Filed 4/2/18 P. v. Philyaw CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY Q. PHILYAW et. al, Defendants and Appellants.	B280789 (Los Angeles County Super. Ct. No. BA447321)

APPEAL from judgments of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed as to defendant Morgan; affirmed and remanded as to defendant Philyaw.

Michelle T. Livecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Q. Philyaw.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant Kevin Morgan.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Anthony Q. Philyaw guilty in counts 1 and 2 of assault with a deadly weapon (Pen. Code, § 245, subd. (a)),[1] in counts 4 and 5 of making criminal threats (§ 422, subd. (a)), in count 7 of false imprisonment by violence (§ 236), in count 9 of possession of a firearm by a felon (§ 29800, subd. (a)(1)), and in count 10 of sexual battery (§ 243.4, subd. (a)).[2] As to counts 1, 2, 4, 5, and 7, the jury found true the allegations that Philyaw personally used a firearm (§ 12022.5, subd. (a)) and committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)).

Defendant and appellant Kevin Morgan was also found guilty of assault with a deadly weapon in counts 1 and 2, and making criminal threats in counts 4 and 5. The jury found true the allegation that Morgan committed the offenses for

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

[2] Philyaw was acquitted in counts 3 and 8. There was no count 6 charged in the information.

the benefit of, at the direction of, or in association with a criminal street gang with respect to those counts.[3]

The trial court found true the allegations that Philyaw served six prior prison terms within the meaning of section 667.5, subdivision (b), and suffered one prior conviction of a serious or violent felony within the meaning of the three strikes law. The court found that Morgan served one prior prison term within the meaning of section 667.5, subdivision (b), and suffered two prior convictions within the meaning of the three strikes law. Both defendants moved to have their strike convictions stricken. The trial court granted Morgan's motion to strike, but Philyaw's motion was denied. Philyaw was sentenced to 32 years 4 months in state prison. Morgan received an 11-year prison sentence.

Defendants contend that there is insufficient evidence to support the gang enhancements under section 186.22, subdivision (b)(1), and that the gang expert relayed case-specific testimonial hearsay to the jury in violation of their right to confrontation. Philyaw additionally claims the trial court erroneously imposed a five-year sentence under section 667, subdivision (a), because the prior conviction was not charged in the information. He also contends the cause must be remanded to allow the trial court to consider exercising its discretion under section 1385 to strike the

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[3] Morgan was acquitted in counts 3, 7, and 8. The jury found not true the allegations that he personally used a deadly weapon in counts 1, 2, 4, and 5. The court dismissed count 10 as to Morgan pursuant to section 1181.1.

section 12022.5, subdivision (a) firearm use allegation under recently enacted section 12022.5, subdivision (c). (Senate Bill No. 620 (2017–2018 Reg. Sess.).

We affirm the judgments as to defendants, but remand as to Philyaw to permit the trial court to exercise its discretion under Senate Bill No. 620, if it so chooses.

FACTS[4]

On June 5, 2016, Stanley M., R.T., and her daughter were visiting R.'s sister, Re., who lived with her boyfriend, Eric. Stanley and R. went to a store around 10:00 p.m. Stanley noticed a white Cadillac Seville blocking the driveway when they returned. As he got out of the car Stanley saw defendants approaching him in an aggressive manner.

Philyaw asked, "Who are you?" and said, "We don't know you." Defendants said that they were looking to kill someone because a friend or family member who was a Hoover gang member was killed in the area. They said they were Hoover gang members. Stanley said he was "nobody" to signify that he was not affiliated with a gang. Philyaw pulled out a gun and threatened to shoot Stanley. Morgan took out a pocket knife, waved it aggressively, and told Stanley not to move.

R. got out of the car and walked to the driver's side. She saw defendants approaching from the white Cadillac.

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[4] Defendants did not present evidence in their defense.

Both defendants looked angry, and Philyaw appeared drunk. Philyaw reached inside his jacket pocket, pulled out a gun, and pointed it at R.'s chest. Philyaw said that he came to retaliate for the death of his "homeboy." Defendants threatened to kidnap R., throw her in the trunk, and kill her. Philyaw repeatedly took the gun out of his pocket and pointed it at R. Both defendants threatened to kill Stanley. Stanley saw Philyaw grope R. R. tried to get away, but Philyaw grabbed her arm.

Re. came out of the house, saw the gun, and slammed the door. She came out again a little later to check on R. and Stanley and ask what the commotion was about. R. said she was okay, but gave her sister a look to indicate that she was not. Philyaw told Re. about the murder of his friend or family member. He crouched down and placed the gun on the sidewalk. Re. walked back into the house.

R. asked Philyaw to let Stanley leave. Defendants let Stanley go, and he drove away. Morgan then walked to the white car and got a 40-ounce bottle of beer. Both defendants were drinking. Morgan began pacing back and forth to the car. He said that they should leave before someone called the police.

At some point, Eric came outside and stood on the porch. He yelled at defendants and asked what they were doing there. Philyaw pointed a gun at Eric and threatened to kill him. Eric went back inside.

R. pleaded with defendants to let her get her daughter and leave. They let her go into the house. R. asked her

sister to call the police before walking back outside with her daughter. Philyaw prevented R. from getting into her car. While blocking the car door, Philyaw groped R.'s breasts and buttocks over her clothes, and licked her neck. R. thought Philyaw said "107 Hoovers," and was a Hoover gang member.

After about an hour, the police arrived and told everyone to put their hands up. Philyaw did not comply. He walked behind R.'s car and tossed the gun into the side yard.

Los Angeles Police Department Officers David Tello and Ali Kaspian responded to Re.'s house. When they arrived, Officer Tello saw R.'s SUV and a white Cadillac behind it. R. was standing between the driver's door and the door frame of the SUV. Philyaw was standing in front of R. Morgan was about five feet behind them.

Officer Tello directed defendants to the middle of the street. Morgan complied, but Philyaw backed away toward the rear of the SUV. Philyaw appeared to toss something. Morgan started yelling and being uncooperative. He had a 40-ouce beer bottle and threw it under a car. He walked in a circle and appeared upset and angry. Officer Kaspian recovered a loaded nine millimeter handgun from where Philyaw had tossed it. No knife was recovered.

DISCUSSION

Gang Enhancements

Gang expert Los Angeles Police Department Officer Michael Barragan testified that engaging in criminal activity benefits gangs because it instills fear in the community. Gang members announce their gang affiliation so that victims know which gang is responsible. A gang with a reputation for committing crimes can engage in further criminal activity with impunity because witnesses are afraid to come forward. The commission of crimes also increases respect for the gang. Retaliating for the killing of another gang member shows respect for the dead gang member and his gang, and demonstrates that the retaliators are willing to commit crimes to benefit their gang.

Officer Barragan testified that the Hoovers gang encompasses numerous subsets, including the 107 Hoovers gang, and that the subsets engage in criminal activity together. He explained that "different sets . . . belong to different streets [within Hoover territory] but they all fall under Hoover." Criminal collaboration between the various sets benefits the overarching Hoovers gang. All Hoover gang members use the Houston Astros logo and other logos containing a star, the Hollister bird, the street name Hoover, the letter "H," and the color orange to identify themselves. Gang members also announce their membership through the

use of tattoos. The Hoovers have a large territory, which includes the location where the charged crimes took place.

Officer Barragan explained that the 107 Hoovers gang's primary activities included possession of narcotics for sale, possession of firearms, drive-by shootings, murders, attempted murders, burglaries, and robberies. The prosecution introduced certified court dockets evidencing Darnell Hoy's two convictions of robbery (§ 211), and Deshon Atkins's conviction of attempted murder (§§ 187/644). After each of the dockets was admitted without objection, the prosecutor questioned Officer Barragan regarding Hoy and Atkins. Officer Barragan opined that Hoy was a member of the 107 Hoovers "[b]ased on the tattoo he has on his body and documentation on the individual and reports . . . ." Defense counsel objected to the testimony that Officer Barragan was "basing his opinion on the reports." The trial court overruled the objection stating that Officer Barragan was testifying as an expert witness and that the court would "allow[] him some latitude in this area." Officer Barragan testified that he had not met Hoy, but had spoken with other officers who had. Officer Barragan had also spoken to officers assigned to Atkins's attempted murder case, and to an officer who prepared the documentation on Atkins, including documentation of his 107 Hoover gang membership and his gang tattoo. Defense counsel objected to the testimony. The trial court overruled the objection because "[e]xperts can rely on reliable hearsay." Officer

Barragan opined that Atkins was also a 107 Hoovers gang member.

Various officers testified to contacts with defendants in which they alternately referred to themselves as Hoovers and 107 Hoovers. Numerous photographs of defendants' tattoos were also admitted into evidence. Officer Barragan explained that Morgan's tattoo "Groovy," is associated with the Hoovers gang. The different subsets of the Hoovers gang, including the 107 Hoovers gang, address each other using the word groovy. Oranges—a symbol the Hoover gang uses—were substituted for the two "o's" in the groovy tattoo. Morgan had another tattoo of a signpost showing the intersection of 107th and Hoover, which is within the 107 Hoovers territory. Philyaw had the tattoos "Hoover" and "Groova," which are associated with the Hoover gang, and "Selo," a nickname that 107 Hoovers use for each other. Philyaw also had a "7" tattooed on the back of his arm, which showed his 107 Hoover allegiance. Philyaw had a "Hoover" tattoo and tattoos of gravesites with "H.I.P. T-Bone" and "H.I.P. Blue Ragg" written under them, to show respect for dead Hoover gang members.

Section 186.22, Subdivision (b)

"To establish that a group is a criminal street gang within the meaning of [section 186.22], the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or

symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 (*Duran*).) "A 'pattern of criminal gang activity' is defined as gang members' individual or collective 'commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more' enumerated 'predicate offenses' during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons." (*Ibid.*)

Expert Testimony

Defendants first contend that Officer Barragan's testimony included inadmissible hearsay which violated their Sixth Amendment right to confront witnesses as interpreted in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). They argue that Officer Barragan lacked personal knowledge of the crimes alleged to be predicate offenses and the individuals who committed them, and that the officer relayed case-specific testimonial hearsay to the jury when he testified regarding the basis for his opinion that Hoy and Atkins committed the predicate offenses and were 107 Hoover gang members. We disagree.

Contrary to defendants' arguments, Officer Barragan did not testify to case-specific facts, and *Sanchez* does not require expert witnesses to base their opinions on personal rather than general knowledge. The defendant in *Sanchez* was convicted of possession of a firearm by a felon, possession of drugs while armed with a loaded firearm, and active participation in the "Delhi" street gang. The jury found that the defendant committed a felony for the benefit of the Delhi gang. (*Sanchez*, *supra*, 63 Cal.4th at pp. 671, 698.) At trial, the prosecution's gang expert testified to specific content contained in a STEP notice,[5] including Sanchez's statements that he "kicked it" and "got busted with" several members of the Delhi gang. The expert also testified to the details of several contacts between Sanchez and police that were taken from police reports, including: "(1) On August 11, 2007, [Sanchez]'s cousin, a known Delhi member, was shot while [Sanchez] stood next to him. [Sanchez] told police then that he grew up 'in the Delhi neighborhood.' (2) On December 30, 2007, [Sanchez] was with Mike Salinas when Salinas was shot from a passing car. Salinas, a documented Delhi member, identified the perpetrator as a rival gang member. . . . [(3) O]n December

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[5] Police officers issue "STEP notices" to individuals known to associate with gang members as part of a law enforcement effort to control gang activity. The acronym refers to the California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.). (*Sanchez*, *supra*, 63 Cal.4th at p. 672, fn. 3.)

9, 2009, [Sanchez] was arrested in a garage with [two known Delhi members, John] Gomez and . . . Fabian Ramirez. Inside the garage, police found 'a surveillance camera, Ziploc baggies, narcotics, and a firearm.'" (*Id.* at pp. 672–673.) On cross-examination, the expert testified that he had never met Sanchez, he had not been present during any of Sanchez's other police contacts, and his knowledge of the individual incidents was derived from police reports. (*Id.* at p. 673.)

The *Sanchez* court first held that, under state evidentiary rules, when an expert relays "case-specific" testimony taken from a STEP notice or police report about the defendant's contacts with and admissions to other police officers regarding his gang affiliation, such testimony is inadmissible hearsay unless the expert has personal knowledge of the evidence or the evidence has been otherwise properly admitted. (*Sanchez*, *supra*, 63 Cal.4th at pp. 685–686.) It defined "case-specific" facts as "those [facts] relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) The court next held that statements contained in a STEP notice or police report are testimonial hearsay in violation of the Sixth Amendment right to confront witnesses, because those documents are sufficiently formal and made for the primary purpose of establishing facts to be used against the defendant at trial. (*Id.* at pp. 696–697.) It reversed the jury's true findings on the street gang enhancements, finding

that the error was not harmless beyond a reasonable doubt. (*Id.* at p. 699.)

The *Sanchez* court emphasized: "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. . . . There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685–686.)

Officer Barragan's testimony regarding convictions suffered by other 107 Hoovers gang members was not "case-specific." The expert in *Sanchez* relayed particular facts relating to the defendant's gang membership and associations. Officer Barragan testified regarding the gang membership of individuals who were not involved in the charged crimes. These are general facts that could be used to establish a pattern of criminal activity in any case involving the 107 Hoovers. The testimony did not relate to defendant or to the particular case being tried. It does not violate state evidentiary rules or the Sixth Amendment under *Sanchez*. (See *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411 [experts may testify to a gang's pattern of criminal activities, which is not case-specific]; *People v.*

Meraz (2016) 6 Cal.App.5th 1162, 1174–1175, review granted on an unrelated issue, March 22, 2017, S239442 [same]; but see *People v. Ochoa* (2017) 7 Cal.App.5th 575, 588–589 ["out-of-court statements by individuals admitting [gang membership] are case-specific hearsay"].)

Even if we were to assume that Officer Barragan's testimony was admitted in error, however, any error was harmless beyond a reasonable doubt. The evidence that defendants individually are 107 Hoover gang members, and the jury's convictions of both defendants of a variety of offenses, is sufficient to establish a pattern of criminal activity.[6] (See *Duran*, *supra*, 97 Cal.App.4th at p. 1457 [charged offense and evidence of another crime committed by a fellow gang member on the same occasion may serve as evidence of a pattern of criminal activity].)

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[6] Philyaw's reliance on *People v. Zermeno* (1999) 21 Cal.4th 927, is misplaced. *Zermeno* held that evidence of a single offense in which one gang member is the perpetrator and the other is convicted on an aiding and abetting theory is insufficient evidence to prove that the gang has a pattern of criminal activity. *Zermeno* is readily distinguishable. In that case, the two defendants were charged with a single offense, whereas here the two defendants were convicted of numerous distinct criminal acts. *Zermeno* does not stand for the proposition that a conviction on an aiding and abetting theory may not be used to establish a pattern of criminal activity as Philyaw argues.

Sufficiency of the Evidence

Defendants next contend that the evidence was insufficient to sustain the gang enhancements because the prosecution failed to prove an organizational or associational connection between the 107 Hoovers gang and the Hoovers gang as required by *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*). They argue that in the absence of a connection between the 107 Hoovers gang and the overarching Hoovers gang, the prosecution failed to establish that defendants committed the crimes to benefit the 107 Hoovers. This is incorrect.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. (*Ibid.*) If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) 'A reviewing court neither reweighs evidence nor

reevaluates a witness's credibility.' (*Ibid.*)" (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.)

In *Prunty*, the prosecution sought to prove the existence of the Detroit Boulevard Norteño gang, one of several subsets of the Norteño gang in the Sacramento area. (*Prunty*, *supra*, 62 Cal.4th at p. 67.) "To show that Prunty's crime qualified for a sentence enhancement under the STEP Act, the prosecution's gang expert testified about the Sacramento-area Norteño gang's general existence and origins, its use of shared signs, symbols, colors, and names, its primary activities, and the predicate activities of two local neighborhood subsets[, the Varrio Gardenland Norteños and the Varrio Centro Norteños]. The expert did not, however, offer any specific testimony contending that these subsets' activities connected them to one another or to the Sacramento Norteño gang in general." (*Ibid.*) The Supreme Court held that where "the prosecution's case positing the existence of a single 'criminal street gang' . . . turns on the existence and conduct of one or more gang subsets, . . . the prosecution must show some associational or organizational connection uniting those subsets. That connection may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit

behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization." (*Id.* at p. 71, fn. omitted.) "Whatever theory the prosecution chooses to demonstrate that a relationship exists, the evidence must show that it is the same 'group' that meets the definition of section 186.22[, subdivision](f)—i.e., that the group committed the predicate offenses and engaged in criminal primary activities—and that the defendant sought to benefit under section 186.22[, subdivision](b)." (*Id.* at p. 72.)

In contrast to *Prunty*, here the prosecution's case did not turn on the existence and conduct of more than a single subset of a larger gang. Because the evidence solely concerned the 107 Hoovers and the Hoovers, the prosecution was only required to demonstrate a connection between the subset and the larger gang. Officer Barragan testified that the 107 Hoovers gang was one of several Hoovers gang subsets that engaged in criminal activity together. Both defendants admitted to officers that they were Hoovers and 107 Hoovers. Each had tattoos displaying their affiliation with the 107 Hoovers gang subset as well as tattoos displaying their affiliation with the overarching Hoovers gang. Several of the tattoos were distinct—not shared symbols of the overarching gang and the subset. During commission of the crimes, Philyaw claimed the Hoovers and the 107 Hoovers, and stated that he was retaliating for a Hoover gang member's death. The prosecution presented evidence of two crimes committed by 107 Hoovers gang

members to demonstrate a pattern of criminal activity. Evidence of collaboration and subset members' behavior demonstrating self-identification with an overarching gang may serve to demonstrate an organizational or associational connection between the subset and the larger gang. (*Prunty*, *supra*, 62 Cal.4th at p. 71.) The jury could reasonably infer that an act committed by 107 Hoovers to avenge the Hoover gang would be committed to benefit both the overarching gang and the subset gang it encompassed. Moreover, evidence was presented that Philyaw claimed both gangs while committing the crimes, which would benefit both the Hoovers and the 107 Hoovers by enhancing their reputations for violent crime. We conclude the evidence sufficiently established the "criminal street gang" in which defendants participated, and which defendants benefitted by committing the crimes, was "the same 'group' that . . . committed the predicate offenses and engaged in criminal primary activities" within the meaning of section 186.22. (*Prunty*, *supra*, 62 Cal.4th at p. 72.)

Uncharged Prior Serious Felony Enhancement

Philyaw contends that the trial court improperly imposed a five-year enhancement under section 667, subdivision (a), because the enhancement was not alleged in the information. We reject the contention. Philyaw had actual notice of the enhancement, which was included in the People's sentencing memorandum. Philyaw conceded that

imposition of the enhancement was mandatory in his own sentencing memorandum. Because Philyaw had actual notice of the enhancement, and he failed to object to its imposition at the sentencing hearing (instead conceding in writing that it was mandatory), the issue has been forfeited.

"Due process requires that an accused be advised of the specific charges against him so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial." (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.) "[A]n accused cannot be convicted of an [enhancement] of which he has not been charged . . . [except where] the accused expressly or impliedly consents or acquiesces . . . ." (*Ibid*.)

Section 667, subdivision (a), provides that "any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." "[T]he same allegation that a particular prior qualified as a serious felony may serve two separate purposes: for use as a five-year enhancement under section 667, subdivision (a); and as a 'strike' for application of the Three Strikes laws. (See, e.g., §§ 667, subds. (a), (d)–(i), 1170.12, subd. (b)(1), 1192.7, subd. (c).) While a serious

felony may be stricken by the court for purposes of the Three Strikes law (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529–530), the same is not true for purposes of a five-year enhancement. When the truth of the allegation of conviction of a crime qualifying for a five-year enhancement has been established, it is mandatory that the enhancement be imposed. (*People v. Dotson* (1997) 16 Cal.4th 547, 550, 554–560; *People v. Purata* (1996) 42 Cal.App.4th 489, 498.)" (*People v. Turner* (1998) 67 Cal.App.4th 1258, 1268–1269.)

The information alleged that Philyaw suffered a prior serious or violent felony conviction in 2012 (§ 245, subd. (a)), subjecting him to sentencing under the three strikes law. It did not allege a five-year enhancement under section 667, subdivision (a).

Defendants opted to bifurcate the trial on the prior conviction allegations and waive jury trial. Prior to the bench trial on the priors, Philyaw filed a sentencing memorandum that stated, "[b]ecause this court has no discretion in the Penal Code section 667(a)(1) allegations, Mr. Philyaw will thus be sentenced to an additional 5 years." The prosecutor's sentencing memorandum requested that the court impose the section 667, subdivision (a) enhancement.

At the trial on the prior convictions, the prosecutor moved to amend the information to include the section 667, subdivision (a) enhancement with respect to Philyaw, and to include that Morgan suffered a third serious or violent felony

in 1995. Defense counsel did not object.[7] The trial court stated that it intended to strike Morgan's older convictions, and denied the motion to amend the information as untimely. The prosecutor asked, "As to both, your honor?" The court responded, "As to both, yes."

Philyaw admitted the alleged 2012 prior strike conviction, and made a motion to have it stricken, which the trial court denied.[8] The prosecutor then requested

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[7] Philyaw represents that he objected to amendment of the information. Defense counsel did not object at the sentencing hearing or file a written objection, however, and Philyaw has neglected to include record cites in support of his assertion.

[8] In the opening brief, Philyaw represents that the only "indication in the record that the court entered an explicit true finding" on the prior convictions was counsel's statement that Philyaw was "okay with the court finding that [he] did suffer these alleged prior convictions . . . ." The record reflects that defense counsel stated, "Mr. Philyaw has indicated that he's willing to admit [the prior convictions]." The court then explained, "Mr. Philyaw, what's going to happen is [a clerk from the district attorney's office] is going to take the stand. . . . She's going to say that the records that you've now looked at are true and correct records that she got from the prison authorities and that you're the person they asked for the records on and these are your records." Philyaw responded, "Yes, sir. I've reviewed them and they are me." The court advised Philyaw that he was entitled to a trial on the matter and that he had the right to have his attorney cross-examine the witness. The court then

clarification on the denial of the motion to amend the information with respect to Philyaw. She noted that although Morgan's 1995 conviction had not been included anywhere in the papers, Philyaw's 2012 conviction was alleged as a strike. The information did not omit Philyaw's 2012 felony—it simply failed to specifically allege the section 667, subdivision (a) enhancement. The court indicated that it was confused as to which defendant the prosecutor was referring to. The prosecutor replied that she was referring to Philyaw. The court did not respond directly, but stated that it tentatively intended to impose a five-year sentence under section 667, subdivision (a), and invited counsel to argue. Philyaw's counsel responded, "[M]y memorandum that I submitted to the court was based on my request that the court strike the strike, so I'm submitting on the court's indicated [sentence] at this time." The court imposed the enhancement without objection.

We agree with the Attorney General that Philyaw's failure to object at the sentencing hearing forfeits the claim on appeal. Philyaw was not only aware that the prosecution sought to enhance his sentence under section 667, subdivision (a), he conceded that the trial court was required

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asked, ". . . and you've had a chance to look at these documents. And so you're okay with the court finding that you did suffer these alleged prior convictions; is that correct?" Philyaw answered, "Yes, I am." The court then proceeded to Philyaw's motion to strike the prior convictions, which would have been moot absent a finding that the prior convictions allegations were true.

to impose the enhancement in his sentencing memorandum. He did not object to the prosecution's motion to amend the information to include the section 667, subdivision (a) enhancement, to the court's tentative ruling, or to the sentence imposed. (*People v. Houston* (2012) 54 Cal.4th 1186, 1228 [where defendant "ha[s] notice of the sentence he face[s] and [does] not raise an objection in the trial court, he has forfeited this claim on appeal"].)

Even if Philyaw had preserved the issue for appeal, the record strongly suggests that the trial court reversed its original ruling on the motion to amend, as it imposed the section 667, subdivision (a) enhancement immediately after the prosecutor's renewed argument and Philyaw's counsel's statement that he would submit on the court's tentative, which included the five-year enhancement.

Defendant's argument that any grant of the motion to amend was an abuse of discretion is unavailing. "Section 969a expressly gives discretion to our trial judges to permit or deny the amendment [citation], and we rely in such matters on the prudent exercise of that discretion to ensure the due process rights of criminal defendants are adequately protected. In exercising such discretion, courts should scrutinize (i) the reason for the late amendment, (ii) whether the defendant is surprised by the belated attempt to amend, (iii) whether the prosecution's initial failure to allege the prior convictions affected the defendant's decisions during plea bargaining, if any, (iv) whether other prior felony convictions had been charged originally, and (v) whether the

jury has already been discharged [citation]. This list . . . is intended to be illustrative rather than exhaustive, and we reiterate the matter is best left to the discretion of our trial judges." (*People v. Valladoli* (1996) 13 Cal.4th 590, 607–608, fn. omitted.)

In this case, defendant was not surprised by inclusion of the enhancement. He conceded its imposition was mandatory in his sentencing memorandum, and did not oppose amending the information. The 2012 prior serious felony was charged in the information for purposes of the three strikes allegation. The truth of the prior convictions was decided in a bifurcated bench trial. Defendant could not have been adversely affected by the dismissal of the jury, as he had already elected to have the truth of the 2012 prior conviction tried by the trial court.[9] The trial court's grant of the motion to amend was not an abuse of discretion.

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[9] We are not persuaded by Philyaw's argument that allowing amendment of the information after dismissal of the jury was an abuse of discretion pursuant to *People v. Tindall* (2000) 24 Cal.4th 767. *Tindall* held that a postverdict amendment to an information to add previously unalleged prior convictions is not permissible after a jury has been discharged. In this case, the 2012 prior conviction had been previously alleged, and Philyaw waived jury trial on the truth of the prior conviction. *Tindall* does not apply.

Firearm Enhancement

Finally, Philyaw contends that the trial court now has discretion, under recently enacted Senate Bill No. 620, to strike the section 12022.5, subdivision (a) firearm enhancement in his case. He argues the case should be remanded to allow the trial court to exercise its discretion to strike the firearm enhancement, because the court lacked the power to do so at the time of sentencing.

When Philyaw was charged, convicted and sentenced, section 12022.5 mandated that "any person who personally uses a firearm in the commission of a felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense." (Former § 12022.5, subds. (a) & (c).) After Philyaw was convicted, but before the cause was final on appeal, the Governor signed Senate Bill No. 620, which amends former section 12022.5, subdivision (c), to permit the trial court to strike a firearm enhancement as follows: "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." (Stats. 2017, ch. 682, § 1.)

At the time of sentencing, the trial court did not have the discretion to strike the firearm use finding under section

12022.5, subdivision (c). Although there is no indication in the record on appeal that the court will exercise its discretion to dismiss the firearm use finding "in furtherance of justice" under section 1385, we conclude that the court should be afforded the discretion to do so in the first instance, and we remand for that limited purpose.

DISPOSITION

The judgments as to defendants are affirmed. As to defendant Philyaw, the cause is remanded to the trial court to consider whether to exercise its discretion under Penal Code section 12022.5, subdivision (c). If the court declines to exercise its discretion, the judgment as to defendant Philyaw shall stand as originally imposed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J. DUNNING, J.*

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