

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JARROD ANTHONY BOXIE,

Defendant and Appellant.

B279023

(Los Angeles County
Super. Ct. No. YA091321)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hector M. Guzman, Judge. Affirmed as modified.

Derek K. Kowata, 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, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jarrod Boxie of second degree murder and possession of a firearm by a felon. He was sentenced to 40 years to life in state prison. On appeal, he argues the trial court erred in (1) not ordering the disclosure of the identity of a confidential informant, (2) denying his motion for a new trial, and (3) staying a gang enhancement. We conclude the court did not err in denying defendant's motion for disclosure of the informant's identity, or denying a new trial. As to the gang enhancement, the attorney general concedes and we agree it should be stricken.

In supplemental briefing, defendant contends that legislation effective January 1, 2018, ending the statutory prohibition on a trial court's ability to strike a firearm enhancement applies and requires a remand for a new sentencing hearing. We agree that the new legislation applies retroactively to defendant, however, we conclude a remand for resentencing is not required. Accordingly, we affirm the sentence as modified to reflect that the gang enhancement is stricken, not stayed.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was a member of the Rollin 90s Neighborhood Crips gang. The Rollin 90s' territory adjoined that of a rival gang, the Hard Time Hustlers.

On March 11, 2012, several members of the Hard Time Hustlers, including Antonio Jones, encountered defendant in front of a smoke shop. Jones had known defendant since elementary school. One of the Hard Time Hustler known as "Popeye" challenged defendant, and the two men engaged in a fistfight. Defendant then fought with another Hard Time Hustler known as "Baby Lo." After the fights ended, Popeye, Baby Lo and Jones walked away. Defendant got in his car and left.

The following afternoon, March 12, 2012, Jones was outside of an apartment building with Christian Carter and other

individuals when a car stopped nearby. An individual in the front passenger seat fired eight shots at the crowd, hitting Carter. Carter died from a fatal gunshot wound to the head.

Three months later, in June 2012, a detective interviewed Kajuan Hall regarding the shooting. Hall recounted an occasion when defendant told him he had been beaten up by some Hard Time Hustlers gang members. Defendant said he had later seen the same individuals on the street, and had shot one of them “in the face.”

Defendant was charged with Carter’s murder (Pen. Code, § 187, subd. (a))¹ and as a felon in possession of a firearm (§ 29800, subd. (a)(1)). The information alleged that defendant committed the murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and personally used a firearm during the commission of the murder (§ 12022.53, subd. (d)). He pled not guilty.

At trial, Hall recanted his prior statements—he denied ever having spoken with the detective about defendant. A recording of Hall’s interview was played for the jury.

Jones testified at trial about the fight the day before the shooting. A surveillance video showing the altercation was played for the jury. The video showed a grey sedan parked nearby. Jones testified that after the fight concluded, he was walking on the street with Popeye and Baby Lo when defendant drove past. Defendant was driving a grey Infiniti and fired several shots at them from his car. No one was injured.

Jones further testified that, on the day of the shooting, he was standing with Carter and others in front of an apartment building when a grey Infiniti pulled up and stopped. Jones saw

¹ All further undesignated statutory references are to the Penal Code unless otherwise stated.

defendant “come out of the front window with a gun” and start shooting. Everyone started running. Carter was shot, and fell to the ground.

The jury found defendant guilty of second degree murder and being a felon in possession. The jury also found true the gang enhancement and firearm enhancement of subdivisions (b), (c) and (d) of section 12022.53. The trial court imposed 15 years to life on the murder conviction and 25 years to life on the firearm enhancement. The court stayed the sentence on the gang enhancement allegation. As to count 2, the court imposed a concurrent midterm of two years. Defendant timely appealed.

DISCUSSION

1. The Pre-Trial Motion to Disclose the Identity of a Confidential Informant

Defendant contends the trial court erred in denying his motion to disclose the identity of a confidential informant. He argues the judgment must be reversed or, in the alternative, remanded for an in camera hearing pursuant to Evidence Code section 1042, subdivision (d). We conclude the court did not err in not permitting the disclosure of the informant’s identity.

Defense counsel filed a motion seeking disclosure of an informant’s identity prior to trial. In support of the motion, counsel submitted a police report in which a detective stated that he was contacted by a “citizen informant” at the scene of the crime. The informant said that the day prior to the shooting, defendant was involved in a fight with Popeye from the Hard Time Hustlers at a smoke shop. The informant further said that 15 to 20 minutes prior to the shooting, he or she was standing in a crowd on the street approximately a mile away from the scene of the crime when defendant drove up in a light-colored Infiniti sedan. Defendant was holding a firearm and said he was looking

for a man named “Popeye” from the Hard Time Hustlers. He then drove off.

The trial court held a hearing and indicated that its tentative was to deny the motion. The court stated it was open to taking further evidence and twice offered to conduct an in camera hearing. Both sides submitted, and the motion was denied.

Evidence Code section 1041 grants the People a privilege not to disclose the identity of a confidential informant. (Evid. Code, § 1041, subd. (a).) The People may claim this privilege when disclosure of the identity “is against the public interest because the necessity for preserving the confidentiality of [the informer’s] identity outweighs the necessity for disclosure in the interest of justice.” (Evid. Code, § 1041, subd. (a)(2).)

If the informant is a material witness in the case, the trial court must order disclosure. “An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. [Citation.]” (*People v. Lawley* (2002) 27 Cal.4th 102, 159–160.)

“It is, of course, the defendant who bears ‘the burden . . . to make a sufficient showing that the unnamed informer does have information which would be material to the defendant’s guilt. [Citations.] This burden is met only where the defendant demonstrates through ‘some evidence’ [citation] that there exists a “ ‘reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant’s exoneration.’ ” ’ [Citation.]” (*People v. Gordon* (1990) 50 Cal.3d 1223, 1245–1246.)

The standard of review of the trial court’s determination that a confidential informant was not a material witness is unsettled. In *Gordon*, the Supreme Court concluded that the abuse of discretion or independent standards of review may

apply. (*Gordon, supra*, 50 Cal.3d at pp. 1245–1246.) There, the court held that the trial court’s determination was sound under any standard. Here, under either standard, we conclude the trial court did not err in finding there was no reasonable possibility the informant could provide exculpatory evidence.

Although the informant was at the scene of the crime after the shooting, defendant’s suggestion that the informant had actually witnessed the shooting is speculative. Defendant suggests the detective’s report was coy about whether the informant witnessed the shooting. Coyness, even if true, is no substitute for evidence. Defense counsel had the option of calling the detective to the stand and examining him on this issue—counsel did not do so but chose to submit on the evidence contained in the detective’s report.

That evidence suggested that the informant did not have exculpatory evidence helpful to defendant’s case—the informant came forward with “information of the shooting” and then identified defendant as having been armed and searching for revenge against a Hard Time Hustlers gang member shortly before the murder. The informant’s statements suggested he or she believed defendant had participated in the shooting *and* had planned the shooting well ahead of time before hunting down his target. Rather than being exculpatory, this evidence would have bolstered the prosecution’s theory that defendant was guilty of first degree murder. (Defendant was convicted of second degree murder.) Accordingly, the statements did not suggest the informant might be a source of exculpatory evidence and the court did not err in denying the motion to disclose the informant’s identity.

Defendant argues, in the alternative, that the trial court should have conducted an in camera hearing to determine if the informant could provide exonerating evidence. We disagree.

Evidence Code section 1042 provides that when a party demands disclosure of an informant's identity on the ground the informant is a material witness on the issue of guilt, "the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. . . . During the hearing, if the privilege provided for in Section 1041 is claimed . . . *the prosecuting attorney* may request that the court hold an in camera hearing. *If* such a request is made, the court *shall* hold such a hearing outside the presence of the defendant and his counsel." (Evid. Code, § 1042, subd. (d) (emphasis added).)

Here, the court held an open, adversary hearing as required by Evidence Code section 1042. It also twice offered to conduct an evidentiary hearing. Counsel chose to submit on the evidence already presented. The trial court was not required to conduct an in camera hearing on the limited showing made by defense counsel and absent a request by the People.

2. *The Trial Court Did Not Err in Denying the Motion for New Trial*

Defendant contends the trial court abused its discretion in denying his motion for a new trial. He argues that newly discovered evidence showing he was at a school ten minutes before the shooting established he could not have been the shooter. We disagree.

When a party moves for new trial based on newly discovered evidence, the trial court considers several factors, including whether the evidence is (1) newly discovered, (2) not merely cumulative, (3) such as to render a different result probable on a retrial, (4) something the party, through reasonable diligence could have discovered and produced at trial, and (5) the best evidence of which the case admits. (*People v. Howard* (2010) 51 Cal.4th 15, 43.) "A new trial motion based on newly discovered evidence is looked upon with disfavor. We will only

disturb a trial court's denial of such a motion if there is a clear showing of a manifest and unmistakable abuse of discretion." (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1151.)

In support of his new trial motion, defendant submitted a sign-in sheet showing that he had dropped off his god-daughter at school on the day of the shooting. Defendant had signed his name on the document and written down "1:15 p.m." It was undisputed the shooting happened at approximately 1:25 p.m. The trial court found that defendant could have driven from the school to the scene of the crime—4.5 miles away—within ten minutes. The court further concluded the evidence against defendant was strong and it was not probable the admission of this new evidence would render a different result. On these grounds, the court denied the motion.

Putting aside whether this evidence about defendant's whereabouts was legally "newly discovered," it was reasonable for the trial court to find that the sign-in sheet did not preclude defendant from being at the crime scene at the time of the shooting. Moreover, we agree with the trial court that the prosecution presented a strong case at trial: Hall's and Jones's accounts of defendant engaging in a fight at the smoke shop before the shooting was corroborated by videotape of the fight. The fight also presented a motive for the murder. Jones further testified about defendant's participation in the shooting, and Hall's recounting of defendant's admission was played for the jury. Based on this evidence, and the limited usefulness of the sign-in sheet to defendant's case, it was not probable this new evidence would render a different result probable on retrial. As a result, we conclude the court did not abuse its discretion in denying the motion for new trial.

3. *Discretion to Strike the Firearm Enhancement*

Defendant's 40-years-to-life sentence included a mandatory 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). At the time of defendant's sentencing (on September 28, 2016), section 12022.53 specified that "[n]otwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.53, subd. (h).)

Effective January 1, 2018, as a result of the enactment of Senate Bill No. 620, the prohibition against striking a firearm enhancement was eliminated. Now, section 12022.53 provides that "[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. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

The parties filed supplemental briefing on the applicability of amended section 12022.53 to defendant's case. Defendant argued that the new legislation applies to all cases not yet final where a firearm enhancement was imposed at sentencing. Respondent concedes and we agree that the amendment to section 12022.53 applies retroactively to nonfinal judgments.

The case is not yet final. Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), when the Legislature has amended a statute to reduce the punishment for a particular offense, we assume, unless there is evidence to the contrary, that the Legislature intended the amended statute to apply "to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323.) The *Estrada* rule has been applied to statutes governing penalty

enhancements (*People v. Nasalga* (1996) 12 Cal.4th 784, 792), and to situations where the amendment “vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty” (*People v. Francis* (1969) 71 Cal.2d 66, 76).

The amendments made by Senate Bill No. 620 do not specify that the change applies only to crimes committed on or after a particular date. Nor do the amendments contain any other indication of legislative intent contrary to the *Estrada* rule. Consequently, the amendments apply to defendants whose judgments were not yet final on January 1, 2018.

Defendant argues that we should remand the case to permit the trial court to exercise the discretion it now has to strike the firearm enhancement. However, respondent argues against remand given the brutality of the shooting and the trial court’s comment at sentencing that, “whatever mitigating circumstances exist do not outweigh the aggravating circumstances.” We agree with respondent that the court’s comments at the sentencing hearing do not raise any possibility it might grant defendant leniency and strike the firearm enhancement. Accordingly, it serves no purpose to remand the matter for resentencing. (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901 [idle act to remand where record demonstrates trial court would not have exercised discretion].)

4. *The Abstract of Judgment Must Be Corrected*

Defendant argues, respondent concedes, and we agree the abstract of judgment must be corrected in two respects: (1) the gang enhancement should be stricken, not stayed, and a 15-year minimum parole eligibility imposed pursuant to section 186.22, subdivision (b)(5) (see *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [where the underlying felony is punishable by life imprisonment, subdivision (b)(5), not subdivision (b)(1)(C), of

section 186.22 “applies and imposes a minimum term of 15 years before the defendant may be considered for parole”]); and (2) defendant is entitled to one additional day of custody credit for a total of 723 days.

DISPOSITION

The judgment is modified to strike the reference to Penal Code section 186.22, subdivision (b)(1)(C) and to reflect that, based on the gang enhancement, defendant is subject to a 15–year minimum eligible parole date under section 186.22, subdivision (b)(5). The abstract of judgment shall be further amended to reflect 723 total days of custody credit. As modified, the judgment is affirmed. A copy of an amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.