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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. VIVIAN PRICE, Defendant and Appellant.	B281164 (Los Angeles County Super. Ct. No. YA092334)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Reversed and remanded with instructions.

Richard B. Lennon and Suzan E. Hier, 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, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Vivian Price fired gunshots into a fistfight between her boyfriend and her neighbor's boyfriend. One of the bullets struck defendant's neighbor in the chest; another struck the neighbor's boyfriend between the eyes and lodged in his brain. Both victims survived. The trial court found defendant competent to stand trial, and a jury found her guilty of assault with a firearm and attempted voluntary manslaughter. It also found true allegations that defendant personally used a firearm and personally inflicted great bodily injury upon her victims.

Defendant contends the judgment must be reversed because the trial court failed to make an independent judicial assessment of her competency and violated her state and federal speedy trial rights. In the alternative, she requests that we remand the case for resentencing under recently amended Penal Code section 12022.5, subdivision (c).[1] We are not persuaded by defendant's speedy trial arguments, but we agree that her competency hearing was deficient. We further agree that she is entitled to resentencing if a retrospective competency hearing demonstrates that she was competent to stand trial. We accordingly reverse, to allow the trial court to hold a retrospective competency hearing if feasible. If such a hearing is feasible, and the trial court finds that defendant was competent to stand trial, the court is directed to reinstate the judgment and resentence defendant in accordance with section 12022.5, subdivision (c).

PROCEDURAL HISTORY

An amended information filed by the Los Angeles County District Attorney on November 12, 2015 charged defendant and her boyfriend, Lawrence Mears, with two counts of assault with a

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

firearm (§ 245, subd. (a)(2)) and two counts of attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664). The information further alleged as to all counts that defendant and Mears personally inflicted great bodily injury (§ 12022.7, subd. (a)) and that defendant personally used a firearm (§ 12022.5).

Defendant and Mears proceeded to a joint trial on February 9, 2016. The trial was interrupted by the prolonged illness of Mears's attorney; the trial court declared a mistrial on February 24, 2016.

On September 28, 2016, the trial court declared a doubt as to defendant's competency, suspended criminal proceedings against her, and appointed an expert to evaluate her. The trial court ultimately found defendant competent based on defense counsel's representations about the expert's forthcoming report and reinstated criminal proceedings against defendant on November 17, 2016.

Mears subsequently pled no contest to an added count of misdemeanor battery of the neighbor's boyfriend (§§ 242, 243, subd. (a)) and was placed on formal probation. Defendant proceeded to jury trial on January 17, 2017.

The jury found defendant guilty of both counts of assault with a firearm. It also found her guilty of two counts of attempted voluntary manslaughter, a lesser included offense of attempted willful, deliberate, and premeditated murder. The jury also found true the enhancement allegations that defendant personally used a firearm and personally inflicted great bodily injury on both victims.

The trial court sentenced defendant to a total of ten years on the first count of assault with a firearm: the midterm of three years, plus the midterm of four years for the personal use

enhancement, plus three years for the great bodily injury enhancement, to be served consecutively. On the second assault count, the trial court sentenced defendant to a total of three years, four months: one year on the assault count (one-third the midterm), plus one year, four months for the personal use enhancement (one-third the midterm), plus one year for the great bodily injury enhancement (one-third the prescribed sentence). The court ordered this sentence to run consecutively to the sentence on the first assault count. The court imposed total sentences of ten years on each of the attempted voluntary manslaughter counts, but stayed them pursuant to section 654. Defendant's total sentence thus was 13 years, four months. The court awarded defendant 739 days of custody credit, plus 110 days of good-time/work-time credit, for a total credit of 849 days.

Defendant timely appealed.

FACTUAL BACKGROUND

Defendant lived in an apartment complex in south Los Angeles, next door to victim Teneysia L. Relations between the women were strained. Teneysia testified that she and defendant had argued over trash cans, lawn watering, and other issues; defendant testified that Teneysia played loud music and banged on their shared wall.

On April 21, 2015, Teneysia and her boyfriend, James G., left her apartment to take out the trash and run errands. Defendant and Mears were outside. Mears exchanged words with James. Defendant told Mears to "sock him in his mother fucking jaw." Mears threw a punch at James, and the two men began fighting.

Defendant retrieved a gun from inside her apartment and fired several gunshots into the scuffle. One bullet hit Teneysia,

who was trying to separate the men. It traveled through her left arm and left breast before becoming lodged in her right breast. Another bullet struck James on the bridge of his nose between his eyes; it remained lodged in his brain at the time of trial. Defendant called 911 and reported that she shot her neighbor and her neighbor's boyfriend. A responding deputy sheriff recovered a revolver from the stoop of defendant's apartment.

The fight and shooting were captured on surveillance cameras installed above Teneysia's apartment door. The footage was played for the jury.

DISCUSSION

Defendant contends the trial court violated her due process rights by failing to make an independent judicial determination of her competency. She further contends that the trial court violated her federal and state rights to a speedy trial. We agree that the competency proceedings were deficient, but reject defendant's speedy trial claims.

I. Competency

A. Background

On September 28, 2016, defendant's attorney filed under seal a letter from clinical and forensic psychologist Dr. Michelle Margules and his own declaration. Based on those documents, which are not in the record, and over defendant's objection, defense counsel asked the trial court to declare a doubt as to defendant's competency and appoint neuropsychologist Dr. Stacy Wood to evaluate her. The trial court reviewed the submissions "carefully" and stated that they reflected a concern that defendant was unable to assist counsel with her defense. The trial court suspended criminal proceedings and appointed Dr. Wood to evaluate defendant. The court set the next hearing for

November 17, 2016.

On November 17, 2016, defendant and her counsel appeared before the court. The court asked if Dr. Wood had submitted her report. Defense counsel said she had not. He continued:

"If I may, Dr. Stacy Wood was appointed. I spoke to Dr. Wood the other day. She will not have the report available to us until December 9th. However, I talked to her about the report, and I don't know if the court and the People are willing to accept my representation.

"She will find Ms. Price competent. She says Ms. Price does suffer from severe memory issues which makes it difficult. And she indicated that it might have been a bit of a close call as to competency due to her memory loss, but she says she does find her to be competent, and the report will say that.

"She does not recommend any further evaluation. That was also a concern of mine as to whether we needed to have her see a neurologist because of these memory issues. She's not recommending a neurologist. So once we receive the report, I would expect it to find her competent and be able to set it for trial.

"If the Court and the People are willing to accept my representations, we can do that today. When the report arrives on the 9th, I will immediately bring a copy both to the People and the Court."[2]

The trial court invited the prosecutor and defense counsel to sidebar, where they had an unreported discussion. When they returned to the record, the court stated, "I understand that both

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[2] No report is in the record. It is not clear whether it was ever completed or filed.

sides will agree to the representations of Mr. Keenan [defense counsel]." The prosecutor confirmed the court's understanding.

The trial court then stated, "The court is going to find Ms. Price is competent. Criminal proceedings are reinstated, both sides having submitted on the representations of Mr. Keenan."

B. Analysis

"A criminal trial of an incompetent person violates his or her federal due process rights. (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354.) The state Constitution and section 1367 similarly preclude a mentally incompetent defendant's criminal trial or sentencing." (*People v. Mickel* (2016) 2 Cal.5th 181, 194-195.) A defendant is incompetent if he or she "lacks '"sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding . . . [or] a rational as well as factual understanding of the proceedings against him [or her]."' [Citation.]" (*Id.* at p. 195.)

When the trial court is presented with substantial evidence that a defendant is mentally incompetent, the trial court must provide the defendant with a hearing on the issue as a matter of right. (*People v. Mickel*, *supra*, 2 Cal.5th at p. 195; *People v. Pennington* (1967) 66 Cal.2d 508, 518; see also § 1368, subd. (b) ["the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369"].) All criminal proceedings must be suspended until the defendant's present mental competence is determined. (§ 1368, subd. (c).) "Indeed, once a doubt has arisen as to the competence of the defendant to stand trial, the trial court has no jurisdiction to proceed with the case against the defendant without first determining his [or her] competence in a section 1368 hearing, and the matter cannot be

waived by the defendant or his [or her] counsel." (*People v. Hale* (1988) 44 Cal.3d 531, 541.)

Section 1369 requires the trial court to "appoint a psychiatrist or licensed psychologist" or other appropriate expert to examine the defendant after a doubt as to his or her competency has been declared. (§ 1369, subd. (a).) The appointed expert "shall evaluate the nature of the defendant's mental disorder, if any, the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder and, if within the scope of their licenses and appropriate to their opinions, whether or not treatment with antipsychotic medication is medically appropriate for the defendant and whether antipsychotic medication is likely to restore the defendant to mental competence." (*Ibid.*)

California Rules of Court, rule 4.130, which neither party cited, further clarifies the obligations of a court-appointed expert tasked with evaluating a defendant's competency. Per that rule, which carries the force of law and is binding so long as it is consistent with constitutional and statutory law (*R.R. v. Superior Court* (2009) 180 Cal.App.4th 185, 205), an expert "must examine the defendant and advise the court on the defendant's competency to stand trial." (Cal. Rules of Court, rule 4.130(d)(2).) "Experts' reports are to be submitted to the court, counsel for the defendant, and the prosecution." (*Ibid.*)[3] The "centrality of

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[3] Effective January 1, 2018, rule 4.130(d)(2) was amended to provide a detailed list of items the expert report "must include." (See Cal. Rules of Court, rule 4.130(d)(2)(A)-(G).) These requirements were not in effect at the time of defendant's competency hearing.

expert reports" to the court's determination of competency "is demonstrated by the rule that a formal adversary hearing on the issue of competence is not required if the prosecutor and defense counsel stipulate that the competency determination be made by the court based on the written reports of the court-appointed experts." (*In re John Z.* (2014) 223 Cal.App.4th 1046, 1058, citing *People v. Weaver* (2001) 26 Cal.4th 876, 903-905.)

Here, the trial court did not receive a written report or even oral testimony from the appointed expert. Instead, it received defense counsel's summary of a yet-unprepared report that allegedly was forthcoming. We have no reason to doubt the veracity of defense counsel's representations to the court. (See *Holloway v. Arkansas* (1978) 435 U.S. 475, 486 ["attorneys are officers of the court, and '"when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath"'"].) Nevertheless, "[t]he obligation and authority to determine a defendant's competency belong to the trial court or jury, not to defendant's counsel." (*People v. Marks* (1988) 45 Cal.3d 1335, 1340; see also 5 Witkin and Epstein, California Criminal Law (4th ed. 2012) § 828.) The trial court could not fulfill that obligation without at least receiving the expert report and evaluating the basis for the expert's opinion. The trial court as finder of fact had an obligation to consider the expert's report and make the competency determination itself. Rather than continuing the hearing to await the report, or taking oral testimony from the expert, the court essentially delegated its factfinding function to defense counsel. Defendant's counsel on appeal argues that this was error.

Respondent disagrees. It points to section 1369, subdivision (f), which provides, "It shall be presumed that the

defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." Respondent further asserts, correctly, that "the defendant bears the burden of proving by a preponderance of the evidence that he or she lacks competence." (*People v. Mendoza* (2016) 62 Cal.4th 856, 871.) It contends defense counsel essentially conceded he could not meet that burden by informing the court of the expert's expected conclusions, and thus left the court with "the presumption of mental competence which defense counsel had not seen fit to challenge." (*People v. Maxwell* (1981) 115 Cal.App.3d 807, 812 (*Maxwell*).) Respondent argues that *Maxwell* "is instructive." We conclude it is distinguishable.

In *Maxwell*, the trial court declared a doubt as to the defendant's competency and appointed two experts to assess his competence. (*Maxwell*, *supra*, 115 Cal.App.3d at p. 809.) At the section 1368 hearing, the trial court informed the parties that it "had received from each of [the experts] a letter that states that in effect he went to the jail for the purpose of interviewing and examining defendant and defendant refused to see him." (*Id.* at p. 810.) Defense counsel told the court he had no reason to dispute or doubt the accuracy of the experts' representations. (*Ibid.*) The court then ruled, "Then, that being the case, I don't have any reason at this time to doubt Mr. Maxwell's competency to stand trial. The [Penal] code provides that a defendant is presumed to be competent to stand trial, and I have no evidence to the contrary. I have observed his conduct in court, and while it seems to border on the bizarre, that may very well be calculated activity on the part of the defendant. So, I am going to adjourn the 1368 proceedings at this time and reinstate criminal proceedings." (*Ibid.*) On appeal, the defendant argued that he

did not receive the hearing to which he was entitled. (*Id.* at p. 809.) The appellate court concluded that the hearing the defendant received was "as much of a hearing under section 1369 as the parties had permitted under the circumstances." (*Id.* at p. 812.) It observed that the trial court had been "left with two letters from the doctors reciting defendant's refusal to see them, its own observations of defendant since its expression of doubt a month and a half before and the presumption of mental competence which defendant had not seen fit to challenge." (*Maxwell*, *supra*, at pp. 811-812.)

The trial court in *Maxwell* had very little before it, but it did have the letters from the experts. It was therefore able to consider their contents and credibility independently of defense counsel's representations. The trial court thus exercised its judgment as factfinder—and the experts discharged their duty to prepare reports and submit them to the trial court for its consideration. Neither of these things occurred here.

We reject respondent's assertion that there is "no merit" to defendant's contention that the trial court "was required to read the expert's report before it accepted counsel's concession as to the report's conclusion and findings." The court was the factfinder at defendant's competency hearing. At a minimum, it was required to receive and consider the expert assessment it was statutorily obligated to order and the expert was statutorily obligated to provide. While counsel may waive a defendant's right to a jury trial on the question of competency (*People v. Masterson* (1994) 8 Cal.4th 965, 975), and may submit the question of competency on the expert report alone (*People v. Weaver*, *supra*, 26 Cal.4th at pp. 903-905), he or she may not waive defendant's right to have the factfinder consider the report

and determine competency. (*People v. Marks*, *supra*, 45 Cal.3d at p. 1340.)

Defendant argues that the remedy for the procedurally improper competency hearing she received is unconditional reversal of her convictions. We disagree. In some circumstances, a limited reversal with remand for the trial court to determine the feasibility of a retrospective competency hearing is appropriate. (See *People v. Lightsey* (2012) 54 Cal.4th 668, 705-710 (*Lightsey*); *People v. Young* (2005) 34 Cal.4th 1149, 1217 fn. 16.) In *Lightsey*, the Supreme Court explained that a limited reversal and remand may be appropriate where (1) the record indicates only that defendant *might* have been incompetent but was denied a fair opportunity to establish that fact; (2) "contemporaneous evidence regarding his [or her] mental competence presumably exists"; and (3) "the passage of time since the trial, while a significant concern, does not necessarily make it impossible for a fair and reliable retrospective competency hearing to be held." (*Lightsey*, *supra*, 54 Cal.4th at p. 709.)

These factors are present here. First, nothing in the record definitively indicates that defendant was mentally incompetent to stand trial; to the contrary, she cogently participated as a witness on her own behalf and apparently persuaded the jury that she acted in imperfect self-defense or the heat of passion. Thus, "[a]n automatic full reversal with a remand for a new trial on the criminal charges would impose severe costs on the justice system in remedying a violation that, while considered a miscarriage of justice in the context of the competency proceedings, might not have affected the guilt and penalty verdicts." (*Lightsey*, *supra*, 54 Cal.4th at p. 707.) Second, even though the record does not contain an expert report, defense

counsel informed the court that defendant's mental competence had been assessed and a report was in process. Such a contemporaneous report may have been filed, or may be able to be filed upon remand. Finally, less than two years have passed since a doubt was declared as to defendant's competency. "[I]ndividuals who formed opinions on defendant's competence based on their observations of [her] mental state at that time may be available to testify at a retrospective hearing." (*Ibid.*)

Accordingly, "we see no reason not to 'at least attempt to have the trial court resolve the matter on remand.' [Citation.] If the trial court determines that conducting a retrospective competency hearing is not feasible,[4] or if a retrospective competency hearing is held at which defendant proves [s]he was incompetent by a preponderance of the evidence [citation], then the only permissible remedy would be to let stand our reversal, subject to defendant's being retried if [s]he is at that time mentally competent to stand trial. If a fair and reliable retrospective competency hearing can be conducted, and at that hearing defendant fails to prove [s]he was incompetent, the judgment will be reinstated." (*Lightsey*, *supra*, 54 Cal.4th at pp. 709-710.) [5]

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[4] Feasibility in this context means sufficient evidence is available to reliably determine defendant's mental competence at the time of her original trial. The focus of the court's determination "must be on whether a retrospective competency hearing will provide defendant a *fair opportunity* to prove incompetence, not merely whether some evidence exists by which the trier of fact might reach a decision on the subject." (*Lightsey*, *supra*, 54 Cal.4th at p. 710.)

[5] As we discuss more fully below, this procedure is acceptable here because no other reversible errors occurred

II. Speedy Trial

A. Background

Defendant and Mears proceeded to a joint trial on February 9, 2016. On February 16, 2016, Mears's retained counsel became ill. The trial was continued to February 18, 2016, and subsequently continued several more times until the trial court declared a mistrial on February 24, 2016. At a pretrial conference on April 6, 2016, the trial court relieved Mears's retained counsel and appointed the alternate public defender to represent him. The court found good cause to continue the trial date and set a new trial date of June 21, 2016.

On June 21, 2016, the court trailed the matter to June 22 because defendant was a "miss out." On June 22, 2016, defendant made a *Marsden* motion.[6] At her *Marsden* hearing, defendant explained that she wanted a new attorney because her current public defender was her fifth attorney and she wanted an attorney "who will finally fight for me and not against me." The trial court told defendant it was "sympathetic" to her situation, because "you have had several attorneys on your case and we've continued the case a number of times." The court continued, "I understand that you are waiting patiently and have been very patient. It must be extremely frustrating. I can't even imagine how frustrating and stressful your situation is. You've told me many times that you want your matter to go forward to trial, but I also know that you want to have the attorney in the best position as possible to try to settle the case for you and get a good resolution for you, or go to trial and take your best shot at trial. . . . I understand your frustration, but there's nothing in this letter

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during defendant's trial proceedings.

[6] *People v. Marsden* (1970) 2 Cal.3d 118.

that you've told me that [defense counsel] is not doing his job. He just doesn't have as much time as he would like. Their offices - - both of their offices right now are extremely short staffed."

Defendant told the court she wanted a new attorney not because "he's doing anything wrong," but because her counsel was being transferred and was "not going to be my attorney in another week or two anymore." The court explained that the case would be assigned to a new public defender and that he or she would "need a few weeks to get ready to go to trial." The court denied defendant's motion and told her, "we're going to get you another attorney, apparently, pretty soon. But prior to that, we're going to try to see if we can meet with everyone involved and try to resolve this case." Defendant asked, "The attorney that – the new attorney that I get, it won't be a state-appointed attorney?" The court responded, "Sure. It will be a state-appointed attorney." Defendant replied, "Or a public defender?" The court informed defendant that "[t]here's no such thing as a state-appointed attorney," and that public defenders were the appointed attorneys. The court then confirmed with defense counsel that a new attorney would be taking over the case.

After the *Marsden* hearing, defense counsel informed the court that his transfer was effective July 5, 2016. After holding an off-the-record discussion with counsel, the court informed defendant that "we're talking about the case returning July 15th for pretrial and the date of August 4th for a stipulated 7 of 10."

The court asked defendant if she agreed to that; she responded, "I have no choice." When the court told her she did have a choice, she said, "No. I'd like to go now, if possible." The court responded, "Well, . . . that's not possible because your attorney, Mr. Ewell, is being transferred, and we have a new

attorney coming in on the case within a couple of days." The court then reiterated to defendant, "So we're talking about starting within three days of August 4th. We'd try to start trial on the date of August 5th if we can't reach an agreement. [¶] Do you understand and agree to that?" Defendant responded, "No. I told you I feel I'm being denied my right to a speedy trial, and you won't sever our cases. I feel I'm being denied my rights. I've been in jail for 14 months."

The court consulted with counsel, and proposed calendaring the case for July 11, as day 7 of 10. When defendant's counsel remarked that he hoped his replacement could be ready that day, the court said, "If they're not ready, then Ms. Price is going to have an attorney who is not ready. She's demanding to get her case started as quickly as possible. If she wants to go to trial with an attorney who is prepared - -" Defendant interjected, "That's why I asked to you to appoint a state-appointed attorney." The court assured her, "You're getting a new attorney. He is going to be appointed, not because you asked for it, but because Mr. Ewell's office is - - he's being transferred. So the 11th is the best I can do for Ms. Price." The court asked defendant if she would agree to that date; she responded, "Yes. I have no choice." The court then set the matter for July 12 to accommodate the prosecutor's schedule, and told defendant that the prosecution "would still have, technically, up to three days after the 12th." It asked her if she understood and agreed. Defendant again stated, "Yes. I have no choice." Defense counsel joined, and the court found that defendant's time waiver was made "knowingly, intelligently, and voluntarily."

Defendant was a "miss out" at the July 12, 2016 hearing, at which deputy public defender Keenan was appointed to represent

her. Defendant appeared the following day, July 13, which was scheduled as "1 of 10" for trial. Defense counsel moved for continuance to September 28, 2016. Defendant said she would agree to that, on the condition that the court "appoint him my attorney where he would be my attorney from now on." The court and defense counsel assured defendant that her new counsel would remain on the case through trial. Defendant agreed to the continuance, and the court set the matter for trial on September 28, 2016, as day 0 of 10.

On September 28, 2016, the court declared a doubt as to defendant's competency and suspended criminal proceedings. The court reinstated the proceedings on November 17, 2016, and informed defendant that she had a right to have the trial start within 60 days, by January 17, 2017. Defendant said she understood and agreed to that.

On January 17, 2017, the case was transferred to a new department of the court for trial. The following day, Mears entered a no contest plea to an added charge of misdemeanor battery and the prosecution dismissed the felony charges against him. Defendant rejected a plea offer and proceeded to trial as scheduled, on January 17. She now contends her state and federal speedy trial rights were violated.

B. Analysis

"The Sixth Amendment to the federal Constitution, as applied to the states through the due process clause of the Fourteenth Amendment (*Klopfer v. North Carolina* (1967) 386 U.S. 213, 222-223 [ ]), guarantees a criminal defendant the 'right to a speedy and public trial.' Similarly, article I, section 15 of the California Constitution guarantees an accused the 'right to a speedy public trial.' The California Legislature has 're-expressed

and amplified' these fundamental guarantees by various statutory enactments, including Penal Code section 1382. [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 225.) Section 1382 provides in relevant part that, in a felony case that resulted in a mistrial, the trial court must order the action dismissed if a defendant "is not brought to trial" "within 60 days after the mistrial is declared," "unless good cause to the contrary is shown." (§ 1382, subd. (a) & (a)(2).) It further provides, "Whenever a case is set for trial beyond the 60-day period by request or consent, express or implied, of the defendant without a general waiver, the defendant shall be brought to trial on the date set for trial or within 10 days thereafter." (§ 1382, subd. (a)(2)(B).)

To prevail on a federal or state speedy trial claim on appeal, a defendant must demonstrate not only a violation of the right but also that he or she was prejudiced as a result of the delay. (See *Barker v. Wingo* (1972) 407 U.S. 514, 530, 532 [federal]; *People v. Johnson* (1980) 26 Cal.3d 557, 574 [state].) In the context of the federal right to speedy trial, prejudice "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect," namely "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." (*Barker v. Wingo*, *supra*, 407 U.S. at p. 532.) "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his [or her] case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past." (*Ibid.*) In the context of the state right to speedy

trial, we similarly "must 'weigh the effect of the delay in bringing defendant to trial or the fairness of the subsequent trial itself.' [Citation.]" (*People v. Johnson*, *supra*, 26 Cal.3d at p. 574.)

Even if we assume for purposes of this opinion that defendant's speedy trial rights were violated, and that she followed the proper procedures to preserve her objection on appeal (see *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 94 ["The only duty placed upon an accused in protecting his right to a speedy trial is to object when his trial is set for a date beyond the statutory period *and then move to dismiss once that period expires* . . . ."], emphasis added), she cannot prevail because she has not shown prejudice.

Defendant argues that she was prejudiced because "[t]he year and a half appellant sat in jail before her second trial impeded appellant's ability to assist her own defense because her severe memory issues would have only worsened during that time." She continues, "It is easy to imagine, therefore, that spending such a length of time in the stressful environment of the jail would have only increased appellant's memory problems and decompensation. . . . Thus, although appellant did not explicitly mention her memory loss, the long delay prior to trial potentially deprived her of her opportunity to tell the jury what happened in a more compelling way had her memory been fresher."

These speculative assertions are insufficient to demonstrate prejudice. Defendant does not point to any evidence in the record describing the nature or extent of her alleged memory problems. Nor does anything the record suggest that she was prone to decompensation or actually decompensated while in custody. Instead, the record shows that defendant was knowledgeable about her rights and spoke coherently to the court

in an effort to exercise them. It further shows that she testified about the fight, shooting incident, and her lengthy history of conflict with Teneysia without any apparent uncertainty or memory lapse. She also clearly addressed her intent, the key issue for the jury to resolve given the video evidence of the shooting. She said she did not intend to kill Teneysia or James, and shot them only because she "thought they were about to kill" Mears: "I saw the blood shooting out of his face and I thought she killed him, to be honest with you."

We recognize that "loss of memory . . . is not always reflected in the record because what has been forgotten can rarely be shown." (*Barker v. Wingo*, *supra*, 407 U.S. at p. 532.) We further recognize that defendant, like many witnesses, admitted that she was not able to "remember every detail." Yet, the evidence of guilt in this case was overwhelming, and there is no indication that bringing defendant to trial more expediently would have affected the result in any way. On the record before us, we cannot conclude that any delay deprived defendant of a fair opportunity to present her case to the jury.

III. Section 12022.5, subdivision (c)

The jury found true enhancement allegations that defendant personally used a firearm in the commission of her crimes (§ 12022.5, subd. (a)). At the time it sentenced defendant, the trial court was required to impose "an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years" for each proven allegation. (*Ibid.*) The trial court selected the midterm of four years (and, where appropriate, one-third the midterm of four years) on all four counts.

Senate Bill No. 620, effective January 1, 2018, amended section 12022.5, subdivision (c) to give the trial court, for the first time, the discretion to strike or dismiss a section 12022.5

enhancement. The amendment applies to all cases, like defendant's, not yet final on appeal when the amendment took effect. (See *People v. Chavez* (2018) 21 Cal.App.5th 971, 1020; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.)

Defendant contends that we should remand the case for the trial court to exercise its discretion under section 12022.5, subdivision (c). The Attorney General concedes the amendment is retroactive but contends remand would be futile because the record shows the trial court would not have exercised discretion to strike the enhancement. Specifically, the Attorney General argues the trial court is unlikely to strike the enhancement because it rejected defendant's argument that she should get the low term based on her lack of criminal history (the court explained, "That's why she's not getting the high term" and because defendant shot two victims. (See P*eople v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand is required "unless the record shows that the sentencing court clearly indicated that it would not . . . have exercised its discretion to strike the allegations"].)

We conclude that a remand for resentencing is appropriate, to the extent that the trial court concludes that defendant's convictions may stand after resolving the competency issue as outlined above. The court's comments at the sentencing hearing were brief and do not permit us to conclude categorically that the court would not exercise its discretion under section 12022.5, subdivision (c) to strike the enhancement. By remanding for this purpose, we are not suggesting that the court should exercise its discretion to reduce the section 12022.5, subdivision (a) enhancement or strike it entirely. We simply decline to presume that any exercise of discretion other than refusing to reduce the section 12022.5, subdivision (a) enhancement would be an abuse of discretion.

DISPOSITION

The judgment is conditionally reversed. The trial court is directed to determine whether it is feasible to hold a retrospective competency hearing, and to hold one if feasible. If the trial court finds at such a hearing that defendant was competent to stand trial, the court is directed to reinstate the judgment and resentence defendant in accordance with section 12022.5, subdivision (c).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.