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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL CORDERO et al., Defendants and Appellants.	B280146 (Los Angeles County Super. Ct. No. VA129304)

APPEAL from judgments of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed in part; reversed in part; remanded with directions.

Paul Couenhoven, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Cordero.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant Christian Calderon.

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

Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Christian Calderon and Daniel Ernesto Cordero appeal from the judgments entered on their convictions for first and second degree murder, respectively, and five firearm crimes, with firearm and gang enhancements, contending insufficient evidence supported the gang enhancements and Calderon's conviction for first degree murder, and the trial court made instructional and sentencing errors. We conclude the trial court erred in imposing certain gang enhancements, but otherwise affirm. We remand the matter for resentencing.

BACKGROUND

a. The shooting

On March 20, 2012, Roxy Borboa arrived at CM Racing shop in South Gate in a Toyota Camry driven by Jaime Torres, intending to fill a tank with nitrous oxide, which they planned to use to inhale. Also in the car were Jesse Casillas, Randy Reyes, and Ricardo Monroy. When they arrived at the shop, Torres stopped in an alley behind a black Ford Expedition. Calderon and Cordero got out of the Expedition, and Calderon approached the passenger side of the Camry and asked the group where they were from, a common gang challenge, and said this was his "hood." When Torres and the group responded that they were not from anywhere, Calderon brandished a handgun with a laser sight. He activated the laser and rolled it over the occupants of the Camry, and said, "I've got a laser for you fools," and "Whatchu got on my laser."

The occupants of the Camry persuaded Calderon to put the gun away, whereupon Cordero approached the driver's side, also

carrying a gun, and asked the Camry passengers whether they had a problem "with his homey or his neighborhood." He said he and Calderon were from "Aztlan," a street gang, and this was their neighborhood. He pressed his gun against Casillas's cheek, and told him that if there was a problem, he would pull the trigger.

Calderon and Cordero then stepped away from the Camry, and Torres accelerated quickly away.

Calderon and Cordero both fired toward the retreating vehicle. Calderon's bullet struck Borboa in the head, killing her. Cordero said, "Dome shot" (meaning gunshot to the head), and went into the shop to obtain a nitrous oxide tank.

Police recovered two .45 caliber shell casings at the scene, which had been ejected from different guns.

b. Calderon's jailhouse confession

While in jail on another charge 11 months later, Calderon told other inmates that he was from Aztlan, he had been "gang banging" since he was 12 or 13, and his nickname was Malo. Recounting an incident where he had confronted a group of people in a car and shot at the car as it drove away, he said, "I had my gun and my homey from the hood has his gun . . . . And then these fools right here in the car try to act like they're gonna pop me." "[T]hey come up to me like . . . where are you from?" "I'm like where you at, fool? I'm the hood . . . fucking rolling up on you right now, dawg . . . . Like we'll gun fling you right now . . . ." "I'm like . . . these motherfuckers caught me at a bad time. I just pulled up my burner . . . this is my fucking neighborhood, homey. Barrio Aztlan, where the fuck you foo[l]s from." "I had my 45 with a . . . beam . . . ." "I had these like laser beams . . . like, try me homey, I wish you would, homey, try it . . .

and they didn't see me cock my shit . . . ." "I'm right here on my zone." "So once they're leaving, they didn't look like they were going to spray me, but I was [thinking] give it to me, homey, and see what you're going to get back." "They bang on me, so I clipped them and I fucking bang and shit . . . ." "I ran around the truck and I . . . just put the laser on . . . the car, and I sprayed that shit." "I didn't hit anybody, but I did hit the window." "And . . . that shit shoots straight, like pow-wow-wow."

c. Cordero's police interview

Thirteen months after the shooting, Cordero told police that Calderon and at least one of the people in the Camry had argued about "gang stuff," and someone in the car yelled "Florence" as it drove away. Calderon then stood behind the car and "just shot at them," and Cordero fired a shot only in the air, for no reason. He did not shoot at the car and did not want to hit anybody.

d. Trial

At trial, several peace officers testified that Cordero and Calderon were members of the Aztlan gang. Los Angeles County Sheriff's Detective Adan Torres testified as a gang expert. Discussing gang culture, including the Aztlan gang, Torres explained that "the more respect" gang members "gain by inflicting fear upon the community or upon other gangs, the more currency they have." If gang members commit a crime together, they can corroborate each other's account to fellow gang members about their actions, which gains more respect within the gang than a lone accounting. Torres explained it is "just part of their culture" for gang members to support one another during crimes, and "[i]t would be a huge problem" if an Aztlan member assaulted someone and a fellow Aztlan member refused to help.

That member would be considered a coward, and would be expelled or "severely reprimanded."

Torres testified that Aztlan's primary activities were "[r]obbery, vehicle thefts, burglaries, drug sales, murder, assault with deadly weapons, [and] gun possessions."

When posed a hypothetical question mirroring the facts of this case, Torres stated that the crimes would benefit the gang because a gang's "stock rises within the gang community as a gang that's prone to violence and will . . . seek out other gang members and shoot them, hit people up by asking them where they're from, [and] control their territory."

The jury found Calderon guilty of first degree murder and Cordero guilty of second degree murder. (Pen. Code, § 187, subd. (a).)[1] Each was also found guilty of four counts of assault with a semiautomatic firearm and one count of shooting at an occupied vehicle. (§§ 245, subd. (b), 246.) The jury found true as to all counts that the crimes were committed to benefit a criminal street gang and involved firearms. (§§ 186.22, subd. (b)(1), 12022.5, subd. (a), 12022.53, subds. (b), (c), (d), & (e)(1).)

The trial court sentenced Calderon to a prison term of 89 years to life. It sentenced Cordero to a term of 79 years to life.

Both defendants timely appealed.

DISCUSSION

I. Evidence of the Gang's Primary Activities

Defendants contend insufficient evidence supported the jury's finding that the Aztlan gang's primary activities include crimes. We disagree.

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

Section 186.22, subdivision (b), provides a sentence enhancement for anyone convicted of a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Subdivision (f) of section 186.22 defines "criminal street gang" as "any ongoing organization, association, or group of three or more persons" that has "as one of its primary activities the commission of one or more" of 28 criminal acts enumerated in subdivision (e). Subdivision (e) lists numerous crimes, including murder, assault with a deadly weapon, robbery, and prohibited possession of a firearm. (§ 186.22, subd. (e).)

To trigger the sentence-enhancement provision of section 186.22 the trier of fact must find one of the criminal street gang's primary activities is the commission of one or more of the crimes listed in subdivision (e) of that section. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*Id*. at p. 323.) Both past conduct and the circumstances of the charged offense are relevant to establish a group's primary activities. (*Ibid*.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently* and *repeatedly* have committed" one or more of the enumerated crimes. (*Id*. at p. 324.) "Also sufficient might be expert testimony, as occurred in [*People v. Gardeley* (1996)] 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had

for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies." (*Ibid.*)

We review the whole record in the light most favorable to the judgment to decide whether the record discloses substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the gang allegation true beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Here, Detective Torres testified he had worked and spoken with gang detectives as a Los Angeles County Sheriff's deputy; had received about 24 hours of training regarding gangs; had worked for about two and a half years in a gang intelligence bureau; and identified and dealt with gang members, including learning who the leaders were. He also worked for seven years as a patrol deputy at the Century Station, where Aztlan was one of the "target gangs," worked in a gang unit again, and attended two or three 40-hour classes regarding gang culture. Torres testified Aztlan's primary activities were "[r]obbery, vehicle thefts, burglaries, drug sales, murder, assault with deadly weapons, [and] gun possessions." This sufficed to establish that Aztlan's primary activities included commission of enumerated crimes.

Relying on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*), defendants argue that Torres's testimony was unreliable because it was conclusory and lacked foundation. In *Alexander L.*, a gang expert responded to an inquiry about the primary activities of the defendant's gang, stating: " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I

know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' " (*Id*. at p. 611.) The appellate court found this evidence failed to establish the nature of the gang's primary activities, explaining: "No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information. He did not directly testify that criminal activities constituted [the gang's] primary activities." (*Id*. at pp. 611-612.) The court continued: "Even if we could reasonably infer that [the expert] meant that the primary activities of the gang were the crimes to which he referred, his testimony lacked an adequate foundation." (*Id*. at p. 612.) "We cannot know whether the basis of [his] testimony on this point was reliable, because information establishing reliability was never elicited from him at trial. It is impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay." (*Ibid*.)

A similar issue was addressed in *People v. Martinez* (2008) 158 Cal.App.4th 1324 (*Martinez*). In that case, a gang expert, who had spent most of his 14 years in law enforcement dealing with gangs, testified that he was familiar with the defendant's gang "based on regular investigations of its activity and interaction with its members." (*Id*. at p. 1330.) He testified that the gang's primary activities included robbery, assault, theft, and vandalism. He also testified about two predicate offenses, both robberies. (*Ibid*.) Relying on *Alexander L.*, *supra*, 149 Cal.App.4th 605, the *Martinez* defendant asserted that the gang expert's testimony lacked foundation and was therefore insufficient to establish the "primary activities" element.

(*Martinez*, *supra*, at p. 1330.) The appellate court rejected the argument. It explained that in *Alexander L.*, "the expert never specifically testified about the primary activities of the gang. He merely stated 'he "kn[e]w" that the gang had been involved in certain crimes. . . . He did not directly testify that criminal activities constituted [the gang's] primary activities.' " (*Martinez*, *supra*, at p. 1330.) In contrast, the *Martinez* expert had both training and experience as a gang expert and specifically testified as to the gang's primary activities. Moreover, his experience dealing with gangs, which included investigations and personal conversations with members and reviews of reports, was deemed sufficient "to establish the foundation for his testimony." (*Ibid.*)

Here, Detective Torres's testimony as to his background, training, and education in the area of criminal street gangs, together with his day-to-day experience dealing directly with gang members and with other officers regarding their own gang investigations, established a foundation for his testimony as to the nature of Aztlan's activities. We therefore conclude Torres's testimony provided substantial evidence to support the jury's finding that Aztlan's primary activities include the commission of crimes enumerated in section 186.22, subdivision (e).

II. Evidence of Calderon's Premeditation

Calderon contends insufficient evidence supported the jury's conclusion that the murder of Borboa was premeditated, and thus the judgment of his conviction must be modified to reflect a conviction for murder of the second rather than first degree. We disagree.

The crime of first degree murder requires proof that the defendant acted with deliberation and premeditation. (§ 189.) Deliberation is the careful weighing of considerations in forming

a course of action. (*People v. Salazar* (2016) 63 Cal.4th 214, 245.) Premeditation means "thought over in advance." (*People v. Sandoval* (2015) 62 Cal.4th 394, 424.) Deliberation and premeditation can be shown by a defendant's motive, his prior planning, or the manner in which he commits a crime. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) "Premeditation can be established in the context of a gang shooting even though the time between the sighting of the victim and the actual shooting is very brief." (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.)

Substantial evidence supports the jury's finding that Calderon shot Borboa with deliberation and premeditation. He had a motive to attack her because to do so would serve the purposes of his gang. As he admitted to a fellow inmate, "once they're leaving, they didn't look like they were going to spray me, but I was [thinking] give it to me, homey, and see what you're going to get back." And on the day of the attack he came prepared with a semiautomatic handgun, which he had to have taken the time to load, and before the shooting he had to deliberately charge a round by working the slide. (See *People v. Salazar*, *supra*, 63 Cal.4th at p. 245 [bringing a loaded gun to a crime scene demonstrates preparation; cocking the gun suggests deliberation, as does shooting it at close range].) Finally Calderon fired at Borboa from close range. (*People v. Perez* (2010) 50 Cal.4th 222, 230 ["a rational trier of fact could find that defendant's act of firing a single bullet at a group of eight persons from a distance of 60 feet established that he acted with intent to kill *someone* in the group he fired upon"].)

From this evidence the jury could reasonably conclude the shooting was premeditated and deliberate.

III. Defendants' Opportunity to Present Mitigating Evidence at Sentencing

"When a prisoner committed his or her controlling offense . . . when he or she was 25 years of age or younger, the [Board of Parole Hearings], in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

Defendants argue that because Calderon was 22 years old when he murdered Borboa and Cordero was 21, and they will be entitled to youthful offender parole hearings during the 25th year of their sentences, they are entitled to a limited remand to provide information relevant for those eventual hearings. (§§ 3051, 4801, subd. (c); *People v. Franklin* (2016) 63 Cal.4th 261, 269 (*Franklin*).) We disagree.

In *Franklin*, the court held that a youthful offender (such as Calderon) who is serving lengthy sentences but is eligible for a youthful offender parole hearing in the 25th year of incarceration under sections 3051, 3046, subdivision (c), and section 4801 should have "an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination" under section 3051. (63 Cal.4th at p. 286.) Because it was "not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing," the court "remand[ed] the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his

eventual youth offender parole hearing. [¶] If the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Id.* at p. 284.)

Here, defendants were sentenced more than seven months after *Franklin* was decided. At the sentencing hearing, defense counsel filed no written sentencing memorandum and mentioned no age-related mitigating circumstances, but requested that any sentences imposed be concurrent.

On this record it cannot be said, in the language of *Franklin*, that it is unclear "whether [defendants] had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (63 Cal.4th at p. 284.) *Franklin* was decided more than

seven months before the sentencing hearing. Nothing in the record suggests defense counsel failed to understand the decision or had insufficient time to gather requisite evidence. Thus, there is no need to "remand the matter to the trial court for a determination of whether [defendants were] afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid.*)

Calderon contends in the alternative that his attorney was ineffective for not creating a record for use at a youthful offender parole hearing.

"To prevail on a claim of ineffective assistance of counsel, a defendant ' "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.' " [Citation.] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.] Moreover, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

Here, nothing in the appellate record suggests defense counsel failed to render reasonable professional assistance, or that defendants suffered any prejudice. Although defendants committed the murder when they were 21 and 22, there is no basis to infer that any mitigating youthful offender evidence existed or would have revealed helpful evidence relevant to their maturity level or other youth-related factors. Nor is there any basis in the record to conclude that family members, friends, or other persons would have provided evidence that would aid them in their future youthful parole hearing. For the same reason, there is no basis to conclude that had defense counsel produced some age-related evidence, a record more favorable to defendants would have been created. We note that if other favorable evidence exists or develops, defendants will have the opportunity to present it at the parole hearings. (See § 3051, subd. (f).) Therefore, we conclude that defendants have failed to prove that their attorneys were ineffective.

IV. Aider and Abettor Instruction

As the prosecutor admitted at trial, Cordero's shot did not kill Borboa—"he missed." The prosecution relied on two separate theories to argue Cordero was guilty of murder: He aided and abetted the murder itself, or he aided and abetted the assault that naturally and probably resulted in the murder. The trial court instructed the jury on both theories, and the jury found him guilty of second degree murder without specifying which theory it credited.

Cordero concedes that evidence was sufficient to support his conviction under the natural and probable consequences doctrine, but argues there was no basis upon which to instruct the jury on direct aiding and abetting of the murder itself. He

argues that the jury may have based its verdict on that unsupported theory. (See *People v. Chiu* (2014) 59 Cal.4th 155, 167 ["When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground"].) We disagree.

A person aids and abets the commission of a crime when he, with knowledge of the unlawful purpose of the perpetrator, and with the intent or purpose of committing, facilitating, or encouraging commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) A person who aids and abets the commission of a crime or advises and encourages its commission is a principal in the crime and shares the guilt of the actual perpetrator. (§ 31.) This doctrine "snares . . . in the net of criminal liability" every person "who intentionally contribute[s] to the accomplishment of the crime," even if some of those people do not "personally engage in all the elements of the crime." (*People v. Morante* (1999) 20 Cal.4th 403, 433.) "Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054.)

A gang member who participates in a gang-related murder committed by another gang member is an aider and abettor of the murder. (*People v. Nguyen*, *supra*, 61 Cal.4th at p. 1055; *People v. Gonzales* (2011) 52 Cal.4th 254, 295-296; *People v. McDaniels* (1980) 107 Cal.App.3d 898, 904.)

Here, Cordero approached Borboa's Camry with Calderon. They harassed the occupants of the car in tandem, flourished

guns, and shot at it. This was ample evidence that Cordero aided and abetted the murder.

V. Restitution

The trial court ordered defendants to pay restitution, but did not expressly state whether each defendant's liability was joint and several. Calderon urges us to modify the abstract of judgment to state that defendants' restitution liability is joint and several. We decline to do so because restitution liability is joint and several by operation of law, rendering such a modification unnecessary. (See § 1202.4 [defendant entitled to pro rata refund of restitution overpayment]; *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1100 [a court need not order that victim restitution be paid jointly and severally by multiple defendants].)

VI. Corrections to Cordero's Sentence

Cordero argues, and Respondent concedes, that the trial court erred in imposing gang enhancements on Cordero's convictions for murder and shooting at a vehicle, because those enhancements may not be imposed on a person who does not personally use or discharge a firearm in commission of the offense, and Cordero's guilt on those charges was determined to be vicarious, not direct. (§ 12022.53, subd. (e)(2).) We agree, and will order that the enhancements be stricken. (*People v. Brookfield* (2009) 47 Cal.4th 583, 595-596.)

VII. Correction to Calderon's Sentence

In supplemental briefing, Respondent argues, and Calderon agrees, that the trial court erred in imposing a gang enhancement sentence of Calderon's murder conviction, and instead should impose a 15-year minimum parole eligibility period pursuant to section 186.22, subdivision (b)(5). We agree.

(*People v. Lopez* (2005) 34 Cal.4th 1002, 1004-1007 [gang enhancement under section 186.22, subd. (b)(1)(C) does not apply when the underlying felony is punishable by life imprisonment].)

Respondent also argues, and Calderon agrees, that the trial court incorrectly imposed and stayed a five-year gang enhancement on the shooting at a vehicle conviction, when the actual term should be 10 years, and further improperly imposed and stayed a 10-year gun enhancement, when the actual term should be 25 years to life. (§§ 186.22, subd. (b)(1)(C), 12022.53, subd. (d).)

VIII. Resentencing Under Senate Bill No. 620

When sentencing defendants, the trial court imposed a 25 years to life gun enhancements pursuant to section 12202.53, subdivision (d), because the jury found that defendants personally and intentionally used and discharged firearms that caused great bodily injury and death. At the time of sentencing, the trial court lacked authority to strike or dismiss enhancements under section 12022.53. (See, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363, citing former § 12022.53, subd. (h).)

Before defendants had exhausted all of their opportunities to challenge the trial court's judgment in reviewing courts, the Legislature amended section 12022.53 to provide that 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." (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 2.)[2] The amendment went into effect on January 1, 2018. (See Cal. Const., art. IV, § 8, subd. (c).)

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[2] Under section 1385, the court "may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed,"

In further supplemental briefing, defendants contend the statute requires that the trial court be given an opportunity to strike their firearm enhancements. We agree.

Generally, amendments to the Penal Code do not apply retroactively. (See § 3.) Our Supreme Court has, however, recognized an exception for amendments that reduce the punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*); accord, *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) The *Estrada* court explained that when the Legislature has reduced a crime's punishment, it has "expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*In re Estrada*, *supra*, 63 Cal.2d at p. 745.) The Court inferred that "the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Ibid.*) To "hold otherwise," the Court concluded, "would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Ibid.*)

The Supreme Court has extended the *Estrada* holding to amendments that do not *necessarily* reduce a defendant's punishment, but which give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; see *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308.) Defendants contend that under this case law, Senate Bill No. 620

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and generally, "to strike or dismiss an enhancement" or "strike the additional punishment for that enhancement." (§ 1385, subds. (a) & (c); see *People v. Meloney* (2003) 30 Cal.4th 1145, 1155.)

applies retroactively to defendants in their position. Respondent concedes that defendants are correct, and we agree.

Nevertheless, Respondent argues that we need not remand defendants case for resentencing because upon remand, the court would not exercise its discretion to reduce their sentences. Respondent cites *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), in which the defendant requested that his case be remanded to the trial court for resentencing after our Supreme Court decided in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 that trial courts have discretion to strike prior strikes in determining a defendant's sentence. The court in *Gutierrez* rejected the defendant's request, noting that "the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the three strikes law, by imposing the high term . . . and by imposing two additional discretionary one-year enhancements. Under the circumstances, no purpose would be served in remanding for reconsideration." (*Gutierrez*, *supra*, at p. 1896.)

Respondent argues that, by the same reasoning, there is no need to remand defendants' case. They point out that when imposing sentence the trial court stated, "It was an absolutely wanton, willful disregard for the humanity and life of everyone within the realm of the firing. There was no provocation by anybody, nothing to justify any of the conduct other than the warped mind frame of each [defendant] which, to this court, remains a mystery." Respondent argues it would be an abuse of discretion for the trial court to strike defendants' firearm enhancements in this situation, and based on the trial court's

comments, the reasonable inference is that the court would not do so in any event. Thus, "[u]nder the circumstances, no purpose would be served in remanding for reconsideration." (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.)

We are not persuaded. In *Gutierrez*, the trial court stated during the initial sentencing hearing that " 'this is the kind of individual the law was intended to keep off the street as long as possible,' " and indicated that it would not have exercised its discretion to lessen the sentence. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) In the current case, the court did not state or imply that it would have imposed the firearm enhancement even if it had the discretion not to do so.

Furthermore, because the law at the time of sentencing did not allow the trial court to strike firearm enhancements, defendants had no reason to argue that the court should strike their enhancements. As our Supreme Court explained in a somewhat similar circumstance in *People v. Rodriguez* (1998) 17 Cal.4th 253, 258 "[t]he evidence and arguments that might be presented on remand cannot justly be considered 'superfluous,' because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion." (*Ibid.* [requiring the presence of defendant and counsel at a hearing in which the court would determine whether it could reasonably exercise its discretion to strike a prior strike].)

DISPOSITION

The judgments are vacated as to all enhancements imposed and the matter is remanded to afford the trial court an opportunity to correct certain enhancements as discussed above

and to reconsider its firearm enhancements. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.