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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CHRISTOPHER AGUIRRE et al.,<br><br>Defendants and Appellants. | C077490<br><br>(Super. Ct. No. 12F00561) |

Defendants Christopher Aguirre, Alfonso Rodriguez Carrillo, Jr., and Jorge Martinez were convicted by a jury of charges arising from a series of armed robberies of Carl's Jr., Burger King, U-Haul, and MetroPCS establishments in December 2011 and January 2012. On appeal, each defendant challenges the sufficiency of the evidence supporting the verdicts on one issue. Aguirre contends that substantial evidence does not support his conviction for aiding and abetting assault with a firearm in the shooting of a

MetroPCS employee by Martinez. (Penal Code, § 245, subd. (a)(2).)[1] Carrillo contends substantial evidence does not support the finding that he personally used a real, as opposed to a replica, firearm in the robberies. (§ 12022.53, subd. (b).) Martinez challenges the finding that he personally used a firearm in the robbery of one of the four victims at the U-Haul store. (§ 12022.53, subd. (b).) We reject these contentions and affirm the verdicts.

In addition, Martinez and Carrillo seek remand for the trial court to exercise its discretion to strike the firearm enhancements under the amendment to section 12022.53, subdivision (h), enacted by Senate Bill No. 620 (2017-2018 Reg. Sess.). The People agree that the amendment is retroactive and remand is appropriate for Carrillo. However, the People oppose remand for Martinez, arguing that the trial court is unlikely to exercise its discretion in his favor. We agree. Remand will be limited to Carrillo.

The People also agree with Carrillo's contention that we should remand for the trial court to afford Carrillo, 18 years old at the time of the crimes, a sufficient opportunity to make a record for a youth parole hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). We will remand to the trial court for this purpose, as well.

Finally, in supplemental briefing, Martinez seeks remand under an amendment to section 667, subdivision (a), and section 1385, enacted by Senate Bill No. 1393 (2017-2018 Reg. Sess.), giving the trial court discretion to strike a five-year sentence imposed for a prior serious felony conviction. The People agree that this amendment is also retroactive to this case but oppose remand for the same reason as for remand under Senate Bill No. 620. We agree and remand is denied.

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[1] All undesignated statutory references are to the Penal Code.

## FACTUAL AND PROCEDURAL BACKGROUND

On December 12, 2011, Daniel Morales, the night shift manager at a Carl's Jr. on Folsom Boulevard, was opening the safe at approximately 6:00 a.m. Three men came in and ordered a customer to get down on the floor. Two of the men were wearing hoodies and bandannas and one just had on a hoodie. One man had a silver pistol and the other a black pistol. The guns looked real. The black gun looked like a small nine millimeter to Morales. The men told the Morales to go to the safe. One of the men took all the money in the safe.

On December 12, 2011, the general manager of the restaurant, Maria Segura, reviewed surveillance video from the robbery and recognized Martinez. Martinez had worked for her at this Carl's Jr. location in 2006 or 2007. Martinez had a way of walking hunched down that was different from everybody else. In the video, Martinez was wearing gray tennis shoes, which Segura had seen him wearing in a post on Facebook.

On December 19, 2011, Karen Gomez was working at a MetroPCS store on Florin Road in Sacramento when two men walked in. One of the men came up to the counter and one walked around the counter. Both men took guns out. One pointed his gun at Gomez's face and the other poked a gun in her ribs. They asked for the most expensive phones. Neither man had any covering over his face. The man at the counter was doing all the talking. His gun was dark gray or black and medium-sized. At trial, Gomez identified Martinez as the man who pointed a gun straight at her.

Martinez said, "Bitch don't talk. Don't move." After asking for phones, he demanded money and Gomez opened the register. The man behind the counter took the money. They told Gomez to get on the floor and not look at them. The men took some phones and accessories as they were leaving.

On January 10, 2012, Gomez went to the Sacramento County jail and viewed a live lineup of five men. She identified Martinez as the man who pointed a gun at her face.[2]

On December 23, 2011, around 6:00 a.m., two men walked into a Carl's Jr. restaurant on Sunrise Boulevard. The general manager, Monica Lopez, was behind the counter. One of the men asked for a cup of coffee and, when Lopez tried to get a cup, one of the men went to the back and the other pulled a gun out of his sweatshirt pocket and held it to her head. At trial, she said she thought the gun was black. He told her to open the safe. She tried to open the safe but at first the code she entered was wrong. The man was yelling, "Open the safe. I don't want to hurt you. Just open the safe." Lopez was able to open the safe, the man took the money from the safe and from three registers.

At trial, Lopez identified Carrillo as the man with the gun who told her to open the safe.

At about 7:30 in the morning on December 23, 2011, Ralph Horton, a cashier at a Burger King in Galt, was putting away stock when he noticed a man in a hooded sweatshirt and asked if he needed help. The man told him to "open the fucking safe." The man produced a gun from the pocket of his sweatshirt. The gun was black metallic and looked real. The man pointed the gun at Horton's chest. The man's face was not covered. In a photo lineup put together by police, Horton said he was 100 percent sure that the photo of Carrillo was one of the robbers. At trial, Horton identified Carrillo as the man who pointed a gun at his chest. Horton raised his hands and went into the office to see if the safe was open. The safe was not open and Horton said he could not open it. One of the men told Horton to get down on the floor.

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[2] Gomez was not able to identify the other man in a photo lineup.

The assistant general manager, Hermelinda Morales, told the men she could open the safe. One man had his face covered and one did not. The one whose face was not covered told her to open the safe. He had a pistol in his hand pointed at her. She didn't notice if it looked like a real pistol. Morales opened the safe. The man holding the gun told the other man to put the money in a trash can when Morales said she did not have a bag. At trial, Morales testified that she would not be able to recognize either of the men if she saw them again.

On December 28, 2011, two men came into a U-Haul store on El Camino in Sacramento. David Hartman was behind the counter helping a customer. One of the men approached the counter, pulled a bandanna up over his face, pointed a gun at Hartman's head, and said, "Give me the money. Where's the safe?" The gun was a short, black handgun. Hartman said he did not have access to the safe. The man said, "Open the drawers." Hartman opened a drawer with a key and the man told him to put the money in a plastic bag. The man told him to open the other drawers. The man came up close to Hartman and said, "Don't make a move or I'll shoot you in your face." Hartman opened the other drawers. The man told Hartman to get down on the floor and he did. The man said, "Don't try to follow us. Don't get up or I'll shoot you. We'll come back."

On January 10, 2012, Hartman went to a live lineup at the Sacramento County jail. He asked each individual to say, "Give me the money. Where's the safe?" and "If you reach for anything, I will shoot you." Hartman identified Martinez as the man who came up to him at the counter.

That day William Cowan was also working at the U-Haul store on El Camino.[3] He remembered one man being at the end of the front counter and one at the back of the

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[3] Cowan initially testified the store was robbed by three people that day but then testified he could not remember how many people came in the store. Surveillance video showed two people.

store. Cowan was standing next to Hartman behind the counter. The man at the counter put on a blue mask and told Cowan to get on the ground. Cowan saw one gun that looked like a BB gun because of the small hole in the barrel. As the men left, they told everyone to stay down or they would blow the place up.

During the robbery, Linda Breault, a U-Haul driver, was in the back office when she heard a commotion in the front. Breault could hear everything that was happening at the counters because she was right behind the wall. She could hear a man saying, "Open the register," and Hartman saying, "Okay, man" in a frantic voice. Breault tried to call 911 using a phone on the wall but the call didn't go through. She tried to call 911 on her cell phone. A young man came to the back, grabbed her phone, and ordered her to open the safe. He had a gun in his right hand. It was grayish black and had a little chip at the barrel. Breault told him she did not have a key to the safe and jiggled the handle to show him it was locked. The man turned around and left. She heard someone say, "Don't come out the front door." Breault found her cell phone on the floor to the right of the front door.

On January 3, 2012, a detective showed Breault a photo lineup. She had a hard time picking out the young man because she had been focused on the gun.

Donald Thomas was a customer in the U-Haul store on El Camino at the time of the robbery. He testified two men walked into the store. One of the men went to the counter and one approached Thomas. The man had a black gun about 10 inches in size. The gun was very small, possibly a .22 caliber. The man asked for money in a calm voice. Thomas threw his wallet on the ground and the man asked him to pick it up. Thomas gave him a $100 bill. The man was holding the gun against his body. He had on a baseball cap worn low. The man at the counter was more aggressive, yelling give me the money and get down, and pointing his gun at someone's head. He had a gun that was "boxy like a Glock."

On January 3, 2012, Thomas went to a police station and viewed a photo lineup. Thomas identified Carrillo as the man who approached him.

On December 28, 2011, Eduardo Piñon was working as the manager of a MetroPCS store on Power Inn Road. He was about to close up early when two men came in. He was at the counter counting the money. The men were "all covered up" with hoodies, hats, glasses and bandannas. One man came up fast to the counter and pointed a gun at Piñon. The other man followed and pointed a gun at Piñon's face. The first man went in the back to the safe, grabbed something, and came back. He asked where the money was and Piñon told him his boss had taken it because he was closing early that day. The second man was pointing a gun at Piñon's face and telling him to open the safe or he would shoot him.[4] Piñon told the second man that his boss had come in about an hour ago and taken the money. The second man opened the register and found about $35. He said, "Why you lying?" to Piñon. He told Piñon to lie down or he would shoot him. As they were walking out, the first man said, "This is for you," and shot Piñon. The bullet went through his calf and out his ankle. The men ran to a car. Piñon saw that one of them dropped a white cell phone.

A police officer located the cell phone on the ground. There was an incoming call on the phone from "China" with a picture of a Hispanic man and woman. From the phone number of the call, police obtained the address of an apartment on La Rivera Drive associated with Cyndia Garcia and Carrillo. Police obtained photos of Garcia and Carrillo that matched those on the phone.

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[4] Piñon testified the second man's gun looked like a smaller black .22 gun. He said that "both guns looked like .22s, smaller guns that's what they looked like to me. I actually never seen a real gun in live [*sic*] besides TV and shows like that." When asked if the guns "look[ed] real," Piñon testified, "It looked like a BB gun," and "[a] BB gun just looks normal I guess. I don't know. Just like a regular airsoft BB gun." On cross-examination, Piñon admitted that his statement about whether or not the guns were real was just a guess.

Video surveillance from the parking lot where the cell phone was found showed a red Pontiac Sunfire parked in front of the MetroPCS store. The video showed a person getting out of the right front passenger door and another getting out of the right rear passenger door. A third person remained in the driver's seat. The red car appeared to be the same car shown in video surveillance of the U-Haul robbery. Clothing worn by the men involved in the robberies at both locations appeared to be the same.

Police officers drove to the La Rivera Drive address looking for the red Pontiac. They saw three people leave the apartment and get into a white SUV; one was Aguirre. Police detained all three at gun point.

Garcia testified that she grew up with Carrillo. She started dating Carrillo when she was 16. She met Aguirre, known as "Shorty," when she was 18 or 19. Garcia identified Aguirre in court by that name. She also knew Martinez, known as "Drifter," and identified Martinez in court as the person who went by that name.

In December 2011, Carrillo sometimes stayed at Garcia's apartment on La Rivera Drive. On December 28, 2011, Garcia borrowed her mother's car to drive from her mother's house to her apartment with a friend and her sister. She found the apartment "trashed" and called Carrillo to clean it up. When he arrived, Garcia told Carrillo to go get the women something to eat while they cleaned the apartment. Carrillo, Martinez and Aguirre left in Garcia's mother's car. They were gone for a long time. Garcia called Carrillo about a half hour after they left. He said he was at a store buying something for a friend. When Carrillo, Martinez and Aguirre came back with the car, they had no food. Garcia heard them out on the patio arguing. Aguirre told Carrillo, "You fucked up." Garcia's mother called her to bring the car back. As Garcia was driving back to her mother's house, she got a call from Carrillo on someone else's phone saying that he had lost his cell phone and asking her to search the car for it. Garcia looked for the phone but

could not find it. Then Martinez called Garcia and cursed at her for not finding the lost phone.[5]

On December 29, 2011, a detective searched the La Rivera Drive apartment pursuant to a warrant related to the U-Haul and MetroPCS robberies the previous day. The detective was looking for clothing and other items seen in surveillance video from the robberies. The detective recovered a pair of green gloves, a black-and-white checked shirt, and a fedora hat that the men robbing the U-Haul and MetroPCS stores were shown wearing in video surveillance. The detective also found a box for a MetroPCS phone and a black handgun. A detective assisting in the search documented that a nine-millimeter handgun was found on the coffee table and a replica gun on the floor.

A detective testified that a replica gun typically has an orange tip to distinguish from an actual gun. The tip of the gun found at the apartment had been broken off and was lying on the floor. The detective testified that she would not be able to immediately identify the replica gun as a replica. From a distance of six feet, it would appear to be a small black handgun.

The same day a detective interviewed Garcia. Garcia confirmed that the red car seen in the U-Haul and MetroPCS surveillance video was her parent's car. Garcia stated that when Carrillo, Martinez and Aguirre left with the car, Carrillo was in the driver's seat, Aguirre was in the front passenger seat, and Martinez was in the back seat. When they came back hours later, Aguirre had turned his sweatshirt inside out; it looked like a different color.

On December 30, 2011, a detective searched Garcia's mother's car and recovered a December 28, 2011 receipt from a Carl's Jr. restaurant near the U-Haul store robbed that day. The time on the receipt was 25 minutes prior to the robbery. Surveillance video

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[5] MetroPCS records from December 28, 2011, documented calls between cell phones belonging to Martinez, Carrillo, Aguirre and Garcia.

of the drive-thru window of the Carl's Jr. at that time showed a red car with the same license plate number as the car seen in surveillance video from the U-Haul and MetroPCS robberies. The person seen sitting in the driver's seat had face tattoos. The employee who was working the drive-thru window on December 28, testified that the driver had "a lot of facial tattoos." At trial, the employee identified Aguirre as the driver of the car.

On January 2, 2012, Rosa Coronado was working with Daniel Morales at the Carl's Jr. on Folsom Boulevard. Coronado heard Morales say, "Again," and saw two people, one with a weapon and one without a weapon coming towards Coronado. The man without a weapon pointed to the shape of a gun under his sweatshirt, but Coronado did not see the gun. The other man pointed a gun at Morales. Coronado was going to use her phone to call 911 but the man by her said, "Don't move." Morales opened the safe; the men took the money and ran out.

Daniel Morales testified that the second robbery occurred at about 6:00 a.m. when he was following the same routine as during the first robbery. One of the men said, "You know what time it is." From his voice, his body size, his eyes and the way he took charge, the man appeared to be the same one who had robbed the restaurant in December. Morales smiled, finding it hard to believe that he was being robbed again just two weeks later. The man said, "I'm not playing," and cocked his gun. The man had the same small black handgun. Morales opened the safe. Morales had to explain there was an inner safe and an outer safe and the inner safe has a 10-minute delay before opening after the code is entered. The man had Morales put the money in the trash can. The men told him to lie down and ran off.

At a live lineup at the county jail on January 10, 2012, Daniel Morales identified Martinez as the robber both times after having each man say, "You know what time it is."

On January 4, 2012, Martinez was arrested after a high-speed chase on Highway 99 and surface streets south of Sacramento. On March 27, 2012, a CalTrans worker found a .22-caliber handgun on the shoulder of Highway 99 in the area of the pursuit.

Police officers learned from Martinez's mother that he had been staying at his sister's apartment on Mack Road. Officers obtained a search warrant and searched the apartment. A key taken from Martinez after the chase fit the apartment door lock. Among other items, officers recovered .22-caliber bullets, a trash can, receipts from an armed money transport company, Carl's Jr. gift cards, cash register drawers and a letter to "Shorty."

In March and June 2012, Aguirre made a series of telephone calls to his girlfriend urging her to assault her friend Garcia or tell her to go to Mexico to keep her from testifying against him.

The jury convicted Aguirre of robbing Hartman, Cowan, Breault and Thomas at the U-Haul store (§ 211, counts one through four), robbing and assaulting Piñon with a firearm at the MetroPCS store (§§ 211, 245, subd. (a)(2), counts five & six), and attempting to dissuade a witness from testifying (§ 136.1, subd. (a)(2), count seventeen). The jury found true that Aguirre was a principal in an armed robbery (§ 12022, subd. (a)(1)). Aguirre was also convicted of assaulting an inmate in jail (§ 245, subd. (a)(4), count sixteen).[6]

Carrillo was convicted of robbing Hartman, Cowan, Breault and Thomas (§ 211, counts one through four), assaulting Piñon with a firearm (§ 245, subd. (a)(2), count six) robbing Lopez at Carl's Jr. (§ 211, count seven), and robbing Horton and Hermelinda Morales at Burger King (§ 211, counts fourteen & fifteen). The jury found true that Carrillo was a principal in the armed robbery at U-Haul (§ 12022, subd. (a)(1)) and personally used a handgun in the U-Haul, Carl's Jr. and Burger King robberies

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[6] We omit a summary of the facts and evidence regarding this charge as irrelevant to the issues on appeal.

(§ 12022.53, subd. (b)).[7] Carrillo was convicted with Aguirre of assaulting an inmate in jail (§ 245, subd. (a)(4), count sixteen).

The jury convicted Martinez of robbing Hartman, Cowan, Breault and Thomas (§ 211, counts one through four), robbing and assaulting Piñon with a firearm (§§ 211, 245, subd. (a)(2), counts five & six), robbing Gomez at MetroPCS (§ 211, count nine), robbing Daniel Morales at Carl's Jr. the first time (§ 211, count ten), robbing Coronado and Morales the second time at Carl's Jr. (§ 211, counts eleven & twelve), and evading police (§ 2800.2, subd. (a), count thirteen). The jury found true that Martinez was a principal in the armed robberies of Hartman, Cowan, Breault, Thomas and Piñon (§ 12022, subd. (a)(1)) and Martinez personally used a handgun (§ 12022.53, subd. (b)). The jury also found true that Martinez personally used a handgun in robbing Gomez and in robbing Daniel Morales the second time (§ 12022.53, subd. (b)).[8] In the robbery of Piñon, the jury found true that Martinez was a principal in an armed robbery (§ 12022, subd. (a)(1)), personally used a firearm (§ 12022.53, subd. (b)), and discharged a firearm (§ 12022.53, subd. (c)). Martinez waived jury trial on the allegation that he had a prior serious felony conviction, which the trial court then found to be true. The court denied Martinez's motion to strike the prior conviction.

The court imposed total state prison sentences of 15 years on Aguirre, 37 years, eight months on Carrillo, and 72 years, four months on Martinez.

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[7] The jury did not return a verdict for Carrillo on count five and count eight (robbery of Edgar Castillo at Carl's Jr. on December 23, 2011).

[8] Counts one through six included criminal street gang enhancements. The jury found the enhancements to be not true against all defendants. Accordingly, we also omit a summary of the gang expert evidence presented.

## DISCUSSION

### I. Sufficiency of the Evidence Claims

*Standard of Review*

Aguirre contends there is insufficient evidence to support his conviction of assault with a firearm (§ 245, subd. (a)(2)). Carrillo and Martinez challenge the sufficiency of the evidence to support gun use enhancements (§ 12022.53, subd. (b)).

In a challenge to the sufficiency of the evidence supporting a conviction, " 'we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict. [Citation.]' " (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The standard is the same in cases where the prosecution relies on circumstantial evidence. (*People v. Alexander* (2010) 49 Cal.4th 846, 917.)

"We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction." (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1058 (*Carrasco*).)

*Aguirre's Conviction of Aiding and Abetting Assault with a Firearm*

Aguirre contends the evidence is insufficient to support his conviction for assault with a firearm on Piñon at the MetroPCS store. Aguirre does not dispute that he was the driver of the car waiting outside, as he also was in the U-Haul robbery, while Carrillo and Martinez robbed Piñon, who was shot as they were leaving. Aguirre acknowledges that the evidence shows that he "aided and abetted the robbery of Pinon [*sic*] at the Metro PCS store by driving Carrillo and Martinez to the store and then leaving with them after the robbery." However, Aguirre argues the evidence was that he "remained at all times inside the vehicle while Carrillo and Martinez were inside the store." Therefore, "[a]lthough there was evidence that [Aguirre] knew a robbery would occur, there was no evidence that before or during the commission of the crime of assault with a firearm he intended to aid and abet the gunman in shooting Pinon [*sic*]."

Distilled to its essence, Aguirre's claim is that there was insufficient evidence that he, as the getaway driver for an armed robbery, aided and abetted a shooting that occurred in the course of the robbery. We disagree.

The trial court instructed the jury with CALCRIM Nos. 400 and 401 on aiding and abetting as follows: "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is guilty of a crime whether he committed it personally or aided and abetted the perpetrator." (CALCRIM No. 400)

"To prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone *aids and*

*abets* crime if he knows the perpetrator's unlawful purpose and he specifically intends to, and does in fact aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor." (CALCRIM No. 401.)

In sum, "[t]o establish aiding and abetting, 'the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." [Citation.]' " (*People v. Mullins* (2018) 19 Cal.App.5th 594, 606; *People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*).) Thus, " 'an aider and abettor is a person who, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." [Citations.]' " (*Mullins, supra*, 19 Cal.App.5th at p. 606; *Prettyman, supra*, 14 Cal.4th at p. 259.)

Whether Aguirre aided and abetted a crime is a question of fact, and on appeal all conflicts in the evidence must be resolved in favor of the judgment. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) Neither presence at the scene of the crime or knowledge of but failure to prevent it is sufficient to establish aiding and abetting of the crime. (*Ibid.*) However, presence at the scene of the crime, companionship with the perpetrator, and conduct before and after the offense, including flight, may be considered in making the determination whether Aguirre aided and abetted the assault. (*Ibid.*; *People v. Medina* (2009) 46 Cal.4th 913, 924; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294.) Circumstantial evidence is sufficient to establish aiding and abetting liability. (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1200.)

The prosecution presented direct and circumstantial evidence of factors indicating Aguirre's intent to aid and abet the assault with a firearm that occurred during the

MetroPCS robbery. Aguirre drove the getaway car borrowed from Carrillo's girlfriend that the three men used in the U-Haul and MetroPCS robberies, including in flight from the scene after Piñon was shot at MetroPCS. The companionship of Aguirre, Martinez and Carrillo was shown, inter alia, by their group decision to commit the robberies with the borrowed car and their stop at a Carl's Jr. for food before proceeding to the U-Haul store that they robbed first. Martinez and Carrillo pointed guns at the victims and threatened to shoot them at both U-Haul and MetroPCS. This evidence supports a reasonable inference that Aguirre joined with Martinez and Carrillo in a plan to borrow a car and commit multiple armed robberies where compliance by the victims was to be achieved at the point of a gun and a promise to shoot. Victim resistance was to be met and punished with assault. Aguirre was not an innocent bystander surprised by a shooting that was never contemplated as part of the plan.

Aguirre correctly points out that the prosecution did not rely on the natural and probable consequences doctrine to impose liability for the assault on Piñon and the jury was not instructed on the doctrine. Under the doctrine, a defendant who intends to commit a target offense (e.g., robbery) may be guilty of a nontarget offense (e.g., assault) if, viewed objectively, that offense was reasonably foreseeable. (*People v. Chiu* (2014) 59 Cal.4th 155, 161-162.) Liability is based on whether a reasonable person in the defendant's position would or should have known the nontarget offense was a reasonably foreseeable consequence of the target offense. (*Ibid.*) The doctrine is not premised on the intention of the defendant to commit the nontarget offense but imposes liability because it is a natural and probable consequence of the target offense, i.e., a reasonable person would have foreseen the commission of the nontarget crime. (*Id.* at p. 164; see also *Prettyman, supra,* 14 Cal.4th at pp. 261-262.)

While the doctrine may have been applicable in this case, the prosecution was not required to rely on it and proceeded on a theory of direct aiding and abetting that we conclude was supported by sufficient evidence. The evidence showed all three

defendants were involved in the planning and execution of multiple armed robberies where an assault with a firearm clearly could and did occur. To state the obvious, armed robbery goes hand-in-hand with assault of robbery victims. The evidence and the reasonable inferences therefrom supported the jury's determination that Aguirre aided and abetted the assault of Piñon.

*Carrillo's Personal Use of a Firearm*

Carrillo contends that there was insufficient evidence to support the jury's true findings that he personally used a "real firearm" in the robberies. Carrillo argues "[t]his is particularly so because police found a highly realistic replica gun, as well as a real gun, in the apartment where Mr. Carrillo was residing at the time of the robberies." According to Carrillo, "[i]t seems reasonable to assume that, in the robberies, he used either the real pistol found in the apartment, or the replica, but the evidence provides no satisfactory basis to distinguish between the two."

This argument fails in the face of our decision in *People v. Monjaras* (2008) 164 Cal.App.4th 1432 (*Monjaras*). In *Monjaras*, a jury convicted the defendant of robbery and found he personally used a firearm (§ 12022.53, subd. (b)). (*Monjaras, supra,* at p. 1434.) As used in section 12022.53, a " 'firearm' means a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of explosion or other form of combustion." (§§ 12001, 16520, subd. (a).) "[T]oy guns obviously do not qualify as a 'firearm,' nor do pellet guns or BB guns because, instead of explosion or other combustion, they use the force of air pressure, gas pressure, or spring action to expel a projectile." (*Monjaras, supra,* at p. 1435.)

"The fact that an object used by a robber was a 'firearm' can be established by direct or circumstantial evidence. [Citations.] [¶] Most often, circumstantial evidence alone is used to prove the object was a firearm. This is so because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event,

victims often lack expertise to tell whether it is a real firearm or an imitation." (*Monjaras, supra*, 164 Cal.App.4th at pp. 1436-1437.) Thus, "[c]ircumstantial evidence alone is sufficient to support a finding that an object used by a robber was a firearm. [Citations.]" (*Id.* at p. 1437.)

In *Monjaras*, the defendant told the female victim, " 'Bitch, give me your purse' " and then pulled up his shirt displaying the handle of a black pistol tucked in his waistband. (*Monjaras, supra*, 164 Cal.App.4th at p. 1436) The victim testified the pistol looked like a gun and scared her. (*Ibid.*) She assumed the gun was real but had never handled a gun. The victim "conceded that she could not say for certain whether it was 'a toy or real or not.' " (*Ibid.*)

However, " 'defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a [firearm].' [Citation.]" (*Monjaras, supra*, 164 Cal.App.4th at pp. 1436-1437) "Accordingly, jurors 'may draw an inference from the circumstances surrounding the robbery that the gun was not a toy.' [Citation.]" (*Id.* at p. 1437.)

In *Monjaras*, we held that when a defendant "commits a robbery by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm within the meaning of section 12022.53, subd (b)," and "the victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm." (*Monjaras, supra*, 164 Cal.App.4th at p. 1437.)

In *Monjaras*, we concluded there was substantial evidence to support personal use of a firearm under section 12022.53, subdivision (b), even though the defendant did not threaten to shoot, or even point a gun at, the victim, but merely displayed the handle of a black pistol in his waistband and demanded her purse. (*Monjaras, supra*, 164 Cal.App.4th at p. 1436 [victim testified that defendant " 'don't show it to me' "]; see

also *People v. Law* (2011) 195 Cal.App.4th 976, 983-984 (*Law*).) Here the evidence was more substantial. At Carl's Jr., Carrillo pulled a black handgun out of his sweatshirt, held it to Lopez's head, and yelled, "Open the safe. I don't want to hurt you. Just open the safe." At U-Haul, Carrillo approached Thomas holding a black handgun about 10 inches in size against his body, asked for money, and Thomas gave him a $100 bill. Breault at U-Haul did not look at the man who grabbed her cell phone and ordered her to open the safe because she was "focused on the gun" he was pointing at her. Horton testified that Carrillo told him to "open the fucking safe" and pointed a black metallic gun that looked real at Horton's chest.

Carrillo invites us to reconsider *Monjaras* which he argues "sweeps too broadly, and should not control the result in his case." In *Law*, we rejected an argument that *Monjaras* was incorrectly decided. (*Law, supra*, 195 Cal.App.4th at p. 979.) Indeed, in *Monjaras* itself we stated our intention "to say in no uncertain terms that a moribund claim like that raised by defendant has breathed its last breath." (*Monjaras, supra*, 164 Cal.App.4th at p. 1435.) In *Law*, we "reaffirm[ed] our conclusion [in *Monjaras*] that ' "if it looks like a duck, and quacks like a duck, it's a duck." ' " (*Law, supra*, at p. 979, quoting *Monjaras, supra*, at p. 1437.) We do so again here.[9]

Moreover, Carrillo's position is that a replica gun and real gun were found in the apartment where he was staying and either could have been the weapon he used in the robberies. The position that both a real and replica were available to Carrillo does not render unreasonable an inference that he used a real gun. Indeed, such an inference is in accord with our observation in *Monjaras* that "[c]ommon sense and common experience

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[9] Carrillo relies on cases that pre-date *Monjaras* and *Law* for the proposition that it is insufficient to rely on circumstantial evidence that a gun is real. (See *People v. Reid* (1982) 133 Cal.App.3d 354; *People v. Godwin* (1996) 50 Cal.App.4th 1562; *People v. Vaiza* (1966) 244 Cal.App.2d 121.) Carrillo has not cited any reported decision contrary to our holding in *Monjaras*, which we reaffirmed in *Law*.

illustrate that little has changed since 1927, when a court astutely observed that criminals 'do not usually arm themselves with unloaded guns when they go out to commit robberies' [citation]." (*Monjaras, supra*, 164 Cal.App.4th at p. 1437.) Nor do criminals usually arm themselves with toy guns. We conclude that substantial evidence supports the jury's finding that the gun Carrillo used was real.

*Martinez's Personal Use of Firearm in Robbery of Breault*

Martinez contends the jury's finding that he personally used a firearm in the robbery of Breault at U-Haul is not supported by substantial evidence (§ 12022.53, subd. (b), count three). Martinez argues he "never showed a gun to Breault, who was in a different room, announced that he had a gun, or otherwise made his gun known to her."

Case law interpreting section 12022.5 supports reading section 12022.53, subdivision (b), in multiple victim cases, to apply to a victim who was not aware of the use. (See, e.g., *People v. Fierro* (1991) 1 Cal.4th 173, 225-227 (*Fierro*), disapproved on another ground in *People v. Thomas* (2012) 54 Cal.4th 908, 941; *People v. Granado* (1996) 49 Cal.App.4th 317, 329-330 (*Granado*).)[10]

In *Fierro*, the court upheld a gun use enhancement where the defendant robbed a woman without displaying the gun and then used the gun to shoot her husband. (*Fierro, supra*, 1 Cal.4th at p. 225.) The court concluded the gun use enhancement in the robbery of the woman was supported by substantial evidence because the jury could reasonably infer the defendant used the gun against her husband to facilitate the defendant's escape

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[10] Section 12022.53, subdivision (b), provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply." Section 12022.5, subdivision (a), provides in relevant part, that "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years . . . ."

or prevent his being identified. (*Id.* at pp. 226-227.) The court noted that "[t]he intent of the Legislature in enacting the firearm use enhancement section 12022.5 was 'to deter the use of firearms in the commission of violent crimes by prescribing additional punishment for each use.' [Citations.] In light of the legislative purpose to discourage the use of firearms, it would appear to be immaterial whether the gun use occurred during the actual taking or against the actual victim, so long as it occurred 'in the commission' of the robbery. [Citation.]" (*Id.* at pp. 225-226.)

In *Granado*, the victim of an attempted robbery fled the scene and was being pursued by the defendant's partner, when the defendant used a gun against a second victim. (*Granado, supra*, 49 Cal.App.4th at pp. 320, 329.) The court upheld the gun use enhancement against the victim who fled, because use of the gun facilitated his partner's attempted robbery of that victim. (*Id.* at pp. 329-330.) The gun was "deployed to control the conduct of both victims" and prevented the victim held at gunpoint from going to the aid of the other victim. (*Id.* at p. 330.)

Moreover, the *Granado* court observed that when a defendant "intentionally deployed a gun in furtherance of the offense, he became subject to a use enhancement. To excuse the defendant from this consequence merely because the victim lacked actual knowledge of the gun's deployment would limit the statute's deterrent effect for little if any discernable reason." (*Granado, supra*, 49 Cal.App.4th at p. 327.) As this court said in *People v. Thiessen* (2012) 202 Cal.App.4th 1397, *Granado* "persuasively undermines defendant's view that a victim must perceive a firearm in order for it to support a use enhancement." (*Id.* at p. 1405.)

"The central question is whether the defendant personally deployed the weapon, or acted as if to do so, in furtherance of the crime." (*Granado, supra*, 49 Cal.App.4th at p. 330; see also *People v. Masbruch* (1996) 13 Cal.4th 1001, 1012 ["A firearm use enhancement attaches to an offense, regardless of its nature, if the firearm use aids the defendant in completing one of its essential elements"]; *Carrasco, supra*,

137 Cal.App.4th at p. 1059 ["Personal use of a firearm may be found where the defendant intentionally displayed a firearm in a menacing manner in order to facilitate the commission of an underlying crime"].)

Here, as Martinez puts it, "two men robbed four people" at the U-Haul store. By deploying a gun to rob the men in the front of the store, Martinez facilitated Carrillo proceeding to the back room to encounter another robbery victim, Breault. The evidence indicates that Martinez used a gun to cover the front room where the registers were located so the Carrillo could go to the back room where the safe would be. Martinez's action was in furtherance of the robbery of all four people. It makes no difference that Breault did not see the gun in Martinez's hand or that he did not point it at her.

Accordingly, we conclude that substantial evidence supports the jury's finding that Martinez used a firearm in the robbery of Breault at U-Haul.

## II. Remand Issues

*Senate Bill No. 620*

Carrillo and Martinez seek remand for the trial court to exercise its discretion to strike the firearm use enhancements under the amendment to section 12022.53, subdivision (h), enacted by Senate Bill No. 620. (Stats. 2017, ch. 682, § 2, effective Jan. 1, 2018.)

Subdivision (h) as amended provides: "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).) The prior version provided the opposite: "Notwithstanding 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." (Stats. 2010, ch. 711, § 5.)

Carrillo and Martinez contend that the Senate Bill No. 620 amendment to section 12022.53, subdivision (h), applies retroactively. The People agree that the amendment is retroactive to cases such as this one which are not yet final. We so held in *People v.*

*Woods* (2018) 19 Cal.App.5th 1080 (*Woods*).

In *Woods*, we said that "the amendment to subdivision (h) of Penal Code section 12022.53 . . . necessarily reflects a legislative determination that the previous bar on striking firearm enhancements was too severe, and that trial courts should instead have the power to strike those enhancements in the interest of justice. Moreover, because there is nothing in the amendment to suggest any legislative intent that the amendment would apply prospectively only, we must presume that the Legislature intended the amendment to apply to every case to which it constitutionally could apply, which includes this case." (*Woods, supra*, 19 Cal.App.5th at p. 1091; see also *In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

The People argue, however, that remand in Martinez's case would be inappropriate, because the record indicates the trial court would not exercise its discretion to strike the firearm enhancement. We agree.

Remand is required unless "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] enhancement" even if it had the discretion. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*); see also *People v. Franks* (2019) 35 Cal.App.5th 883, 892-893 (*Franks*); *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) In reviewing whether the trial court made such an indication, we consider the trial court's statements and sentencing decisions. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 418-419 (*McVey*).) The trial court need not have stated it would not strike the enhancement if it had the discretion to do so. (*Ibid.*)

Here, there is a clear indication that the court would not exercise its discretion to strike any of the firearm enhancements imposed on Martinez. At the sentencing hearing, the trial court said: "I looked carefully at the factors in which I might conclude that there were mitigating reasons based upon which Mr. Martinez should have some consideration with respect to shortening his sentence," including "running some of the counts

concurrent . . . or going with a lid rather than an upper term in terms of the principal term for sentencing." However, "because of Mr. Martinez's overall behavior and because in particular of Mr. Martinez's shooting of the victim . . . I could not see any basis to mitigate in any fashion the ultimate sentence given." The court further observed: "In your case, the facts show that it was an absolute gratuitous shooting of the victim, and that gives great concern to the Court and to society itself. And so consequently after a very careful consideration of the factors in this case, I do find that the aggravating factors are significant. We are talking about crimes of great violence, we are talking about great bodily harm, we are talking about serious threats of harm, we're talking about cruelty, viciousness, callousness, just gratuitously shooting somebody, and the robbery had already been completed at the time of the shooting." The court then imposed the maximum possible sentence, the upper term on count five deemed the principal term and related enhancements, doubled by the prior strike, and consecutive sentences on the remaining counts.

This record establishes that the trial court would not be inclined in any way to exercise discretion in favor of leniency towards Martinez. (*McDaniels, supra*, 22 Cal.App.5th at p. 427 ["[T]he egregiousness of a defendant's crimes, a defendant's criminal history, and the court's sentencing options and rulings may prompt the court to express its intent to impose the maximum sentence permitted. When such expression is reflected in the appellate record, a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in the defendant's favor"]; *McVey, supra*, 24 Cal.App.5th at p. 419 ["In light of the trial court's express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement, there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether. We therefore conclude that remand in these circumstances would serve no purpose but to squander scarce judicial resources"].)

We will remand this case for resentencing Carrillo under Senate Bill No. 620 but not Martinez.

*Remand for Franklin Hearing*

Carrillo contends the case must also be remanded to give him the opportunity to make a record relevant to his eventual youth offender parole hearing, as set forth in *Franklin, supra*, 63 Cal.4th 261. The People concede remand is appropriate under section 3051 and section 4801.

At the time of the robberies, Carrillo was 18 years old. He was sentenced on September 26, 2014. At that time, a youth offender parole hearing was only available to a prisoner who committed the controlling offense before the age of 18. (Stats. 2013, ch. 312, § 4.) The Legislature thereafter amended sections 3051 and 4801 several times to raise the applicable age, currently 25 years or younger. (Stats. 2019, ch. 577, § 2; Stats. 2017, ch. 675, § 2; Stats. 2017, ch. 684, § 2.5.)

Section 3051, subdivision (b)(1), provides: "A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing during the person's 15th year of incarceration. The youth parole eligible date for a person eligible for a youth offender parole hearing under this paragraph shall be the first day of the person's 15th year of incarceration." (See also § 4801, subd. (c).)

In *Franklin*, a 16-year-old defendant, who shot and killed another teenager, was convicted of murder with a firearm enhancement and received the mandatory sentence of life in prison with the possibility of parole in 50 years. (*Franklin, supra*, 63 Cal.4th at p. 268.) The California Supreme Court determined that recent legislation that afforded Franklin a parole hearing after serving 25 years of his prison sentence mooted an Eighth Amendment challenge to his sentence. (*Id.* at p. 280.)

The court, however, remanded "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." (*Franklin, supra*, 63 Cal.4th at p. 284.) "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.)

The amendments to sections 3051 and 4801 making those statutes applicable to Carrillo had not been enacted when he was sentenced on September 26, 2014. Carrillo is entitled to an opportunity to supplement the record with information relevant to his eventual youth offender parole hearing. Although he "could have introduced such evidence through existing sentencing procedures," he "would not have had reason to know that the subsequently enacted legislation would make such evidence particularly relevant in the parole process." (*People v. Rodriguez* (2018) 4 Cal.5th 1123, 1131.) On remand, the trial court shall provide Carrillo and the prosecution an opportunity to supplement the record with information relevant to Carrillo's eventual youth offender parole hearing. (*Franklin, supra*, 63 Cal.4th at p. 284.)

*Senate Bill No. 1393*

We granted Martinez's request for supplemental briefing regarding remand for the trial court to exercise its discretion to strike the five-year enhancement to his sentence for a prior serious felony conviction under section 667, subdivision (a), and section 1385, as amended by Senate Bill No. 1393.

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amended sections 667, subdivision (a), and 1385, subdivision (b), to permit a court to exercise discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971; Stats. 2018, ch. 1013, §§ 1-2.) The prior versions of these statutes required the court to impose a five-year consecutive term for any person convicted of a serious felony and the court had no discretion to strike any prior conviction. (*Garcia, supra,* at p. 971.)

The People agree that Senate Bill No. 1393 is retroactive to Martinez's case but oppose remand because, as with Senate Bill No. 620, the trial court clearly indicated it would not exercise its discretion to strike the prior serious felony enhancement. The People note that the trial court denied Martinez's motion to strike the prior conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The trial court stated that the motion was "devoid of merit," explaining that the current offenses occurred "relatively short in time" to the prior conviction, there was "no intervening conduct that is redemptive in any way," Martinez's criminal conduct was not "idiosyncratic or one-off behavior" but "a series of conduct, and consequently, this is exactly the circumstance in which a strike prior is valid and should be respected . . . ."

Based on denial of the *Romero* motion and the comments set forth above on the "cruelty, viciousness, callousness" of Martinez's conduct, the trial court clearly indicated that it would not have stricken the five-year enhancement even if it had the discretion to do so. We decline to remand for resentencing under Senate Bill No. 1393. (*Franks, supra,* 35 Cal.App.5th at p. 893.)

## DISPOSITION

Carrillo's sentence is vacated and the matter is remanded to the trial court (1) to exercise its discretion to strike his firearm enhancements under section 12022.53, subd. (h), as amended by Senate Bill No. 620, and (2) to afford Carrillo and the People an adequate opportunity in accordance with *Franklin, supra*, 63 Cal.4th 261, to make a record of information relevant to a youth offender parole hearing under sections 3051 and 4801. The judgments are otherwise affirmed.

/s/
RAYE, P. J.

I concur:

/s/
BLEASE, J.

Duarte, J., Dissenting.

Forty-five years of codefendant Jorge Martinez's 72-year four month sentence are now subject to discretionary imposition. There is no dispute that this new discretion stems from changes in the law taking effect after Martinez was sentenced but before his conviction was final. Nonetheless, the majority declines to remand. I strongly disagree with this portion of the majority's decision; therefore, I am compelled to dissent.

The passage of the legislation at issue here signals a willingness by the Legislature to confer new discretion on trial courts. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 ["When the Legislature amends a statute so as to lessen the punishment it has obviously 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"]; *People v. Francis* (1969) 71 Cal.2d 66, 76 [conferring discretion to either impose same penalty as under former law or a lesser penalty evidences Legislature's determination that former penalty provisions may have been too severe in some cases, and sentencing courts should be given wider latitude to tailor sentence to fit the circumstances].) This discretion was not idly conferred; it reflects a societal determination that additional care should be taken and thoughtful analysis should be employed before making the formerly mandatory decision to more than double an offender's sentence, causing that sentence to increase from one that gives him a reasonable chance at release on parole during his lifetime to one that does not.

In my view, by foreclosing remand based on the denial of an unrelated motion and the consideration of various comments by a trial court that, at the time of sentencing, had no occasion to consider the propriety *of the enhancements now at issue*, we are undermining these consequential changes in the law and shifts in public perceptions as to what punishment may be necessary to achieve rehabilitative and other goals. With our refusal to remand to ensure that this newly conferred discretion is thoughtfully and appropriately exercised under the new laws, we are encouraging the trial courts to ignore their new discretion and the corresponding societal determination. The trial court could

not have considered this societal determination here because it was not yet evidenced by the passage of these bills, and the subject did not come up at sentencing. Accordingly, we should allow the court to consider its newly conferred discretion to strike defendant's Penal Code section 12022.53, subdivisions (b) and (c)[11] (as amended by Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018) firearm felony enhancements pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.) and section 667, subdivision (a) (as amended by Stats. 2018, ch. 1013, § 1, eff. Jan. 1, 2019) serious felony enhancement pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.).

Martinez received section 12022.53, subdivision (b) enhancements on counts one through four, nine, and twelve, for the robberies of the four different victims at the U-Haul store, the robbery of victim Morales at Carl's Junior, and the robbery of victim Gomez at the Metro PCS, respectively. He received a section 12022.53, subdivision (c) enhancement on count five for the robbery (and non-fatal shooting) of victim Pinon at the Metro PCS. He received the full, mandatory, 20-year term for the section 12022.53, subdivision (c) enhancement on count five, designated the principal term, and the required one-third the midterm consecutive sentence of three years four months on each of the remaining six counts of conviction that included a section 12022.53, subdivision (b) enhancement, for a total of 20 years plus 20 more years (six counts of three years, four months each) or 40 years of gun enhancements added to Martinez's sentence. As to counts one through four, these four enhancements (constituting 13 years four months of prison time) were for the same gun and the same event, with four victims all charged separately. The trial court had no choice but to impose *all* of the enhancements at sentencing, including four separate gun enhancements for one incident resulting in the robbery of four people, where no gun was fired. The prior conviction enhancement, also the subject of this appeal and Martinez's request for remand, accounted for another mandatory five years of these 72 years four months. Thus, nearly *two-thirds* of

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[11] Further undesignated statutory references are to the Penal Code.

Martinez's sentence was composed of what were at the time mandatory enhancements for true findings on the same enhancements that are now deemed discretionary by our Legislature. I do not think it is appropriate for us to conclude in the first instance that the trial court would have necessarily declined to adjust this sentence, based on considerations evidenced by the record at sentencing that had no bearing on a finding that an increase of 45 years to Martinez's sentence for enhancements was appropriate for his particular situation.

As a general rule, remand is *required.* The exception to that rule applies where the record shows the trial court clearly indicated at the original sentencing that it would not strike the enhancement, even if it had the discretion to do so. (*People v. Franks* (2019) 35 Cal.App.5th 883, 892; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Although the majority implicitly concludes the trial court considered the relevant factors in its imposition of sentence (maj. opn., *ante*, at pp. 24-26) and its denial of defendant's motion to dismiss his prior strike (maj. opn., *ante*, at pp. 27-28), and thus has already indicated that it will not exercise its newly conferred discretion such that it "would not be inclined in any way to exercise discretion in favor of leniency towards" defendant Martinez, I disagree that these observations should be the beginning and end of our analysis.

The trial court's comments do not conclusively demonstrate that it would have concluded that all of the imposed gun enhancements--which the court did not even mention during sentencing--were appropriate in this case. It is entirely possible that the court could find the existence of aggravating factors and thereby find appropriate consecutive sentences on the robberies, but also conclude that imposing an additional 40 years of gun enhancements and another five years for the prior conviction was not warranted, particularly given the fact that the two codefendants received prison sentences of only 15 and 37 years, respectively. (Maj. opn., *ante*, at p. 12) The trial court's comments clearly centered primarily around count five, the principal term, and the court did not have occasion to discuss the remaining gun enhancements; for example, neither the parties nor the court raised or discussed the propriety of including four separate gun

enhancements for one incident resulting in the robbery of four people where no gun was fired.

Moreover, I do not see how making discretionary decisions at sentencing as to whether imposition of additional prison time on certain enhancements is appropriate given the specific circumstances of the offenses and the offender equates to "leniency," as the majority suggests. Rather, thoughtful consideration of all available options results in informed and careful sentencing decisions. Further, as I have pointed out, before the legislation at issue was passed, the trial court had no reason to consider the policy reasons behind the new laws and whether their application was warranted under the specific facts of this multiple count case. " 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers [cannot] exercise that "informed discretion." ' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) Finally, I disagree that the court's statements about count five do in fact "establish" that the court would not be inclined *in any way* to exercise discretion. Nowhere did the court express that the defendant's conduct merited 40 years of gun enhancements and five years for the prior *beyond* doubling of the sentence on all counts.

The majority also concludes that because the trial court denied defendant's motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the court "clearly indicated that it would not have stricken the five-year enhancement even if it had the discretion to do so." (Maj. opn., *ante*, at p. 27.) But the relevant analyses are completely different. In deciding whether to dismiss a prior strike allegation under *Romero*, a trial court must determine whether *the defendant* should properly be deemed outside the spirit of the three strikes law. (See *People v. Williams* (1998) 17 Cal.4th 148, 161.) In contrast, in the application of the discretion conferred by Senate Bill No. 1393, the role of the trial court is to "evaluate[] all relevant circumstances to ensure the punishment fits *the offense and the offender*." (*People v. Shaw* (2020) 56 Cal.App.5th 582, 587, italics added.) These are very different analyses with different considerations. In the context of deciding a *Romero* motion, the trial court need not consider the underlying offense or

offenses and the appropriate sentence therefor. Rather, the analysis concerns only whether the *offender* falls within the spirit of the three strikes law, which is a tool for punishing those offenders with recidivist tendencies more harshly than non-recidivist offenders. The decision to decline to find defendant outside the heartland of recidivist offenders is not a decision about the propriety of the sentence he or she will face as a consequence of inclusion in or removal from that heartland. Accordingly, I disagree that the *Romero* motion's denial was necessarily a signal of the trial court's unspoken conclusion that the aggregate sentence was sufficient for Martinez to achieve a level of rehabilitation and at the same time protect the community. I do not see that the decision to deny the motion was an endorsement of the resulting sentence as a sentence that would ensure the punishment *fits the offense and the offender*. (See *People v. Shaw*, *supra*, 56 Cal.App.5th at p. 588.)

"Firearm enhancements carry heavy terms and in many cases constitute much if not most of the total sentence. Given these high stakes . . . a reviewing court has all the more reason to allow the trial court to decide in the first instance whether these enhancements should be stricken, even when the reviewing court considers it reasonably probable that the sentence will not be modified on remand." (*People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 427, fn. omitted.) This case is readily distinguished from the cases cited by the majority in support of its refusal to remand, including *People v. Franks*, *supra*, 35 Cal.App.5th at page 893, where the trial court announced it would not dismiss the prior *even if* it had discretion to do so, and *People v. McVey* (2018) 24 Cal.App.5th 405 at page 419, where the trial court thoroughly addressed and analyzed its three sentencing choices for the section 12022.5, subdivision (a) enhancement and stated its reasons for imposing the upper term sentence on that enhancement. No such analysis was undertaken here and no such definitive statement was made, with the *possible* exception of count five. The majority makes another passing reference to the remarks made by the trial court in consideration of the aggravating factors to support its conclusion that the court would not have stricken the prior conviction enhancement (maj. opn., *ante*, at p. 27); however, those remarks were made in a completely different context

and addressed only one of the seven counts on which enhancements were mandatory at the time, count five. The remarks did not address the five-year prior conviction enhancement at all.

In my view, the trial court's statements were what they purported to be: a finding of aggravating circumstances and related comments centering on the count of conviction wherein defendant Martinez discharged the firearm and wounded the victim, which was the most serious of the seven counts of conviction, and, as to the denial of the *Romero* motion, a finding about the offender himself, made with no consideration of the discretion that had not yet been conferred by Senate Bill Nos. 620 and 1393 and their underlying policy message. I do not agree that anything less than the equivalent of the life sentence previously imposed in this case would be unwarranted leniency such that 45 years of Martinez's life are not even worth a hearing on remand. For the reasons expressed herein, I would remand and give the trial court the opportunity to consider its new discretion and to adjust defendant's sentence as necessary given the court's decision in that regard. We should encourage the trial courts to thoughtfully and appropriately exercise their newly conferred discretion, rather than dismiss this critical exercise as unwarranted and characterize 45 additional years of prison as an inevitable result. Because the majority takes the latter course, I dissent.

/s/
DUARTE, J.