-1397; *People v. Dixon* (2007) 153 Cal.App.4th 985, 1001.) In this case, as we have seen, the jury found true all elements of the section 12022.5 enhancement, and the information alleged an enhancement under section 12022.5.

Contrary to Asbury’s argument, the court’s opinion in *People v. Millbrook* (2014) 222 Cal.App.4th 1122 (*Millbrook*) does not bar the substitution of a lesser included enhancement in a case like this one. In *Millbrook*, the court merely noted that if the prosecution accepted a reduction from murder to manslaughter, the trial court could not impose an enhancement under section 12022.53 at resentencing. (*Id.* at pp. 1127, fn. 3 & 1151.) The court was clearly correct in that conclusion because, as we have discussed above, section 12022.53 does not apply to manslaughter. *Millbrook* contains no discussion, however, of the requirements of section 1170.1 or the propriety of imposing a firearm enhancement for manslaughter under section 12022.5 on remand. The case thus provides no support on this issue. (See *People v. Stone* (2009) 46 Cal.4th 131, 140 [“Cases are not authority for matters not considered.”].)

Asbury also argues that it would be improper to substitute an enhancement under section 12022.5 in place of the enhancement under section 12022.53 because she did not consent to such a substitution. She cites *People v. Edwards*, *supra*, 39 Cal.3d

at page 118, in which our Supreme Court cited the defendant's consent to a modification of the judgment as part of the Court's justification for reducing his murder conviction to manslaughter. But by arguing in this case that the trial court should have given an instruction on manslaughter by heat of passion, Asbury offered an argument that went only to the degree of her offense, not to guilt or innocence, and implicitly consented to a modification of the judgment to voluntary manslaughter. The substitution of one enhancement for another in her sentence is merely a consequence of that modification, not an issue for which Asbury needed to offer separate consent.

Asbury also argues that the trial court was without jurisdiction to impose an enhancement under section 12022.5 because we did not order the trial court to do so upon resentencing her. She cites numerous cases holding that, on remand, a trial court has jurisdiction to act only pursuant to the instructions contained in the reviewing court's remittitur. (E.g., *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701; *People v. Dutra* (2006) 145 Cal.App.4th 1359, 1367; *People v. Martinez* (2017) 10 Cal.App.5th 686, 718–719.)

Our disposition in Asbury's prior appeal was silent as to the question of enhancements. We offered the prosecution "the option to retry Asbury for second degree murder, or to accept a modification of the judgment to reflect a conviction for voluntary manslaughter. If the prosecution elects to accept the modification of the judgment, the trial court shall resentence Asbury in accordance with the modified judgment." (*Asbury I, supra*, 4 Cal.App.5th at p. 1232.)

We disagree with Asbury's interpretation of our silence as implying that the trial court should not impose an enhancement

under section 12022.5. We intended for the trial court, in resentencing Asbury for voluntary manslaughter, to take all appropriate actions in connection with that resentencing, including addressing the sentence enhancement. When the prosecution accepted the modification of the judgment and reduced Asbury's conviction to voluntary manslaughter, Asbury's enhancement under section 12022.53, which cannot apply to a manslaughter conviction, was no longer valid. The trial court was required to take action in order to impose a valid sentence. By substituting an enhancement under section 12022.5 containing all the elements that the jury had found true with regard to Asbury's actions, the trial court acted correctly and in conformance with our remittitur.

B. The Trial Court's Discretion to Deny Probation and to Impose the High Term

Asbury contends that the trial court abused its discretion by sentencing her to the high term of 11 years for voluntary manslaughter. According to Asbury, the court should have granted her probation or, in the alternative, should have chosen the low term of three years in prison. We disagree.

1. *The selection of the high term*

When imposing sentence, a trial court must provide reasons for its selection of the upper, middle, or lower term. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 (*Sandoval*); § 1170, subd. (b).) We review a trial court's selection of a sentence for abuse of discretion. (*Sandoval, supra*, 41 Cal.4th at p. 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' "

(*Ibid.*) A court abuses its discretion “if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision.” (*Ibid.*) “Even if a trial court has stated both proper and improper reasons for a sentence choice, ‘a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.’” (*People v. Jones* (2009) 178 Cal.App.4th 853, 861.) Rule 4.421 of the California Rules of Court lists a series of potential aggravating factors for trial courts to consider. As relevant to this case, a court may consider whether “[t]he manner in which the crime was carried out indicates planning, sophistication, or professionalism” (Cal. Rules of Court, rule 4.421(a)(8)), and whether “[t]he defendant has engaged in violent conduct that indicates a serious danger to society.” (Cal. Rules of Court, rule 4.421(b)(1).)

In this case, the trial court found several factors in aggravation, and Asbury takes issue with all of them. We focus our analysis on two statements in particular. The court stated that the crime showed a level of sophistication, noting that Asbury bought ammunition approximately one month “before this killing and engaged in target practice.” Next, the court stated that Asbury could pose a potentially serious danger to society because she engaged in “stalking behavior leading up to this killing.” Asbury contends that these statements suggest that the court believed Asbury did not kill Simiele “upon a sudden quarrel or heat of passion” (§ 192, subd. (a)), as the reduction of her conviction to voluntary manslaughter implies. Rather, the court must have believed that Asbury planned in advance to kill Simiele. If that were the case, Asbury would be guilty of murder rather than manslaughter. If the court properly relied on these factors, they

would be sufficiently severe as to justify the court's sentencing decision regardless of any mitigating factors. On the other hand, if these factors were improper, they would undermine the entire basis for the trial court's sentence.

Asbury acknowledges that our Supreme Court in *People v. Towne* (2008) 44 Cal.4th 63, 85–89 (*Towne*) held that a trial court, when selecting a sentence, may consider factors related to charges for which a defendant was acquitted. Asbury contends, however, that this rule does not apply in cases like hers, where the trial court's resentencing decision occurred after the Court of Appeal reduced the defendant's conviction to a lesser included offense.

Both the Penal Code and the California Rules of Court allow trial courts to consider a wide range of evidence in determining a sentence. In particular, “the court may consider the record in the case” (§ 1170, subd. (b)) and “any . . . factor reasonably related to the sentencing decision.” (Cal. Rules of Court, rule 4.420(b).) The Court in *Towne* concluded that “[n]othing in the applicable statute or rules suggests that a trial court must ignore evidence related to the offense of which the defendant was convicted, merely because that evidence did not convince a jury that the defendant was guilty beyond a reasonable doubt of related offenses.” (*Towne, supra*, 44 Cal.4th at pp. 85–86.)

In addition, “the United States Supreme Court has held that the double jeopardy clause does not preclude a trial judge from considering, at sentencing, conduct underlying a charge of which the defendant was acquitted. (*United States v. Watts* (1997) 519 U.S. 148, 157 [136 L.Ed.2d 554, 117 S.Ct. 633].) The high court reasoned that an acquittal merely establishes the existence of a reasonable doubt as to guilt. Unless specific findings are made, ‘the jury cannot be said to have “necessarily rejected” any facts when it

returns a general verdict’ (*Id.* at p. 155.) Facts relevant to sentencing need be proved only by a preponderance of the evidence, and ‘ “an acquittal in a criminal case does not preclude the [g]overnment from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.” ’ ” (*Towne, supra*, 44 Cal.4th at p. 86.) For similar reasons, the consideration of facts pertaining to counts of which a defendant was acquitted does not violate the defendant’s Sixth Amendment right to trial by jury. (*Ibid.*)

Asbury contends that this reasoning does not apply to her case because the trial court did not “properly find[] . . . by a preponderance of the evidence” (*In re Coley* (2012) 55 Cal.4th 524, 557) that Asbury stalked Simiele, nor that her attendance at a shooting range was in preparation for killing him. Asbury notes that in *Towne*, the trial court explicitly evaluated the evidence at the sentencing hearing and concluded that the victim’s account of what happened was more credible than the defendant’s. (See *Towne, supra*, 44 Cal.4th at pp. 73–74.) In this case, by contrast, the trial court simply stated that Asbury stalked Simiele and that her attendance at a shooting range shortly before the killing showed sophistication.

We are not persuaded that this distinction makes a difference. Neither in *Towne* nor in any other case Asbury cites did the court set out a procedure the trial court must follow in finding facts at a sentencing hearing.⁴ Moreover, it would be pointless to

⁴ Asbury cites *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1223, in which the court justified its reversal of a sentence in part on the basis that the trial court did not state on the record that it was reweighing the trial evidence under a preponderance standard, but at the time, there was a split in the case law

reverse the case on this basis to require the trial court to restate explicitly what is already implicit in the record: namely, that the court evaluated the evidence under the preponderance of the evidence standard and concluded that Asbury most likely stalked Simiele, and that she bought ammunition and practiced at a shooting range in order to prepare to kill Simiele. Both of those conclusions were reasonable in light of the evidence presented at trial.

Next, Asbury contends that *Towne* does not apply here because the procedural posture is different. In *Towne*, the jury convicted the defendant of felony joyriding while acquitting him of more serious charges, including carjacking, robbery, and kidnapping. (See *Towne, supra*, 44 Cal.4th at pp. 72–73.) In this case, by contrast, the jury convicted Asbury of murder, and the prosecution accepted a reduction to manslaughter. Thus, according to Asbury, the trial court could not have applied the same reasoning that our Supreme Court approved of in *Towne*—namely, that the evidence showed it more likely than not that the defendant committed a more serious crime, but not so likely as to support a finding of guilt beyond a reasonable doubt. (See *id.* at p. 87.)

But the posture of this case is not as different from *Towne* as Asbury contends. We reversed Asbury’s murder conviction because we concluded that there was a reasonable probability that, if the trial court had instructed the jury on a heat of passion theory of manslaughter, the jury would have convicted her of manslaughter rather than murder. In other words, the jury *might* have

regarding whether a trial court was free to consider evidence on acquitted counts. *Towne, supra*, 44 Cal.4th 63 resolved that split, and we do not perceive a need for a trial court to explicitly state the standard it applied.

determined that there was a reasonable doubt as to whether Asbury killed Simiele as a result of provocation, rather than through malice. We see no reason why the trial court, having heard all the evidence at trial, could not conclude in spite of this that it was more likely than not that Asbury murdered Simiele, indeed that she planned in advance to kill him. To hold otherwise would create a new set of sentencing rules applicable only to cases like this one where the prosecution has accepted a reduction of a conviction to a lesser offense. We see no justification for doing so.

We conclude therefore that the trial court did not err by relying on factors suggesting that Asbury committed murder rather than manslaughter. These factors were sufficiently important that they justify the trial court's selection of the high term sentence without reference to the other factors the trial court cited. Even if, as Asbury alleges, the court erred by minimizing the mitigating factors she presented or by erroneously recounting evidence about whether or not Simiele carried a hammer upstairs with him to Asbury's bedroom, the absence of those factors would not have altered the sentence the trial court imposed.

2. *The trial court's rejection of probation*

For similar reasons, we reject Asbury's contention that the trial court abused its discretion by denying her request for probation. Just as with other sentencing decisions, a "trial court has broad discretion in determining whether or not to grant probation. In reviewing that determination it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances." (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 825 (*Du*).)

In cases like this one where the defendant “used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted” (§ 1203, subd. (e)(2)), the trial court may not grant probation “[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation.” (§ 1203, subd. (e).) In these cases, courts must employ a two-step process before granting probation. First, the court must evaluate the guidelines under California Rules of Court, rule 4.413 regarding whether the defendant’s case is unusual. If the court concludes that the answer is yes, the court must then proceed to rule 4.414 and decide according to the factors contained in that rule whether probation is appropriate. (See *Du, supra*, 5 Cal.App.4th at p. 830.)

In this case, the trial court did not make an explicit finding as to whether Asbury’s case was an unusual one under the criteria of California Rules of Court, rule 4.413, and indeed did not cite any of that rule’s criteria before proceeding to analyze the case according to the standards of rule 4.414. Asbury contends that the court therefore implicitly found that the case was unusual pursuant to rule 4.413. We disagree with this conclusion. Nothing in the transcript of the sentencing hearing suggests that the trial court believed Asbury’s case was of such an exceptional nature that she, unlike most other defendants who use a gun in the commission of an offense, should be eligible for probation. Nor does the evidence show that Asbury’s use of a firearm was “substantially less serious than the circumstances typically present in other cases involving” firearm use. (Cal. Rules of Court, rule 4.413(c)(1)(A).) In fact, Asbury’s firearm use was far more serious than in most cases, because she used a gun to kill her victim. We are not aware of a single case in which a reviewing court held that the trial court

abused its discretion by denying probation to a defendant who committed voluntary manslaughter with a firearm, and Asbury has not presented evidence to show that her case is so far outside the norm as to make this case the exception.

Even if Asbury were correct that the trial court implicitly found her case to be unusual, we would nevertheless conclude that the trial court did not abuse its discretion in concluding that Asbury did not meet the criteria for probation under California Rules of Court, rule 4.414. The trial court found that Asbury was ineligible for probation because she was the aggressor, because she stalked Simiele, because Simiele was vulnerable, and because she took advantage of a position of trust with respect to Simiele. All of these considerations are relevant to one of the rule 4.414 factors.⁵ Asbury argues again that these factors are inconsistent with the idea that she killed Simiele upon a sudden quarrel or heat of passion. But just as when selecting the low, middle, or high term sentence, the trial court when deciding whether to impose probation is not limited to the facts the jury found beyond a reasonable doubt. As we have already seen, evidence at trial supported the trial court's conclusions regarding Asbury's killing of Simiele, even if those findings are more indicative of murder than of voluntary manslaughter.

⁵ In particular, they are relevant to “[t]he nature, seriousness, and circumstances of the crime as compared to other instances of the same crime” (Cal. Rules of Court, rule 4.414(a)(1)); “[t]he vulnerability of the victim” (Cal. Rules of Court, rule 4.414(a)(3)); and “[w]hether the defendant took advantage of a position of trust or confidence to commit the crime.” (Cal. Rules of Court, rule 4.414(a)(9).)

D. Resentencing under Senate Bill No. 620

In October 2017, the Governor signed into law Senate Bill No. 620. The bill amended section 12022.5 and section 12022.53, which define enhancements for defendants who personally use a firearm in the commission of certain felonies. Under Senate Bill No. 620, “[t]he 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.” (Sen. Bill No. 620, §§ 1 & 2, amending §§ 12022.5, subd. (c), 12022.53, subd. (h).) Prior to the enactment of Senate Bill No. 620, these enhancements were mandatory, and the trial court lacked the authority to strike or dismiss them. (See, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363, citing former § 12022.53, subd. (h).)

The trial court resentenced Asbury on June 16, 2017, before Senate Bill No. 620 became effective. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 54 [Governor signed law on October 11, 2017 to become effective January 1, 2018].) The court imposed a 10-year enhancement on Asbury pursuant to section 12022.5, subdivision (a), for personal use of a firearm in the commission of manslaughter. The change in the law applies retroactively to those like Asbury whose sentences were not final at the time Senate Bill No. 620 became effective. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089–1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678–679.) Asbury contends that we must therefore remand the case to the trial court to allow it an opportunity to exercise its discretion regarding the enhancement. We agree.

The Attorney General concedes that Senate Bill No. 620 applies retroactively, but argues that a remand is not required in

this case because “the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*).) We disagree. The trial court resentenced Asbury several months before the Governor signed Senate Bill No. 620 into law, and nothing in the record suggests that the court considered whether it would exercise its discretion regarding the firearm enhancement in a hypothetical situation where that discretion existed. Although the court imposed the maximum allowable sentence in the case, the court did not, and could not, have exercised “ ‘informed discretion’ ” (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081) regarding whether to impose the firearm enhancement. Consequently, remand is required.⁶

⁶ We disagree with Asbury’s contention that there is a significant potential that the trial court will be biased against her. Consequently, we reject her request to assign her case to a different judge for resentencing.

DISPOSITION

Asbury's sentence is vacated. On remand, the trial court shall hold a new sentencing hearing to consider whether to exercise its discretion under section 12022.53, subdivision (h), to strike or dismiss an enhancement otherwise required by section 12022.53. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

CURREY, J. *

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.