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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD RANGEL, Defendant and Appellant.	B287707 (Los Angeles County Super. Ct. No. BA440338)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed.

Christian C. Buckley, 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 Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Richard Rangel appeals from the judgment after a jury convicted him of two counts of second degree robbery and one count of possession of a firearm by a felon, and found allegations in support of firearm and gang enhancements true. Rangel contends that the trial court improperly denied his request to represent himself at trial, committed misconduct by questioning prosecution witnesses, and abused its discretion by imposing the maximum allowable sentence. Rangel also filed a supplemental brief seeking remand for resentencing in light of Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393), which as of January 1, 2019, will grant trial courts the discretion to strike the five-year enhancement under Penal Code[1] section 667, subdivision (a)(1) for a prior conviction.

We hold that the trial court properly rejected Rangel's request for self-representation because it was equivocal, arising from his desire to circumvent the trial court's denial of his request for new appointed counsel. The trial court's questioning of witnesses, even if sometimes helpful to the prosecution, was within its discretion to clarify the evidence for the jury and did not constitute misconduct. The trial court properly based Rangel's sentence on aggravating factors listed in the Rules of Court. Finally, we hold that SB 1393, once effective, would apply retroactively to Rangel's sentence, but remand for resentencing would serve no purpose because the trial court clearly indicated it would not exercise its discretion to reduce his sentence. We therefore affirm the judgment.

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

FACTUAL BACKGROUND

We briefly summarize the facts underlying the charged crimes. We provide additional background relevant to each issue on appeal separately in our Discussion section.

On September 26, 2015, Rangel, armed with a shotgun, entered a taco truck in which three employees were working. Rangel held his gun to the neck of one of the employees, threatening to "blow off [the employee's] head" if the others did not hand over their money. The employees testified to being "scared" and "very afraid." Rangel left with approximately $3,500.

As Rangel was leaving the scene, he encountered the taco truck's owner, who was approaching in her car. The owner testified that Rangel pointed his gun at her.

At trial, the prosecution introduced evidence of Rangel's tattoos, which a police officer identified as tattoos worn by members of the Big Hazard gang.

PROCEDURE

An information charged Rangel with two counts of second-degree robbery (§ 211), one count of assault with a firearm (§ 245, subd. (a)(2)), and one count of possession of a firearm by a felon (§ 29800, subd. (a)(1)). The information alleged that in committing the robberies Rangel personally used a firearm (§ 12022.53, subd. (b)), and that Rangel committed all four offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). The information further alleged that Rangel was subject to sentence enhancements because of two prior convictions and prison terms (§ 667, subd. (a)(1); § 667.5, subd. (b).) The alleged prior

convictions were for robbery (§ 211) and assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1).)

The jury convicted Rangel of the robbery and firearm possession counts, and found the firearm and gang allegations true. The jury acquitted Rangel of the assault count. Following a court trial, the trial court found Rangel had suffered the two prior convictions and prison terms, and that the prior robbery conviction was a "strike" under sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a) through (e).

The trial court sentenced Rangel to the upper term of five years for the first robbery count, doubled because of the strike to 10 years, plus 10 years each for the firearm and gang enhancements, for a total of 30 years. For the second robbery count, the court imposed a sentence of one year, which was one-third the middle term, doubled to two years because of the strike, plus one-third of both the firearm and gang enhancements, for a total of 8 years 8 months. The trial court imposed a five-year enhancement for the prior robbery, which was a serious felony under sections 667, subdivision (a)(1) and 1192.7, subdivision (c)(1)(19), and a one-year enhancement for the prior assault conviction under section 667.5, subdivision (b). The trial court imposed a 10-year concurrent sentence for the firearm possession count and stayed it pursuant to section 654. Rangel's total sentence therefore was 44 years 8 months. The trial court imposed fines and fees and awarded credits.

Rangel timely appealed.

DISCUSSION

A. Rangel's Request To Represent Himself Was Equivocal

Rangel argues the trial court erred by not considering his request to represent himself. We disagree.

1. Additional background

During a proceeding to set the trial date, Rangel stated that he wished to complain about his appointed counsel. The trial court cleared the courtroom except for court staff, Rangel, and Rangel's counsel. Rangel stated that "nothing's been done" regarding his case. The trial court asked Rangel if there was something he expected his counsel to do that his counsel did not do. Rangel said that his counsel "should have been going to check up on me and explaining to me what's going on with my case. Only time I get to see him is when I came here." Then Rangel said, "I'm better off representing myself. That's the thing."

The trial court began asking questions about Rangel's complaints about his attorney and Rangel interrupted several times, stating he was "frustrated." The trial court said the interruptions "seem[ ] disrespectful," and after further interruptions said Rangel was "either very frustrated" or "a very impolite man." The trial court told Rangel to "[k]eep your mouth shut while I'm talking," stating that otherwise, the trial court would not continue talking with him.

Defendant reiterated his request for a new attorney. After asking further questions of Rangel and his counsel, the trial court indicated Rangel had not given him a good reason to replace appointed counsel, but Rangel could hire his own lawyer if he wished. The following colloquy took place:

"[Rangel]: Well, don't fire [appointed counsel], I'll represent myself then. I would like to sign my rights over or whatever for him—I would like to represent myself as myself.

"The Court: Because you're frustrated you want to represent yourself?

"[Rangel]: Yeah. Yeah. Because after I do that, if I can't represent myself right, they're gonna revoke my rights and eventually I'm gonna get a different attorney."

The trial court said nothing further regarding replacing appointed counsel or Rangel representing himself, instead stating its intent to call the prosecution and others back to the courtroom and set the next court date.

2. Analysis

"To invoke the constitutional right to self-representation, a criminal defendant must make an *unequivocal* assertion of that right in a timely manner." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1087.) "Equivocation of the right of self-representation may occur where the defendant tries to manipulate the proceedings by switching between requests for counsel and for self-representation, or where such actions are the product of whim or frustration." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002 (*Lewis and Oliver*).) On appeal, we review the record independently to determine if a defendant invoked the right to self-representation. (*People v. Doolin* (2009) 45 Cal.4th 390, 453.)

We conclude Rangel's assertion of his right to self-representation was both a product of frustration and an attempt to manipulate the proceedings, and therefore equivocal. (*Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1002.) Rangel's statement that he was "better off representing myself," which he

made in the context of requesting a new lawyer, was not an assertion of his right to represent himself, but merely an illustration of his dissatisfaction and frustration with his current counsel. While Rangel later stated expressly that he "would like to represent myself as myself," he also expressly indicated that he made the request out of frustration, and that his interest was not in representing himself, but in ultimately obtaining a new lawyer once it became clear he could not "represent myself right." In other words, Rangel's assertion of the right to self-representation was nothing more than an attempt to bypass the trial court's denial of his request for a new attorney, a ruling Rangel does not challenge on appeal. Under these circumstances, the trial court correctly declined to address the topic of self-representation further.

Rangel argues that the law required the trial court to make "a sincere attempt to address appellant's clear invocation" of the right to self-representation. "Instead," Rangel contends, "[the trial court] admonished [Rangel] for his manners and informed him that his only choice was to hire private counsel," which Rangel characterizes as "combative dialogue."

Rangel's argument relies on the premise that his invocation of the right to represent himself was "clear"—that is, unequivocal—which, as we have explained, it was not. The trial court's admonishment was appropriate given Rangel's frequent interruptions, and the advisement that he could hire his own attorney also was proper given the trial court's unchallenged conclusion that Rangel had not provided adequate reasons to replace appointed counsel.

B. The Trial Court Did Not Commit Misconduct By Questioning Witnesses

1. Additional background

Rangel contends there are numerous sections of the reporter's transcript in which the trial court committed misconduct by improperly questioning prosecution witnesses. We describe below the instances identified by Rangel.

a. Examination of Detective Hidalgo

The prosecution asked Detective Jose Hidalgo of the Los Angeles Police Department (LAPD) whether he learned about "basic gang cultures" by virtue of growing up in a particular Los Angeles neighborhood. Hidalgo said yes, and that he "was affected personally by the gang lifestyle." Hidalgo explained that friends and family members had been "absorbed by the gang lifestyle." Defense counsel objected on various grounds including nonresponsiveness and relevance. The trial court overruled the objections. Hidalgo then stated that the gang lifestyle would be "appealing to a young . . . Hispanic boy growing up in South Central." The trial court asked, "Was that your experience growing up? It appeared to you to be appealing to young people?" Hidalgo said yes.

After Hidalgo looked at a photograph and identified the pictured individual as a member of the Big Hazard gang, the trial court asked "Hang on. What's the basis of your belief ?" Hidalgo then relayed how he knew the individual and that the individual had admitted gang membership to him multiple times.

The prosecution introduced a baseball cap into evidence, which Hidalgo identified as the cap Rangel wore in a video of the crime scene. The trial court sustained an objection by defense

counsel, then asked, "Does that appear to look the same as the baseball cap worn by the individual on the video?" Shortly thereafter, the court asked whether the hat was taken into police custody after Rangel was apprehended. Hidalgo answered yes to both questions.

The prosecution asked Hidalgo about a search of a vehicle, and what items were found. The trial court interjected, "First of all, did you conduct the search yourself?" Hidalgo said yes. The court asked if Hidalgo recovered the items. Hidalgo said no. The court asked if the items were "recovered in your presence," and Hidalgo said yes.

The prosecution asked Hidalgo to remove a spent shotgun hull from a manila envelope and identify it for the jury. The trial court stated, "Just before you do anything else, so the jury is clear, do you know what a shotgun hull is?" Hidalgo said yes, and the court asked him to "explain to the jury what a shotgun hull is." Hidalgo did so, and the court confirmed with additional questions that a shotgun hull was what remained of a round of ammunition after it had discharged.

When the prosecution presented a video of the crime scene, Hidalgo answered questions regarding tattoos on the individual in the video. At one point, Hidalgo referred to the individual as "Rangel." The trial court clarified that Hidalgo was identifying tattoos he could see on the individual in the video, not on Rangel himself in the courtroom. Later, after the prosecution advanced the video, the trial court described the image and asked if it was taken with a camera at a different angle. Hidalgo explained it was the same camera.

When Hidalgo began describing an "L" on the leg of the individual in the video, the trial court verified that Hidalgo was

talking about a tattoo. When the prosecution asked whether Hidalgo had seen such a tattoo on Mr. Rangel, defense counsel objected on grounds of foundation. The court asked Hidalgo, "Have you seen a tattoo on Mr. Rangel?" Hidalgo said yes and the court instructed the prosecution to proceed. A similar exchange happened when Hidalgo identified another tattoo—again, the defense raised a foundation objection, the court asked if Hidalgo had seen the tattoo on Rangel, Hidalgo said yes, and the court overruled the objection.

b. Examination of Officer Feria

The prosecution asked LAPD Officer Alejandro Feria when he had first heard of the Big Hazard gang. Feria said growing up in Boyle Heights he would see graffiti. The trial court said, "The question was when." Feria said, "When I was a kid." The court asked, "Grade school? High school?" Feria said grade school. Later, when Feria described what evidence of gangs one might see in the neighborhood he grew up in, the trial court said, "But you yourself, how did you start to become aware?" Feria then explained his own experience learning about gangs.

When Feria described the images in Big Hazard graffiti, the trial court asked, "Are these things that you saw when you were in grade school?" Feria said yes.

Feria used the term "shot caller" and the court asked him to define the term for the jury. Feria described symbols and tattoos used by the Big Hazard gang and the court asked him to explain their meaning. The court also asked about "cliques" and confirmed with Feria that clique members were still members of Big Hazard. Later, when Feria said gang members were "expected to cut whatever money they make," the court asked for an explanation of "cut," which Feria provided.

When the prosecution asked Feria about a photograph of a purported gang member, the court asked questions confirming Feria knew the individual in the photo.

The prosecution asked Feria about crimes he had investigated that Big Hazard members had committed. Feria listed numerous crimes, including narcotics sales, auto theft, assault with a deadly weapon, criminal threats, and murders. The prosecution asked, "Now, out of all of those crimes, what would you say is the bread and butter of Big Hazard, meaning that are primary activities, daily crimes, that happen the most often?" Feria said, "Sales of narcotics."

The court then asked, "Are all of the crimes you talked about crimes that are committed by Big Hazard gang members[?]," to which Feria said yes. The prosecution then said, "And the most frequent we see of those would be sales of narcotics, specifically methamphetamine and heroin. And what else? If you could just narrow it down, like two or three others?" The court interjected, "Let's not narrow it down. Crimes that are committed regularly." Defense counsel objected as asked and answered. The court continued, "Are . . . all the other crimes you talked about . . . crimes that are committed periodically, more than once, by . . . Hazard gang members?" Feria said yes. The court said, "You're just saying that the sales of the drugs are something that happen constantly?" Feria said, "They're a little more prevalent. It happens more often, correct."

Later, Feria explained that gang members have "jobs" within the gang, with some selling narcotics, others "steal[ing] and rob[bing]," others stealing cars, and others shooting rival gang members. The following colloquy occurred:

"The Court: Let me stop for one second. Just so I'm clear, you say those who commit robberies. Is that also a crime that's regularly committed by Big Hazard members?

"[Feria]: It happens, yes.

"The Court: All right. When you say 'it happens,' what do you mean by that?

"[Feria]: It's not as often, but it does occur. I have investigated crimes—

"The Court: Is it something that happens more than once?

"[Feria]: Yes.

"The Court: More than twice?"

"[Feria]: Could.

"The Court: Big Hazard members?

"[Feria]: Yes.

"The Court: All right. Go on."[2]

2. Analysis

"Evidence Code section 775 ' " 'confers upon the trial judge the power, discretion and affirmative duty . . . [to] participate in the examination of witnesses whenever he believes that he may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his right of explanation, and in eliciting facts material to a just determination of the cause.' " ' " (*People v. Harris* (2005)

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[2] Rangel lists other pages in the reporter's transcript in which the trial court purportedly "engaged in questioning and interaction with the witnesses," but states that the occurrences are so frequent "that it would be almost impossible to detail each instance." We decline to summarize or address these additional purported instances in the absence of argument as to why they constituted misconduct or were prejudicial.

37 Cal.4th 310, 350 (*Harris*).) In doing so, the trial court must ensure that "the questions remain ' " 'temperate, nonargumentative, and scrupulously fair' " ' and do not 'convey to the jury the court's opinion of the witness's credibility.' " (*People v. Perez* (2018) 4 Cal.5th 421, 460 (*Perez*).) " '[J]udge[s] should be careful not to throw the weight of [their] judicial position into a case, either for or against the defendant,' " and " 'should be exceedingly discreet in what they say and do in the presence of the jury lest they seem to lean toward or lend their influence to one side or the other.' " (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237 (*Sturm*).)

It is misconduct for a trial judge to "disparag[e] defense counsel and defense witnesses in the presence of the jury, and convey[ ] the impression that he favor[s] the prosecution by frequently interposing objections to defense counsel's questions." (*Sturm*, *supra*, 37 Cal.4th at p. 1238.) Put another way, a trial judge commits misconduct by " ' "officiously and unnecessarily usurp[ing] the duties of the prosecutor . . . and in so doing creat[ing] the impression that he [is] allying himself with the prosecution." ' " (*Harris*, *supra*, 37 Cal.4th at p. 347.)

Rangel argues that the trial court's questions to the prosecution's witnesses "ensure[d] the prosecution elicited the necessary evidence to support the gang enhancements, chain of custody, and identification of appellant." He contends the trial court "did not clarify or control evidence—it supplied evidence." "In this way," Rangel argues, "the court usurped the prosecutorial function and improperly took a side." Rangel claims that "[w]ithout the court's questioning the prosecution would not have established their case."

Rangel has forfeited this argument by failing to object to the trial court's questions (apart from a lone objection that a particular question was asked and answered). (*People v. Williams* (2017) 7 Cal.App.5th 644, 693.) Rangel claims objection would have been futile because "the court's interaction with the witnesses was so ubiquitous that any objection would have been fruitless and clearly unable to change the court's pattern and practice." In the absence of any objection to the trial court's conduct, however, we cannot guess how the trial court might have responded, and are unwilling to assume the objection would have been futile.

Regardless, Rangel's challenge fails on the merits. Even accepting Rangel's contention that the trial court elicited evidence supporting elements that the prosecution otherwise would not have established, this would be insufficient to show misconduct. The trial court was within its discretion to " ' " 'elicit[ ] facts material to a just determination of the cause' " ' " (*Harris*, *supra*, 37 Cal.4th at p. 350), which could include facts potentially beneficial to the prosecution. Rangel cites no authority holding that merely asking questions that elicit evidence beneficial to one side or the other constitutes judicial misconduct. We reject Rangel's contention that the trial court somehow "supplied" evidence, given that its questions were based on subject matter already raised in the prosecution's questioning, were not leading, and did not limit the witnesses to particular responses.

Indeed, at least some of the trial court's admonishments of the prosecution and its witnesses more likely appeared as criticism rather than support, which would only have strengthened Rangel's position. For example, at one point the

trial court spontaneously stated that the prosecution's question assumed facts not in evidence, leading to an apology from the prosecution. Shortly thereafter, the trial court interrupted Detective Hidalgo because his answers were not responsive to the prosecution's questions, and admonished the prosecution, "You can ask about that, but that isn't what you asked him. All right?"

Rangel does not claim, nor does the record support, that the trial court's questions were intemperate, argumentative, or unfair, or that the trial court through its questions and comments conveyed its opinion as to a witness's credibility. (See *Perez*, *supra*, 4 Cal.5th at p. 460.) Nor does Rangel claim, or the record support, that the trial court disparaged defense counsel or "frequently interpos[ed] objections to defense counsel's questions." (*Sturm*, *supra*, 37 Cal.4th at p. 1238.) In the absence of such conduct, we do not believe the jury would perceive the trial court as taking the prosecution's side simply by asking clarifying questions that ultimately proved beneficial to the prosecution's case. In sum, the record does not support Rangel's claim of judicial misconduct.

C. The Trial Court Did Not Abuse Its Discretion By Imposing The Maximum Sentence

Rangel argues the trial court abused its discretion by relying on improper reasons to impose his sentence. We disagree.

1. Additional background

At the outset of the sentencing hearing, defense counsel requested that the trial court impose a sentence in accordance with the prosecution's pretrial offers, which were between 19 and 26 years. The trial court declined to be guided by the pretrial offers, stating "It's up to me to assess what I think is an

appropriate sentence based on the defendant's history and the alleged offenses."

The trial court continued, "And I think the maximum is an appropriate sentence because, first of all, the defendant has had two recent convictions," one of which was a strike. The trial court queried why the prosecution had not alleged that the second prior conviction, for assault, was also a strike, and the prosecutor stated that it did not qualify as a strike under current law.

The trial court responded, "Either way, it's still a pretty darn serious thing when you get convicted of assault likely to produce great bodily injury.[3] And he has a prior robbery strike. So it's not just a prior strike. It's a strike for the same thing. So he's not exactly been a good person through his life, just to put it mildly."

The trial court went on: "But, in addition, this was a really pretty egregious offense. I mean, he didn't just rob these people. He held them in a position of particular vulnerability isolated in a truck where nobody really would be able to see. And he held a gun to someone's head and threatened to kill them. The people were terrified. They were terrified when they came back to court. [¶] And, you know, he—I don't know what he is intrinsically, but he has been a bad dude in his behavior through his life, done some really horrible things. That was a particularly horrible crime. You know, it's bad enough to rob somebody on the street. It's bad enough to point a gun at them, but pointing a shotgun

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[3] Rangel previously was convicted of assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)), not assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). Rangel does not challenge this discrepancy on appeal and we need not address it further.

right against their head, threatening to kill them and—that's horrible. And there's consequences for behavior like that. And there's no question of his guilt. And I can't see any reason to give him anything other than the maximum term based on his prior record and the absolutely totally egregious nature of this offense."

The trial court then imposed the sentence of 44 years 8 months we described previously, which included the upper term on the first robbery count. The prosecution reminded the trial court that it had the discretion to strike the firearm and gang enhancements. The trial court responded, "Nobody has asked me to do that. And I don't know if I have to make a record, but I think it's clear from what I said that it's—I have no intention whatsoever of striking either." Shortly thereafter, the trial court stated, "[T]he record will just reflect that the court chooses not to exercise its discretion to do either. I think that the reason for that is apparent from my remarks."

The trial court then resentenced Rangel for a separate violation for possessing a weapon in prison (§ 4502, subd. (a)), and stated, "All the more reason why the fact that he would have a weapon in prison—I didn't need it, it's just another reason why he should be maxed out on the instant case, but it wasn't necessary to my decision."

Defense counsel asked the trial court to "strik[e] the strike" for purposes of resentencing on the prison weapon possession charge, and the court declined: "I don't think he deserves anything based on his behavior. He's been a pretty awful person. No."

At the end of the sentencing hearing, the trial court stated, "I just want to reiterate, people earn what their sentences are. When you have prior convictions for robbery and assault and you

commit a robbery with a shotgun and hold a gun to somebody's head, threaten to kill them when they're in a particular position of vulnerability inside a taco truck, that's horrible stuff. It's the reason why the sentence is so long. It is completely antisocial, dangerous, and violent."

2. Analysis

Rangel argues that "the trial court's sentence was erroneous because it was based on the court's opinion that [Rangel] was an 'awful' person." Rangel contends this "is not a basis for a max-term sentence."

We agree with respondent that Rangel did not object to his sentence before the trial court and therefore has forfeited his appellate challenge to the trial court's articulation of reasons for the sentence it imposed. (See *People v. Sperling* (2017) 12 Cal.App.5th 1094, 1100 [appealing criminal defendant may not " 'raise "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" if the party did not object to the sentence at trial' "], quoting *People v. Gonzalez* (2003) 31 Cal.4th 745, 751.) Rangel makes no argument to the contrary.

Rangel's challenge also fails on the merits. The trial court gave a far more comprehensive explanation for its sentence than the belief that Rangel was a bad or awful person. The trial court referred to the facts that Rangel threatened to kill at least one of his victims and that the victims were particularly vulnerable, being trapped in a taco truck out of public view. "[T]hreat of great bodily harm" and vulnerability of the victim are "[c]ircumstances in aggravation" expressly listed in the Rules of Court that can support discretionary sentencing decisions such as imposition of an upper term or a consecutive

sentence. (See Cal. Rules of Court,[4] rules 4.420(b), 4.421(a)(1), (3), 4.425(b).) Rangel does not challenge the trial court's findings as to those circumstances in aggravation, and concedes that "a single factor in aggravation is sufficient to justify a sentencing choice." (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.)

Rangel notes that rule 4.420(c) and (d) prohibit the trial court from imposing the upper term based on "a fact charged and found as an enhancement"[5] or "[a] fact that is an element of the crime on which punishment is being imposed." He argues that all of his "current and prior offenses were taken into account by the convictions," and "his use of a weapon, his personal actions, his prior crimes, and his gang affiliation" were "the underlying criteria of the crimes that established the base terms. Thus, the criminal acts could not also serve to aggravate the sentence."

We agree that under rule 4.420(c), the facts of Rangel's prior crimes, gang affiliation, and use of a firearm could not be used to impose the upper term because those facts were the basis of sentence enhancements. Rangel fails to explain, however, why the trial court properly could not rely on the circumstances in aggravation noted above to impose the sentence it did. To the extent Rangel is suggesting that threatening to kill particularly vulnerable victims is "an element of the crime on which punishment is being imposed" (rule 4.420(d)), we reject this contention. Robbery consists of "the felonious taking of personal

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[4] Undesignated rule references are to the Rules of Court.

[5] This prohibition does not apply "if the court has discretion to strike the punishment for the enhancement and does so" (rule 4.420(c)). Here, the trial court did not exercise its discretion to strike any enhancements, so the prohibition applied.

property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Neither a threat of deadly force or particular vulnerability of the victim is a required element.

Even if the trial court relied upon both proper and improper factors in selecting the upper term, remand for resentencing nonetheless would be unwarranted. When a court improperly uses facts for two sentencing purposes in violation of the Rules of Court, remand is unnecessary " 'if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error." ' " (*People v. Osband* (1996) 13 Cal.4th 622, 728 (*Osband*).) In *Osband*, the trial court imposed the upper term based on several aggravating factors, and then imposed a consecutive sentence based on one of those same aggravating factors, in violation of rule 4.425(b)(1). (*Osband*, *supra*, 13 Cal.4th at p. 728.) The Supreme Court found no prejudicial error: Because "[o]nly a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence," "the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term, and on this record we discern no reasonable probability that it would not have done so." (*Id.* at pp. 728-729.)

Similarly, here the trial court recited facts on which it properly could rely to impose the upper term without invoking the facts underlying the enhancements. Given the trial court's clear indication that it believed Rangel's crimes merited the maximum sentence, and its express refusal to exercise its discretion to reduce the sentence, we do not think it reasonably probable that Rangel would receive a better outcome on remand.

D. Remand For Resentencing Under SB 1393 Is Unwarranted Given The Trial Court's Clear Indication That It Would Not Impose A Lesser Sentence

Rangel requests that we remand for resentencing in light of SB 1393. The parties have submitted supplemental briefing on the subject. We hold that remand is unwarranted.

Under current law, which was in effect when Rangel was sentenced, a trial court does not have the authority "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b).) SB 1393, adopted September 30, 2018, amends sections 667 and 1385 to omit this restriction, thus granting trial courts discretion to strike the prior conviction as it relates to the five-year sentence enhancement under section 667, subdivision (a)(1). (See Sen. Bill No. 1393 (2017-2018 Reg. Sess.) § 2; *People v. Garcia* (Nov. 1, 2018, E068490) __ Cal.App.5th __ [p. 13] (*Garcia*).) These amendments will be effective as of January 1, 2019. (Cal. Const., art. IV, § 8, subd. (c)(1).)

Rangel argues that when SB 1393 takes effect, it will apply retroactively to his case, and we therefore should remand so the trial court may exercise its discretion and decide whether to strike Rangel's enhancement under section 667, subdivision (a)(1). Respondent concedes that SB 1393 would apply to Rangel's sentence if it were to become effective before his judgment became final. Respondent argues, however, that because the law is not yet in effect, Rangel's contention is not ripe for adjudication. Respondent further argues that even if the issue were ripe, remand in this case is unwarranted because the

trial court's statements at sentencing clearly indicated it would not exercise its discretion to reduce Rangel's sentence.

Our colleagues in the Fourth District, confronting similar arguments, concluded it was proper to address them although SB 1393 is not yet in effect. (*Garcia*, *supra*, __ Cal.App.5th __ [p. 16].) In *Garcia*, decided November 1, 2018, the court reasoned that the defendant's judgment would not be final by January 1, 2019, because the defendant would not have exhausted his appeal rights by that date, including to the United States Supreme Court. (*Ibid.*) Here also, it is highly unlikely Rangel will have exhausted his appeals before January 1, 2019, and it would serve little purpose for us to decline to resolve his challenge as unripe only to have it return to us through some other mechanism. We thus proceed to address the issue on the merits.

We agree with the parties that SB 1393, once effective, will apply to Rangel's sentence. (*Garcia*, *supra*, __ Cal.App.5th __ [p. 13] [SB 1393 applies retroactively to all cases with enhancement imposed under § 667, subd. (a)(1) if judgment not yet final when law takes effect].) When a change in the law grants a trial court discretion to strike a previously mandatory enhancement that the trial court has already imposed, remand for resentencing is required "unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement" even if it had the discretion. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*).) On this record we conclude the trial court clearly indicated it would not strike the five-year enhancement, and remand is unnecessary.

McDaniels, in articulating its rule, relied on the oft-cited case of *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), which we find persuasive here. In *Gutierrez*, a jury convicted the defendant of one count of robbery and one count of attempted robbery, and found true allegations of three prior convictions, one of which was a strike under section 667, subdivisions (b) through (i). (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1895.) During sentencing, the trial court imposed the high term on the robbery count, stating that the defendant "was 'clearly engaged in a pattern of violent conduct, which indicates he is a serious danger to society,' " and doubled it because of the prior strike. (*Id.* at p. 1896.) The trial court then imposed a consecutive sentence on the second count and added a five-year enhancement under section 667, subdivision (a) for a prior conviction. (*Ibid.*) The trial court stated that it had the discretion whether to impose two additional one-year enhancements for prior convictions under section 667.5, subdivision (b), and opted to impose them: " '[T]here really isn't any good cause to strike it. There are a lot of reasons not to, and this is the kind of individual the law was intended to keep off the street as long as possible.' " (*Ibid.*)

While the *Gutierrez* appeal was pending, the Supreme Court issued an opinion holding that trial courts had the discretion to strike "strike" convictions in the furtherance of justice, a holding the Court expressly stated was retroactive. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896, citing *People v. Superior Court (Romero)* (1996)13 Cal.4th 497.) The *Gutierrez* court nonetheless held that remand for resentencing was not appropriate: "[T]he trial court indicated that it would not, in any event, have exercised its discretion to

lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements. Under the circumstances, no purpose would be served in remanding for reconsideration." (*Gutierrez*, at p. 1896.)

The facts here are analogous to those in *Gutierrez*. The trial court expressly stated "the maximum is an appropriate sentence," based in part on Rangel's conduct being "completely antisocial, dangerous, and violent." The trial court followed through by imposing the upper term on the robbery count and adding decades to the sentence through various enhancements, expressly declining to exercise its discretion to strike the gang and firearm enhancements. When defense counsel asked the trial court to "strik[e] the strike" for purposes of the separate prison weapon possession charge, the trial court said, "I don't think he deserves anything based on his behavior." These statements and actions are clear indication that the trial court's intent was to impose the highest sentence possible, beyond even what the law required. Thus, as in *Gutierrez*, we conclude that remand for resentencing would serve no purpose.

Rangel suggests that remand is required unless the trial court specifically stated that it would not strike the particular enhancement at issue even if it had the discretion to do so. *Gutierrez* has no such requirement; the trial court in that case imposed the strike enhancement without comment as to whether it would have declined to do so had it the discretion. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896 [when doubling sentence term pursuant to three strikes law, trial court "did not

indicate that it had discretion to strike the three strikes prior conviction"].) Here, we take the trial court's statements and conduct to reflect that it would not exercise *any* discretion to reduce the sentence, regardless of the particular enhancement at issue.

Rangel's cited cases are inapposite because none involved clear indications of intent akin to those in *Gutierrez* or the instant case. *McDaniels* held that remand in light of Senate Bill No. 620[6] was proper when, among other things, the trial court "expressed no intent to impose the maximum sentence" and struck other discretionary enhancements. (*McDaniels*, *supra*, 22 Cal.App.5th at p. 428.) In *Billingsley*, Division Seven of this court also remanded in light of Senate Bill No. 620 when the trial court "did not express an intention to impose the maximum possible sentence" and "expressed concern [that] the consequences of Billingsley's sentence were 'unfortunate' and 'tragic'." (*Billingsley*, *supra*, 22 Cal.App.5th at p. 1081.) *People v. Gamble* (2008) 164 Cal.App.4th 891 held that the trial court incorrectly believed it lacked discretion to impose a particular sentence concurrently, and that remand was warranted because the record "d[id] not disclose whether the trial court would have exercised its discretion to impose a concurrent term if it had known that it had such discretion." (*Id.* at p. 901.) In particular, the Court of Appeal noted that the trial court

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[6] Senate Bill No. 620 (2017-2018 Reg. Sess.) amended section 12022.5, subdivision (c) and section 12022.53, subdivision (h), to give trial courts discretion to strike firearm enhancements imposed under those statutes. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080 (*Billingsley*).)

already had imposed a concurrent term for one of the other charges. (*Ibid.*)

Here, again, the trial court stated expressly that it intended to impose the maximum sentence and did so, with no expression of sympathy towards Rangel. The trial court lacked any of the ambivalence or leniency demonstrated in Rangel's cited cases.

Rangel contends that "the reasoning and language" in *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*) "suggests that when the legislature takes action to create new important discretion, it is improper to deny a trial court the chance to consider the importance of that change even where the court has declined to exercise other discretion in the first instance." *Francis* addressed whether an amendment to the Penal Code providing for alternative sentences for narcotics offenses applied retroactively to cases in which judgment was not yet final. (*Francis*, *supra*, 71 Cal.2d at p. 75.) Although the Supreme Court remanded for resentencing, it did not discuss the possibility that remand might be futile, nor does it appear the Attorney General raised such an argument. (*Id.* at p. 79.) Thus, *Francis* does not support the proposition that remand is mandated whenever a change in the law has retroactive application, and it is not in conflict with our holding.

DISPOSITION

The judgment is affirmed.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

CURREY, J.*

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