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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MAURICE NUBY, Defendant and Appellant.	B269910 Los Angeles County Super. Ct. No. TA133127

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed in part, vacated in part, and remanded for resentencing.

Corey Evan Parker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, and Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Maurice Nuby of second degree murder and found firearm allegations true. The trial court sentenced Nuby to state prison for 15 years to life, plus 25 years to life for the firearm enhancement. We affirm Nuby's conviction but vacate his sentence and remand for the trial court to exercise its discretion whether to strike the imposed firearm enhancement.

BACKGROUND

An amended information filed November 5, 2015 charged Nuby with an April 28, 2014 assault with a firearm, and assault with a semiautomatic firearm, on Alfredo Sanchez (counts 1 and 2); the February 7, 2014 murder of Dayveon Perkins in violation of Penal Code section 187, subdivision (a)[1] with allegations of personal firearm use in violation of section 12022.53, subds. (b)–(d) (count 3); and four prior prison term allegations under section 667.5, subd. (b) (which were stricken after trial at the prosecution's request). Nuby pleaded not guilty to all three counts and denied the special allegations. On November 5, 2015, the prosecution stated it was unable to proceed on counts 1 and 2, and the court granted Nuby's motion to dismiss those counts.

Nuby went to trial on the murder count. A jury found Nuby guilty of second degree murder and found the firearm allegations true. The trial court sentenced Nuby to state prison for 15 years to life, plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), with custody credits and restitution, fines, and fees. Nuby filed a timely notice of appeal.

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

1. ***The night of the murder***

At trial, Kristopher Burton testified that he knew Perkins, the victim, from church and from the neighborhood. Late at night on February 7, 2014, Perkins called Burton to invite him to his birthday party at an apartment on West Adams Boulevard. When Burton arrived at the party, 40 to 50 people were crowded into the small apartment and Perkins was dancing and clowning around. The lights were on in the bedroom and the kitchen but off in the living room, which was very dark.

A man and a woman argued in the bedroom, and when that stopped, "people started gang banging inside the apartment," making gang signs and asking where people were from. A man out on the patio banged on the window, and when Burton went out to tell him to stop, he threw a punch at Burton. A fight started in the living room between Burton and the man from the patio, and two of the man's friends. Perkins and another man joined the fight. Everyone else ran out of the apartment and left the six men fighting. Burton knocked one man out and another stopped fighting, so Burton went into the kitchen, leaving Perkins fighting in the living room. He saw a man try to hit Perkins with a Ciroc bottle. Perkins grabbed the bottle and punched the man, who fell to the floor.

From his position in the kitchen about five feet away, Burton saw Nuby, who had long cornrow braids down to the middle of his back, walk in the front door and pull out a small black gun with his right hand. Nuby aimed the gun at Perkins's side and Burton heard one shot. He ran to where Perkins lay on the floor, covered him up, and told him he would be all right. After making sure someone called the police, Burton ran out of the apartment after Nuby. Nuby headed for the stairs and

Burton followed him, but got locked in the staircase. After someone opened the stairway door, he talked to the police.

Shown a still photo exhibit, Burton identified the shooter, who wore red pants and a Chicago Bulls hat.

Lanesha Browning testified she was at the party when the fight broke out in the crowded apartment. She called 911 after the shooting and told the operator she thought Perkins was shot in the stomach area by "the dude with the braids in his hair," who "pulled out the fuckin' gun 'cause he's a bitch" and "they was getting they ass whooped."

When Browning saw the shooter with the gun, she at first thought it was a toy. The living room was so dark, she couldn't describe the shooter. She ran out after the first shot, and heard another shot. She told the police shortly afterwards that the shooter was a black male wearing a black top.

Brittney McCray testified that she was with Browning at the party. The apartment was dark and so crowded she could barely walk. She saw a man waving a Ciroc bottle in the air trying to hit Perkins. She couldn't see the fight or the shooter, but she heard a shot, and as she was running out she saw Perkins hit the floor.

Los Angeles Police Department (LAPD) Officer Saul DeLeon responded to a radio call and found Perkins lying face up in the living room with a gunshot wound in his abdomen. The hall was crowded, the atmosphere was hectic, and a University of Southern California (USC) police officer was talking to the victim. Officer DeLeon interviewed Browning, who said the gun was a blue steel semiautomatic handgun, and she could positively identify the shooter if she saw him again. Burton gave Officer DeLeon the same description of the gun, and said that as the

shooter ran out he put the gun in his waistband. Burton said he would be able to identify the shooter if he saw him again. Officer DeLeon recorded witnesses' combined descriptions of the shooter as a black male, five feet eight inches, wearing a black hoodie.

2. ***The investigation***

Laura Nissley was the general manager of the apartment building, which was also student housing for USC. She provided general surveillance video to the police. Later, at LAPD's request, she narrowed the surveillance video to include footage of someone resembling the description of the suspect ("a tall African America[n] male wearing red, white, and blue with a Chicago Bulls hat").

LAPD Detective Todd Patino interviewed Browning three days after the shooting, on February 10. She wrote a statement describing the shooter as "a young black male who had on a bl[ac]k jacket and white tee-shirt with cornrows neck length who pulled out a . . . black handgun." Detective Patino then showed her the surveillance video, and she identified Nuby, with his hair in cornrows and wearing red pants, a gray and black sweater, and a Bulls hat, as the shooter ("that's the guy I saw had the gun"). The video showed Nuby entering the elevator. His hands were in the front pocket of his sweater that seemed to hold an object, consistent with Detective Patino's experience that suspects often carried guns in their shirt pocket or waistband. After the interview with Browning, Detective Patino asked Nissley to narrow the surveillance video search to someone with red pants, a Bulls hat, and cornrows.

When Detective Patino interviewed Burton on March 4, Burton described the fight in the living room, the shooting, and his pursuit of the shooter, who had braids and wore a grey

sweater, red pants, and a Bulls hat. Burton then watched the surveillance video and identified Nuby, wearing red pants and a Bulls hat, as the shooter. He later identified Nuby in a six-pack.

Detective Patino visited Perkins in the hospital on April 10. He had visited twice before when Perkins was still in a coma, had tubes down his throat, and was not able to speak. On April 10, Detective Patino visited Perkins for the third time. He introduced himself and spoke to Perkins for five to 10 minutes, asking if he remembered anything about the night of the shooting. Perkins provided nothing of use, and Detective Patino did not record or take notes of the conversation. Detective Patino visited Perkins again on April 24, but did not record or take any notes of the conversation. On May 26, 2014, Perkins died of complications from the gunshot wound to his abdomen.

The police found a 9-millimeter bullet casing and a spent round near the sliding glass door. The shell casing matched casings collected in two Long Beach cases, including a murder on February 10, 2014. Ballistic testing established that the Long Beach murder involved the same firearm.

Detective Richard Arciniega testified he interviewed Deon Hall. The transcript of the interview was introduced into evidence, and a video of the interview was played for the jury. Hall identified Nuby and others in the elevator surveillance photo. Nuby sold him a gun for "$200, $150," and Hall then sold the gun to someone named Joe for $375. Joe later told Hall he used the gun to kill someone in Long Beach. Detective Arciniega testified that after the interview with Hall, Nuby became the key suspect.

Hall testified at trial with a grant of use immunity and generally denied his statements at the interview and that he bought a gun from Nuby.

On July 22, Detective Arcineiga interviewed Burton, who described the shooter as a Hispanic man with braids. (Burton testified the shooter could be "mixed Black, Hispanic.") Burton identified Nuby as the shooter in a six-pack photo array.

Detective Arciniega arrested Nuby, and he and his partner interviewed Nuby on July 25, 2014. The jury heard the recording of the interview and saw a transcript. Nuby agreed to the interview after he answered, "yes," to questions regarding whether he understood: his right to remain silent; his statements may be used against him; he had the right to the presence of an attorney and if he could not afford one, an attorney would be appointed free of charge.

Nuby said he cut his hair after he got out of jail in December and was trying to get a job. Nuby at first denied that a photograph Detective Arciniega showed to him was of him and his friends, and denied owning clothing shown in the photograph. Detective Arciniega offered a hypothetical about a party at a USC apartment building, a fight, and whether Nuby would defend a friend. Asked what Nuby would say if someone said he shot someone while trying to protect a friend, Nuby responded: "I ain't shoot nobody. I ain't going to no party to, to defend or protect nobody."—and he had not been at a party on Adams on February 7. Shown the photographs and the surveillance video, Nuby said the detectives were "[a]ccusing me or telling me I did it," and admitted it was him in the video, although he didn't know anything about what happened.

On page 22 of the transcript, Nuby said: "You're all pretty smart. You all went to school for it, I know this. And, uh, that's what I'm saying, I mean, I mean, I feel more comfortable with my attorney here because, you guys went to school for your job doing right now, questioning me. [M]y attorney would be . . . My attorney, my attorney went to school for, uh, to defend people against people like you all. So, uh, I would feel more comfortable if he was present, you know?"

Detective Arciniega said the police only had one side of the story, and Nuby said: "I don't have no story for you all. Honestly, I don't." He identified himself in the photographs again, and Detective Arciniega said: "It's one of the witnesses we got that, that's saying that it was you. Okay? So we're, we're just trying to, we're just trying to figure this mess out, okay?" He continued: "I'm not asking no more [questions] 'cause, you want to talk to your lawyer. I'm not going to ask you no more questions, okay?" The interview continued, however, with Detective Arciniega telling Nuby, "Somebody got shot and people are saying that it was you." Nuby said, "I want my lawyer[,]" and both detectives said, "You're all right." Nuby reminded the detectives that anything he said would be held against him, and, "you read me my rights." Detective Arciniega's partner replied: "Our hands are tied if you don't tell us your side of the story. We got to book you." Nuby said he had nothing to tell, he didn't know who got shot or who shot him, and, "[w]hoever told you I did, they told a story." He again denied being at the party and said he knew nothing about any shooting.

Nuby did not present any evidence in his defense.

DISCUSSION

1. *Nuby has forfeited his claim that pretrial identification procedures were impermissibly suggestive*

Nuby argues that the pretrial identification procedures were so impermissibly suggestive that they presented a very substantial likelihood of "irreparable misidentification." He does not identify any police procedures that were improperly suggestive, instead pointing out weaknesses in the identifications made by the witnesses at trial. Such weaknesses or inconsistencies "are matters affecting the witnesses' credibility, which is for the jury to resolve." (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) And Nuby did not raise the issue of suggestive identification procedures in the trial court. "Insofar as defendant is asserting that unduly suggestive pretrial identification procedures tainted the courtroom identifications, so that the witnesses should not have been permitted to identify defendant in court, defendant has forfeited the claim by failing to make a timely objection or motion to exclude in the trial court." (*Id.* at pp. 585−586.)

2. *The plea offer was not so unclear as to prejudice Nuby*

Just before beginning jury selection on November 5, 2015, the trial court reminded Nuby that she had told him he faced 50 years to life (in what apparently was an unreported proceeding). Asking Nuby to listen closely, the court stated: "I was wrong. I was only looking at count 3 which is the murder. And in that case you were looking at—I said 50 years to life. But I was wrong. I neglected to take into account you have priors and also take into account counts 1 and 2." If Nuby was convicted on all

charges, he faced 77 years and four months. The prosecutor was offering 23 years, "the high term for the voluntary [manslaughter] which is 11, 10 years for the gun possession, and 2 years for your two priors. That's how we get to the 23 years." The court pointed out Nuby was a young man and suggested he talk to his parents although "it's your decision and your decision alone." The court called a brief recess to give Nuby a chance to talk to his parents without the prosecutor present.

After the recess, Nuby refused the offer, acknowledging he faced "77 to life" if he was convicted. After another brief recess, the court asked the prosecutor, "People, with regards to counts 1 and 2, are you announcing unable to proceed at this point?" The prosecutor responded, "Yes"; and the court asked: "We're just going to be looking at the murder; is that correct?"—and the prosecutor answered, "Yes." After granting Nuby's motion to bifurcate the priors, the court advised Nuby: "You're only—only count we're going to be looking at is the count 3. Along with that is that he personally used a firearm. So those—that's the only allegation that I see." The court asked if there was anything else before it called the jury in, and Nuby's counsel responded, "Not from the defense standpoint."

Nuby argues the oral proceedings were unclear, leaving open the possibility that the two dismissed counts were merely postponed, and the trial court "did not clearly inform [Nuby] that there now was only one charge that would ever be going to trial against him." We disagree. The court made it clear that only one count remained. The court also clarified that the only remaining count was murder, and then directly addressed Nuby to emphasize the "only count we're going to be looking at is the count 3."

Nuby also argues that the court never discussed the potential sentence he might face on the murder charge alone. But the court had already advised Nuby that he faced 50 years to life on the murder charge alone. The trial court also stated that the prosecution's offer was 23 years for voluntary manslaughter and two years for the prior prison terms, without any mention of the other counts, and gave Nuby time to consult with his parents. Nuby and his counsel were advised of the potential sentence and the offer on the murder count. Nuby's suggestion on appeal that he "deserved new counsel" is meritless. He does not allege this constituted ineffective assistance of counsel. Further, he has no constitutional right to a plea bargain and the prosecutor had no legal obligation to make any plea offer. (*People v. Trejo* (2011) 199 Cal.App.4th 646, 655–656.)

3. ***Nuby cannot show prejudice from the consolidation of counts 1 and 2 with count 3, when counts 1 and 2 were dismissed before trial***

Nuby argues the trial court erred when in August 2015, over his opposition, it consolidated counts 1 and 2 (assault with a firearm and assault with a semiautomatic firearm on Alfredo Sanchez on April 28, 2014) with count 3 (murder of Perkins on February 7, 2014). The record does not contain a reporter's transcript of the hearing.

Nuby admits that assault with a firearm and murder are "assaultive crimes against the person," so that all three offenses are in the same class of crimes, which permits joinder under section 954. (*People v. Jones* (2013) 57 Cal.4th 899, 924.) When (as here) the statutory requirements for joinder are satisfied, the court retains discretion to order severance in the interest of justice and for good cause. (*Id.*) Nuby must make a clear

showing of potential prejudice to show that the trial court abused its discretion in ruling that the counts would be consolidated. (*Id*. at pp. 924–925.)

After consolidation, counts 1 and 2 were dismissed before jury selection began, and Nuby went to trial on count 3 only. Nuby has not made a clear showing of potential prejudice from the joinder.

4. ***The trial court did not err when it gave a voluntary manslaughter instruction***

Nuby and his counsel stated they did not want an instruction on voluntary manslaughter. The court agreed and instructed the jury. At the next court session, the court stated it had reconsidered after more research and believed substantial evidence supported the lesser included offense of voluntary manslaughter. Although both sides opposed it, the court would give the instruction, and both sides could argue against it. The court gave the instruction.

In closing, the prosecution argued to the jury there was no evidence of heat-of-passion voluntary manslaughter or imperfect self-defense. The defense argued that although Nuby was at the party, he did not participate in any arguments or fights, and did not shoot Perkins.

After his conviction, Nuby filed a motion for new trial arguing there was absolutely no evidence to support the voluntary manslaughter instruction. At the hearing, the trial court explained it had a duty to give all applicable instructions if supported by substantial evidence. "There was a fight right beforehand. I believe one of the defendant's friends was—got hit or beat up, and then the shot came. I mean, that's a classic situation for a voluntary manslaughter."—and there was "plenty"

of evidence to support the instruction. The court denied the motion for new trial.

We agree the court properly gave the instruction. The trial court must instruct the jury on a lesser included offense if substantial evidence shows the offense committed may have been less than the charged offense. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) A killing that would otherwise be murder may be voluntary manslaughter if the defendant killed someone without the malice required for murder, upon a "sudden quarrel" or in a heat of passion. (*People v. Najera* (2006) 138 Cal.App.4th 212, 221.) Testimony established the small apartment was crowded and dark, and at least six people were brawling in the living room. Lanesha Browning told the 911 operator the shooter and others were "getting they ass whooped." Perkins, the victim, was in the middle of the brawl when Nuby pulled out his gun. "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim[, and] sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Id.* at p. 254.) A jury could reasonably conclude that Perkins's active participation in the brawl could have caused an ordinary person who was getting "ass whooped" to act rashly and without reflection. Substantial evidence supported the instruction.

5. ***Nuby failed to object when the recording of Hall's interview was played to the jury, and he does not demonstrate prejudice***

During Hall's interview, Detective Arciniega asked Hall what kind of hat Nuby was wearing in a photograph, and Hall

said he thought it was a Bull's hat. Detective Arciniega's partner then asked, "[A]ren't you guys Crips, aren't you?" When Hall answered, "Yeah," the detective asked: "Then what's up with all the red?"—adding: "Look at you, man. All you red on your shirt." Hall also told the detectives that Nuby was on parole in his mother's house "in Pocket Hood," and Nuby had been jailed for drug possession and assault with a deadly weapon before his release. Nuby argues on appeal that the "red" exchange was gang evidence with only marginal relevance, which (along with the reference to his prior convictions) was highly prejudicial.

Nuby did not object to these portions of the interview, either upon the admission of the transcript into evidence nor when the prosecution showed the jury a videotape of the interview. "Absent a timely objection in the trial court on the ground or grounds urged on appeal, we generally will not review challenges to the admissibility of evidence." (*People v. Merriman* (2014) 60 Cal.4th 1, 84.) This claim is forfeited.

In any event, the brief exchange with Hall about red clothing referred to a group photo, and implies that red is *not* a Crips color. Any gang association was attenuated, and the defense may have made a tactical decision not to highlight the exchange by making an objection. (*People v. Rices* (2017) 4 Cal.5th 49, 80–81.)

Moreover, after the jury saw the video, the trial court admonished them: "In the recordings that we listened to from Mr. Nuby and also Mr. Hall there were a couple references with regard to jail and being arrested. Those things were not offered for the truth of the matter and you can not [*sic*] consider them in evaluating the evidence in this case. That was just part of the

general conversation . . . . [¶] [Y]ou can not [*sic*] use that nor hold it against Mr. Nuby in any way, shape or form."

Even absent an objection, the trial court neutralized any prejudicial effect with this advisement, which we presume the jury heeded.

6. ***The trial court properly admitted into evidence Nuby's interview with Detective Arciniega***

Defense counsel objected to the admission of Nuby's interview with Detective Arciniega, arguing that Nuby had requested an attorney and the detectives' continued questioning violated Nuby's rights under *Miranda v. State of Arizona* (1966) 384 U.S. 436. After reviewing the recording, the court concluded Nuby "is a pretty sophisticated guy" who knew his rights, and who did not unequivocally assert his right to an attorney before page 22 of the transcript. At that point, Nuby said: "I feel more comfortable with my attorney here because, you guys went to school for your job doing right now, questioning me. [M]y attorney would be . . . My attorney, my attorney went to school for, uh, to defend people against people like you all. So, uh, I would feel more comfortable if he was present, you know?" After that statement, Detective Arciniega recognized he had asserted his right to have a lawyer present: "I'm not asking no more [questions] 'cause, you want to talk to your lawyer. I'm not going to ask you no more questions, okay?" The court agreed to admit the interview only up to page 22. Nuby did not explicitly say he wanted his lawyer present, but the detectives understood that he had asserted his right to counsel (although "it's not [the] subjective mind of the officer"). After further discussion, however, Nuby's counsel withdrew his objection, and requested that the entire transcript be admitted and the entire recording be

played for the jury, for tactical reasons ("I think there is stuff that could help Mr. Nuby, after what we've heard today. I didn't know Mr. Hall was going to be testifying.").

After a suspect has waived his right to counsel (as Nuby did after the officers advised him of his rights at the start of the interview), police officers must stop a custodial interrogation when a suspect clearly and unequivocally asserts the right to counsel. (*Davis v. United States* (1994) 512 U.S. 452, 459.) "[T]he suspect must unambiguously request counsel." (*Ibid.*) The standard is objective: would a reasonable police officer under the circumstances understand the statement to be a request for an attorney? (*Ibid.*) While the police may seek to clarify an ambiguous request, they are not required to do so. (*Id.* at p. 461.) " 'Maybe I should talk to a lawyer' " is not an unambiguous request for counsel. (*Id.* at p. 462.) Nor are: " 'I think it'd probably be a good idea for me to get an attorney.' " (*People v. Bacon* (2010) 50 Cal.4th 1082, 1105); " '[I]f for anything you guys are going to charge me I want to talk to a public defender too, for any little thing.' " (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1116, 1126); " 'I need to know, am I being charged with this, because if I'm being charged with this I think I need a lawyer.' " (*People v. Suff* (2014) 58 Cal.4th 1013, 1068–1069); or " 'I want to see my attorney 'cause you're all bullshitting now.' " (*People v. Williams* (2010) 49 Cal.4th 405, 432, italics omitted).

We agree with the trial court that Nuby's statement, "I [would] feel more comfortable with my attorney here," was ambiguous. The officers were not required to stop questioning Nuby. Nevertheless, the court intended to exclude the rest of the interview because the interviewing officers construed Nuby's statement as a request for counsel. Nuby's attorney then

requested the interview be admitted in full because it could help Nuby. The admission of the entire interview was not error.

7. ***The absence of a written record of Detective Patino's hospital interviews was not prejudicial error***

Nuby argues that LAPD policy required Detective Patino to keep a written record of his attempts to interview Perkins in the hospital after the shooting, and that if such records existed, the defense had a right to review the records. Nuby's counsel requested copies of any records of the hospital interviews.

Detective Patino testified that Perkins was in a coma the first two times the detective came to the hospital. The third and fourth times he visited, Perkins was conscious but intubated. Detective Patino did not take notes of his conversations with Perkins, noting in the chronological report after the third visit that Perkins did not provide useful information or help to identify a suspect.

Due process requires the prosecution to disclose material exculpatory evidence to the defendant, regardless of the good or bad faith of the prosecution. (*Brady v. State of Maryland* (1963) 373 U.S. 83, 87–88.) When the evidence is only potentially exculpatory, however, the defendant must show bad faith when the prosecution fails to preserve the evidence. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57–58.)

Here, Nuby has not shown that any evidence existed or was suppressed, lost, or destroyed. Detective Patino testified that he did not take notes of his two conversations with Perkins on his third and fourth visits, and there is no evidence to the contrary. The defense had the chronological report that recorded the dates of Detective Patino's visits. Even if we were to assume that any such evidence might exist, and that the evidence might be to

Nuby's advantage, notes of the conversations would be only potentially exculpatory. Nuby would have to show that the prosecution or the police acted in bad faith, which he does not argue.

We also reject Nuby's suggestion that his counsel was ineffective in not pushing harder to discover written records of the hospital interviews. Defense counsel requested the records and received the chronological report. We see no deficient performance by counsel, and certainly no prejudice, in failing to pursue written records of the substance of the interviews when there is no evidence those records exist. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

8. ***We remand for a new sentencing hearing in light of Senate Bill 620***

In supplemental briefing, Nuby argues we should remand his case to the trial court to allow the court to exercise its discretion to strike the firearm enhancement imposed under former section 12022.53, subd. (h). We agree that remand is necessary.

When the trial court sentenced Nuby in January 2016, it had no discretion to strike the firearm enhancement imposed under section 12022.53. (Former § 12022.53, subd. (h).) In October 2017, the Legislature passed S.B. 620, which took effect on January 1, 2018. Section 12022.53, subdivision (h), 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 People concede the amendment applies retroactively to Nuby's non-final judgment, but argue we should decline to

remand because the record shows the trial court would not have exercised its discretion to strike the firearm enhancement.

"[R]emand 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 a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

At Nuby's sentencing hearing, the trial court pointed out that Nuby had already been to state prison, and, though a young man, he had committed a number of crimes including grand theft, robbery, and burglary. The court mentioned letters of recommendation and character letters, but "Mr. Nuby, on this evening, decided to take a loaded firearm to a party that he wasn't even invited to." It was sad for Nuby's daughter that her father took a gun with him and took someone's life, but "that's on him" and he should be ashamed of that. Nuby and his friends crashed the party, and "[i]t's a tragedy. But it's all because of Mr. Nuby." The letters did not reflect the man depicted in the videos and in testimony, who "took a totally innocent man's life, and it's—that's just tragic, all the way around." The court imposed 15 years to life for second degree murder (as required by section 190, subdivision (a)), plus 25 years to life for the firearm enhancement, for a total of 40 years to life.

In denying Nuby's motion for bail pending appeal, the court referenced the 40-years-to-life sentence, and disagreed that Nuby did not pose a danger to the community: "This is a young man . . . . He's been already to state prison on pretty serious charges before and now a murder charge, over nothing. Absolutely nothing. Because he wanted to be a tough guy, bring a gun to a party he wasn't even invited to, and then shoot

somebody in cold blood. [¶] You know—and I think one of your things was he was involved with church? Guess what, he was involved with church when he did the murder. . . . He doesn't even come close to somebody that warrants being on bail on appeal." The court continued: "[A]t the very beginning of the case, he was offered something that the court thought was incredibly reasonable. And it's his choice whether or not to go to trial. And I believe his family even talked to him. And it was his choice. [¶] And he is a headstrong young man. He's going to do what he's going to do. He's going to shoot somebody in cold blood, because that's what he wants to do." The court denied a request for Nuby to hug his daughter: "The answer is 'no.' . . . He shouldn't have killed somebody."

The trial court expressed dismay at the senselessness of Nuby's decision to bring a gun to the party and the resulting tragedy of Perkins's murder. The trial court did not, however, clearly state what it would have done if it had the authority to choose whether to impose the firearm enhancement, which resulted in a 25-years-to-life term that more than doubled Nuby's total sentence. The court had no discretion to impose a sentence lower than 15 years to life for the second degree murder conviction, so it had no occasion "to express its intent to impose the maximum sentence permitted." (*People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 427.) We therefore remand to allow the trial court to decide in the first instance whether the firearm enhancement should be stricken.

DISPOSITION

Nuby's sentence is vacated and the matter is remanded for the limited purpose of allowing the trial court to consider whether to strike the firearm enhancement imposed under Penal Code section 12022.53. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

KALRA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.