NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DEJON WAYNE MURRAY, Defendant and Appellant.	C084981 (Super. Ct. No. 10F02610)

In March 2010, defendant Dejon Wayne Murray and two others—Kenneth Oliver Owens, Jr., and Maurice Edward Reed, Jr.—committed a home invasion robbery during which a person was shot and killed. Three separate juries respectively convicted the three defendants of first degree felony murder with special circumstances (committed in the course of a robbery and a burglary), two counts of robbery in concert, and one count of burglary. (Pen. Code, §§ 187, subd. (a), 189, 190.2, subd. (a)(17), 211, 213, subd.

(a)(1)(A), 459, 462, subd. (a).)[1] The juries also found that Murray and Reed personally used firearms in these offenses while Owens was vicariously armed. (§§ 12022.53, subd. (b), 12022, subd. (a)(1).) Sentenced to state prison for life without parole (LWOP) plus lengthy determinate terms, defendants separately appealed.[2]

In his first appeal, Murray, who was two months shy of turning 18 years old when he committed the offenses, raised various arguments, including several issues regarding sentencing juveniles to LWOP. In a previous unpublished opinion, we reversed the judgment of sentence as to Murray and remanded the matter for the trial court to exercise its sentencing discretion regarding his conviction for special circumstance felony-murder in light of the United States Supreme Court's intervening decision in *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407] [holding that a mandatory LWOP sentence for any juvenile offender (i.e., any offender under the age of 18 at the time of the offense) violates the Eighth Amendment's prohibition on cruel and unusual punishment] (*Miller*).) We affirmed the judgment of conviction as to all defendants. (*Owens, supra*, C069838, C069853, C069856.)

In remanding for resentencing, we explained that the trial court did not have the benefit of *Miller*'s constitutional guidance in sentencing Murray under section 190.5, subdivision (b).[3] (*Owens*, *supra*, C069838, C069853, C069856.) Instead, the court was

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[1] Undesignated statutory references are to the Penal Code.

[2] We consolidated the appeals for purposes of oral argument and disposition. (*People v. Owens* (Sept. 24, 2013, C069838, C069853, C069856) [nonpub. opn.] (*Owens*).)

[3] Section 190.5, subdivision (b) provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

obligated to follow the LWOP presumptive punishment interpretation of that statute from other appellate court decisions. We explained that LWOP is the harshest possible penalty constitutionally available for juveniles, and that *Miller* requires that a " 'sentencer' " (" 'judge or jury' ") " 'follow a certain process' " before imposing the harshest possible penalty on a juvenile offender: i.e., consider the offender's youth and the hallmark features of youth (among them, immaturity, impetuosity, and failure to appreciate risks and consequences); and consider, in an individualized way, the nature of the offender and the offense (for example, as relevant, the offender's background and upbringing, mental and emotional development, and possibility of rehabilitation). (*Owens*, *supra*, C069838, C069853, C069856.) We further explained that while *Miller* does not foreclose a sentencer's ability to impose LWOP for juvenile offenders in homicide cases, it requires that, before imposing such a sentence, the sentencer " 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' " (*Owens*, *supra*, C069838, C069853, C069856, quoting *Miller, supra*, 567 U.S. at p. 480.) We noted that the *Miller* court remarked that sentencing juveniles to the harshest possible penalty will be uncommon given children's diminished culpability and heightened capacity for change and the " 'great difficulty' " in distinguishing between " ' "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." ' " (*Owens*, *supra*, C069838, C069853, C069856, quoting *Miller, supra*, at p. 480.) Because *Miller* was not available to the trial court at sentencing, we remanded for resentencing so the trial court could exercise its discretion to impose a sentence of LWOP or a sentence of 25 years to life on Murray's conviction for special circumstance felony murder—in light of *Miller*, without having to consider LWOP as the " 'generally mandatory' " or " 'presumptive' " choice. (*Owens*, *supra*, C069838, C069853, C069856.)

At the resentencing hearing in April 2017, the trial court, after considering the *Miller* factors, sentenced Murray to an aggregate prison term of 59 years four months to life, which included a prison term of 25 years to life on Murray's conviction for special circumstance felony murder. In imposing such a sentence, the trial court found that Murray was not the rare juvenile who was beyond redemption to justify LWOP. Murray filed a timely notice of appeal.

In his second appeal, Murray contends that Proposition 57, the "Public Safety and Rehabilitation Act of 2016," applies retroactively to this case and requires us to conditionally reverse the judgment of conviction entered below and remand for further proceedings. Murray also contends that the trial court improperly imposed an upper term sentence on count two (robbery in concert) based on facts not found true by the jury, in violation of his Sixth Amendment rights. In a supplemental brief, Murray contends that, in light of the recent passage of Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620), this matter must be remanded to permit the trial court to consider whether it should exercise its newly granted discretion to strike or dismiss the firearm enhancements imposed under section 12022.53.

In view of our high court's recent decision in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*), we find that Proposition 57 applies retroactively to benefit Murray. Therefore, we will conditionally reverse the judgment of conviction and remand the matter to the juvenile court for a transfer hearing wherein the court will determine Murray's fitness for treatment within the juvenile justice system. (Welf. & Inst. Code, § 707.) Because we find no merit in Murray's sentencing error claim and no need to remand for resentencing on the firearm enhancements, if Murray is found unfit for juvenile court treatment, then his convictions and sentence will be reinstated. Alternatively, if juvenile court treatment is found appropriate, the juvenile court is ordered to treat Murray's convictions as juvenile adjudications and impose an appropriate

juvenile disposition after a dispositional hearing. (Welf. & Inst. Code, §§ 702 [§ 602 wardship determination], 706 [disposition hearing].)

FACTUAL BACKGROUND[4]

Victims of Robbery and Burglary

Roommates Derek Martin and Eric Warren were having dinner at their apartment on Friday, March 26, 2010, when there was a knock at their door. Warren thought it was their friend, Salvador Heredia-Arriaga (the eventual murder victim), who was going to take Warren out to a bar. Instead, two armed men intruded.

The first man was Reed, who, about one week before, had come to the apartment to buy marijuana from Warren; Warren had a marijuana recommendation and occasionally sold marijuana. Reed carried a revolver. The second man was Murray, carrying a semiautomatic handgun.[5] About two days before, Murray had accompanied Owens to the apartment; Owens, who had previously lived at the same apartment complex, came to buy marijuana, which he had done on several previous occasions while also socializing with Warren.

Reed and Murray barked orders and threats to kill at Martin and Warren, gathered up marijuana, cash, wallets, and video games and equipment, herded Martin and Warren to the bathroom, and then demanded four minutes for an escape.

While in the bathroom, Warren heard the front door open. Realizing it was Heredia-Arriaga, Warren yelled, "Sal, give it up. We are being robbed." Warren and Martin heard scuffling, and then one gunshot. Emerging from the bathroom, Warren and Martin discovered a fallen Heredia-Arriaga, who died of a gunshot wound to the chest.

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[4] The facts are taken from our previous unpublished opinion disposing of the three separate appeals filed by defendants. (*Owens*, *supra*, C069838, C069853, C069856.)

[5] Because there was little dispute on appeal about the identity of the two intruders, they were referred to as Reed and Murray.

Witness Desirea Cunningham

Desirea Cunningham, defendant Owens's girlfriend and the mother of their child, told police that she heard Owens call his cousin, Reed, on the night of the homicide. Owens told Reed that he had a "lick" (a robbery), mentioning that a person, who apparently lived at Owens's former apartment complex, had money, a plasma TV, and an Xbox. Owens told Reed to meet him "somewhere" near the apartments.

At trial, Cunningham acknowledged these statements, but said they were lies prompted by Cunningham's anger over "another woman."

Accomplice/Accessory Tamika Reed

Tamika Reed (Tamika) is defendant Reed's sister, defendant Owens's cousin, and the girlfriend of a good friend of defendant Murray. She was charged with special circumstance murder but received a plea bargain of three years eight months, for accessory and grand theft, in exchange for testifying against these three.

On the night of the shooting, Tamika was at a party for her boyfriend, which defendants Reed and Murray also attended, when Reed asked Tamika to drive him to get some marijuana. As the two Reeds were heading out, defendant Reed had Tamika pick up Murray, who had just obtained from another man something wrapped in a white shirt.

Tamika and her crew subsequently engaged with defendant Owens and followed his car to an apartment complex. There, they all parked. Owens told defendants Reed and Murray to knock on a certain door and provide some sort of word or code. Owens stayed behind, talking to Tamika, and then walked off.

A short time later, Owens returned, walking rapidly to his car and driving off hurriedly. Defendant Reed followed hastily in short order, jumping in Tamika's car and saying, "Go, go, go." On the way out, they stopped for Murray, who flopped in the backseat armed with a gun in one hand and a PlayStation in the other.

Tamika's trio drove to her apartment, where Owens joined them about five or 10 minutes later. At Tamika's apartment, Reed gave a "cowboy" (revolver) gun to Murray,

which was unlike the gun Tamika had seen Murray with during their getaway. The three defendants argued and lamented why Murray had shot the man, with Murray responding, "He was wrestling with you [(i.e., Reed)]. What was I supposed to do . . . .?" Then, they divided the loot.

Physical Evidence

Found at the scene of the shooting were an ejected (fired) .40-caliber semiautomatic bullet casing, a fired bullet embedded in a wall, and an unfired .40-caliber bullet.

A criminalist opined that a fingerprint taken from a videogame case at the scene matched Murray's.

When Murray was arrested about four weeks after the shooting, he was carrying a loaded .44-caliber revolver (which would not eject bullet casings like the .40-caliber semiautomatic casing found at the scene). Incriminating text messages were found on Murray's cell phone.

Defendant Reed's Admissions

In a jail interview with a local television reporter, Reed stated that he went to the Martin-Warren apartment to rob the men, not to kill them; he also wrote a letter of apology to the Heredia-Arriaga family.

Defense Evidence

Defendant Murray presented two witnesses.

A clinical psychologist tested Murray's IQ at 69 (mildly retarded), and opined that Murray's overall intellectual functioning was closer to 75 (borderline range; functioning at a very basic level).

Channa Gates (Murray's aunt) testified Tamika told her that defendants Reed and Owens got Murray "all liquored up and all drugged up" and took him to the robbery; that Murray was not the shooter; and that Owens had set up the robbery.

DISCUSSION

1.0 Proposition 57

After sentencing but prior to resentencing, Proposition 57 became effective in November 2016. Among other provisions, Proposition 57 amended the Welfare and Institutions Code so as to eliminate direct filing by prosecutors in adult criminal court. Certain categories of minors—which would include Murray—can still be tried in criminal court, but only after a juvenile court judge conducts a transfer hearing to consider various factors such as their age, maturity, intellectual capacity, physical, mental and emotional health, degree of criminal sophistication, prior delinquent history, whether they can be rehabilitated, and the circumstances and gravity of the offense alleged. (Welf. & Inst. Code, § 707, subd. (a).)

Murray contends that Proposition 57 applies retroactively to this case and requires us to conditionally reverse the judgment entered below and remand for further proceedings. We need not address Murray's arguments supporting his contention that Proposition 57 should apply retroactively to this case, or the People's arguments in opposition, because our high court has resolved the issue.

In *Lara* our Supreme Court held: "The possibility of being treated as a juvenile in juvenile court—where rehabilitation is the goal—rather than being tried and sentenced as an adult can result in dramatically different and more lenient treatment. Therefore, Proposition 57 reduces the possible punishment for a class of persons, namely juveniles. For this reason, [the] inference of retroactivity [set forth in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*)] applies. As nothing in Proposition 57's text or ballot materials rebuts this inference, we conclude this part of Proposition 57 applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Lara*, *supra*, 4 Cal.5th at pp. 303-304.) Accordingly, Proposition 57 applies to this case.

Having determined that Murray is entitled to the retroactive benefit of Proposition 57, we must now decide the appropriate remedy under the circumstances of this case.

Murray contends that the judgment of conviction must be conditionally reversed and the matter remanded to the juvenile court with directions to conduct a transfer hearing pursuant to Welfare and Institutions Code section 707, subdivision (a). We agree.

The procedural posture of *Lara* was not the same as this case. In *Lara*, the prosecutor had directly filed charges in adult criminal court, but the real party in interest had not been tried at the time Proposition 57 took effect. (*Lara*, *supra*, 4 Cal.5th at p. 304.) Here, Murray had been tried, convicted, and sentenced in adult criminal court before Proposition 57 took effect. However, the *Lara* court endorsed a remedy for such cases provided in *People v. Vela* (2017) 11 Cal.App.5th 68, review granted July 12, 2017, S242298 (*Vela*).

In *Vela,* the defendant had been charged in adult criminal court, tried, convicted, and sentenced prior to the enactment of Proposition 57. (*Vela*, *supra*, 11 Cal.App.5th at pp. 71-72, rev.gr.) After the passage of Proposition 57, the *Vela* court concluded that Proposition 57 applied retroactively to the defendant's case under the rule in *Estrada*. (*Vela*, *supra*, at pp. 76-81, rev.gr.) Regarding the remedy fashioned in *Vela*, our high court in *Lara* wrote: "After finding that the defendant was entitled to a transfer hearing, the *Vela* court considered the remedy. It began by noting that the 'jury's convictions, as well as its true findings as to the sentencing enhancements, will remain in place. Nothing is to be gained by having a "jurisdictional hearing," or effectively a second trial, in the juvenile court.' [Citation.] Noting that an 'appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances[]" [citation],' the court ordered a limited remand. [Citation.] [¶] Specifically, the *Vela* court ordered as follows: 'Here, under these circumstances, Vela's conviction and sentence are conditionally reversed and we order the juvenile court to conduct a juvenile transfer hearing. [Citation.] When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer

Vela's cause to a court of criminal jurisdiction. [Citation.] If, after conducting the juvenile transfer hearing, the court determines that it would have transferred Vela to a court of criminal jurisdiction because he is "not a fit and proper subject to be dealt with under the juvenile court law," then Vela's convictions and sentence are to be reinstated. [Citation.] On the other hand, if the juvenile court finds that it would *not* have transferred Vela to a court of criminal jurisdiction, then it shall treat Vela's convictions as juvenile adjudications and impose an appropriate "disposition" within its discretion.' [Citation.]" (*Lara*, *supra*, 4 Cal.5th at pp. 309-310, quoting *Vela*, *supra*, 11 Cal.App.5th at pp. 81-82, rev.gr., original italics.)

The *Lara* court endorsed the *Vela* remedy. (*Lara*, *supra*, 4 Cal.5th at p. 312.) In doing so, the court considered the *Vela* remedy in discussing another Court of Appeal case, which concluded that the complexity of remedies, such as the remedy provided in *Vela*, supported the denial of transfer hearings to cases already pending in adult criminal court. (*Lara, supra*, 4 Cal.5th at pp. 312-313, discussing *People v. Superior Court* (*Walker*) (2017) 12 Cal.App.5th 687, 704-705 & fn. 20, review granted Sept. 13, 2017, S243072.) Rejecting this rationale for denying transfer hearings, the *Lara* court concluded that "complexity is inherent when juveniles are to be treated as adults," and stated that "remedies like those provided in *Vela* and [*People v. Cervantes* (2017) 9 Cal.App.5th 569, review granted May 17, 2017, S241323] are readily understandable, and the courts involved can implement them without undue difficulty. The potential complexity in providing juveniles charged directly in adult court with a transfer hearing is no reason to deny the hearing." (*Lara*, *supra*, at p. 313.)

Consistent with the *Lara* court's endorsement, we conclude the remedy in *Vela* is appropriate here. Accordingly, we will conditionally reverse the judgment of conviction and remand the matter to the juvenile court with directions to conduct a transfer hearing wherein the court will determine Murray's fitness for treatment within the juvenile justice system. (Welf. & Inst. Code, § 707, subd. (a).) Because, as we discuss *post*, we find no

merit in Murray's sentencing error claim and no need to remand for resentencing on the firearm enhancements, if the juvenile court determines it would have transferred Murray to adult court, then this case will be transferred to adult court and Murray's convictions and sentences shall be reinstated. (Welf. & Inst. Code, § 707.1, subd. (a).)

Alternatively, if the juvenile court finds that it would not have transferred Murray to adult court, it shall treat Murray's convictions as juvenile adjudications and enter appropriate findings consistent with Welfare and Institution Code section 702. (Welf. & Inst. Code, §§ 602 [defining ward], 702 [wardship determination].) It shall thereafter impose an appropriate disposition after a dispositional hearing. (Welf. & Inst. Code, § 706.)

2.0 Sentencing Error Claim

Murray contends the trial court improperly imposed an upper term sentence on count two (robbery in concert) based on facts not found true by the jury, in violation of his Sixth Amendment rights. According to Murray, it was error for the court to consider him as the person who shot Heredia-Arriaga, particularly since the jury did not find true the allegation he personally discharged a firearm. We find no sentencing error.

Under California's determinate sentencing law, which specifies three terms for most offenses, the decision to impose an upper term rests within the broad discretion of the trial court. (*People v. Sandoval* (2007) 41 Cal.4th 825, 836, 847 (*Sandoval*).) "A single aggravating factor will support an upper term sentence. [Citation.]" (*People v. Weber* (2013) 217 Cal.App.4th 1041, 1064; see *People v. Osband* (1996) 13 Cal.4th 622, 728, 732.) California Rules of Court, rule 4.421 sets forth a nonexclusive list of appropriate aggravating circumstances the court may consider. (Cal. Rules of Court, rule 4.408(a); *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1325-1326.) In addition to the enumerated aggravating circumstances set forth in the California Rules of Court, a trial court may base an upper term sentence upon any aggravating circumstance that the

court deems "significant," and that is " 'reasonably related to the decision being made.' " (*Sandoval*, *supra*, 41 Cal.4th at p. 848.)

"The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*Sandoval*, *supra*, 41 Cal.4th at p. 847.) A trial court abuses its discretion if "it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Sandoval*, *supra*, at p. 847.) The burden is on the party attacking the sentence to clearly show the trial court's decision was an abuse of discretion. (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1258.)

Having reviewed the record from the resentencing hearing, we find no error. In selecting the upper term for the robbery in concert offense, the trial court specifically found that such a sentence was appropriate because the offense involved planning and sophistication. (Cal. Rules of Court, rule 4.421(a)(8).) While the court, during its discussion of the *Miller* factors, stated that it believed that defendant had shot and killed Heredia-Arriaga, it did not expressly rely on this circumstance in selecting the upper term on the robbery in concert offense. But even assuming for purposes of argument that the court did rely on this circumstance, and further assuming that the court erred in doing so, the court's identification of a valid aggravating factor undermines Murray's claim of error. Because a single aggravating factor will support an upper term sentence, we conclude that Murray's claim fails. Murray has not clearly shown the trial court's decision was an abuse of discretion.

3.0 SB 620

On October 11, 2017, while Murray's second appeal was pending, the Governor signed into law SB 620 (2017-2018 Reg. Sess.), which amended section 12022.53, subdivision (h), effective January 1, 2018 (Stats. 2017, ch. 682, § 2). Prior to the enactment of SB 620, and at the time Murray was resentenced by the trial court, section

12022.53 required mandatory imposition of sentencing enhancements in certain enumerated situations. As amended, this provision now states: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).) Here, as noted above, Murray's sentence includes firearm enhancements under section 12022.53.

In his supplemental brief, Murray argues that this matter must be remanded to permit the trial court to exercise its newly granted discretion to decide whether to strike or dismiss the firearm enhancements under section 12022.53, subdivision (h). The People agree that Murray is entitled to the retroactive ameliorative effect of the amendment to section 12022.53 but argue that remand would be futile. According to the People, remand is inappropriate because there is no reason to believe that the trial court would exercise its newly granted discretion to strike any of the firearm enhancements.

For the reasons stated by this court in *People v. Woods* (2018) 19 Cal.App.5th 1080), we conclude that the recent amendment to section 12022.53 is retroactive and applies to this case. (See *People v. Woods*, *supra*, at pp. 1090-1091.) However, given the trial court's comments at the resentencing hearing and the sentence imposed, we conclude that remand to the trial court for resentencing on the firearm enhancements would serve no purpose. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*) [remand not required where trial court's comments at sentencing and sentence itself show that "no purpose" would be served by a remand].)

In *Gutierrez*, the appellate court concluded that it need not remand the case for the trial court to exercise its discretion under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 to strike a prior conviction under the "Three Strikes" law, because the record showed that the trial court would not have exercised such discretion. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) At sentencing in that case, the trial court stated that

"imposing the maximum sentence was appropriate" and that the defendant was " 'the kind of individual the law was intended to keep off the street as long as possible.' " (*Ibid.*) The trial court increased the defendant's sentence "beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements." (*Ibid.*) On these facts, the appellate court concluded that the trial court would not exercise its discretion to lessen the sentence, and therefore "no purpose would be served in remanding for reconsideration." (*Ibid.*)

At the resentencing hearing here, several members of Heredia-Arriaga's family spoke, including his mother. During her statement, she asked the trial court to impose the sentence it originally imposed. She stated that she resented having to attend the hearing and was incensed by Murray's request for a reduction in his sentence. She indicated that it was beyond her comprehension that a reduction in sentence was possible.

After the matter was submitted, the trial court stated: "I think [Heredia-Arriaga's] mother . . . particularly hit the nail on the head . . . . It's offensive to be here. It's offensive because in natural law if somebody takes somebody's life that person forfeits their life. Natural law, that's the way it's supposed to work." The court went on to state: "But when we form societies and have laws, that natural law gets . . . mitigated, diluted, and people who are in the position that [Heredia-Arriaga's] family are in give up that right of revenge . . . to the state." The court then explained that the law required it to consider certain factors (i.e., the *Miller* factors) in determining the appropriate sentence on Murray's conviction for special circumstance felony murder—either LWOP or a term of 25 years to life. During its discussion of the *Miller* factors, the trial court noted that Murray armed himself with a firearm and chose to participate in a planned robbery, terrorized two people by holding them at gunpoint, shot Heredia-Arriaga with the intent to kill him (even though the jury did not make such a finding; it found that Murray personally used, rather than personally discharged, a firearm), and then ran away without

calling the police and requesting medical assistance. The court also noted that Murray's possession of a gun when he was subsequently arrested and the comments he made at the resentencing hearing—that he was not a criminal but rather a young kid who made a mistake—showed that he did not appreciate the seriousness of the crimes he committed and his role in those crimes. After considering the *Miller* factors, the trial court found that Murray was not the rare juvenile who was beyond redemption to justify an LWOP sentence, particularly given his background and upbringing. The court, however, found that Murray had otherwise "earned the maximum sentence that is permitted by the law." Thereafter, the trial court sentenced Murray to an aggregate sentence of 59 years four months to life.

Here, the comments by the trial court and the sentence imposed at the resentencing hearing make clear that the court would not have struck any firearm enhancement if it had known it had the discretion to do so. After declining to sentence Murray to LWOP on his conviction for special circumstance felony-murder, the court imposed the maximum sentence otherwise available, including upper term sentences on the firearm enhancements. In doing so, the court stated that Murray had "earned" such a sentence.

DISPOSITION

Consistent with this opinion, we conditionally reverse Murray's convictions and sentence, and remand the matter to the juvenile court for a juvenile transfer hearing to determine Murray's suitability for treatment within the juvenile justice system within 90 days of the issuance of our remittitur. (Welf. & Inst. Code, § 707.) If the juvenile court determines that Murray is unfit for juvenile court treatment, the case will be transferred to adult court and his convictions and sentence reinstated. If Murray is found fit for juvenile court treatment, the juvenile court is ordered to treat Murray's convictions as juvenile

adjudications and impose an appropriate juvenile disposition after a dispositional hearing. (Welf. & Inst. Code, §§ 602 [defining ward], 702 [wardship determination], 706 [disposition hearing].)

Butz

Butz, Acting P. J.

We concur:

Mauro

Mauro, J.

Renner

Renner, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: The People v. Murray
C084981
Sacramento County
No. 10F02610

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