

S257658

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
) Court of Appeal No. F076836
Plaintiff and Respondent,)
)
v.) Super. Ct. No. BF163811A
)
JOSE GUADALUPE TIRADO,)
)
Defendant and Appellant.)
)
_____)

APPELLANT’S PETITION FOR REVIEW OF THE
PUBLISHED DECISION BY THE COURT OF APPEAL FOR
THE FIFTH APPELLATE DISTRICT, IN CASE NUMBER
F076836, AFFIRMING THE JUDGMENT OF THE
SUPERIOR COURT OF KERN COUNTY

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THE PEOPLE OF THE STATE OF CALIFORNIA,)	
)	Court of Appeal No. F076836
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JOSE GUADALUPE TIRADO,)	
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Defendant and Appellant.)	
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APPELLANT’S PETITION FOR REVIEW OF THE PUBLISHED DECISION BY THE COURT OF APPEAL FOR THE FIFTH APPELLATE DISTRICT, IN CASE NUMBER F076836, AFFIRMING THE JUDGMENT OF THE SUPERIOR COURT OF KERN COUNTY

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant and Defendant JOSE GUADALUPE TIRADO respectfully petitions this Court for review of the published decision of the Court of Appeal, Fifth Appellate District, affirming the judgment of the Superior Court of Kern County.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. WHETHER PENAL CODE SECTIONS 1385 AND 12022.53, SUBDIVISION (H), AND THE FEDERAL AND STATE DUE PROCESS CLAUSES, REQUIRE REVERSAL OF THE TRIAL COURT’S ORDER DENYING APPELLANT’S MOTION TO DISMISS THE FIREARM ENHANCEMENT BECAUSE THE TRIAL COURT WAS

UNAWARE OF ITS DISCRETION TO DISMISS A PORTION OF THE TRUE FINDING TO THE FIREARM ENHANCEMENT AND IMPOSE A MORE JUST SENTENCE?

NECESSITY FOR REVIEW

This case presents an issue in which the published appellate court opinions are in conflict within the meaning of California Rule of Court 8.500, subdivision (b)(1).

A jury found appellant guilty of first degree robbery, driving a vehicle under the influence of alcohol, and assault with a semi-automatic firearm. A Penal Code¹ section 12022.53, subdivision (d), firearm enhancement was found true for the robbery and assault counts. Section 12022.53 imposes escalating punishment for the use of a firearm in the commission of specified felonies. Section 12022.53, subdivision (b), imposes a consecutive sentence of 10 years for the use of a firearm. Section 12022.53, subdivision (c), imposes a consecutive sentence of 20 years for the personal and intentional discharge of a firearm. Section 12022.53, subdivision (d), imposes a consecutive sentence of 25 years to life for the discharge of a firearm which causes death or great bodily injury to another person. Effective January 1, 2018, the Legislature added subdivision (h), to the statute to give the trial court the discretion to strike the punishment imposed by section 12022.53. (Stats. 2017, ch. 682, §2 (SB620).)

Appellant and his companion went into a convenience store to steal beer. Appellant shot a customer who got in the way. Appellant was sentenced to 25 years to life in state

¹ All future statutory references are to the Penal Code unless otherwise stated.

prison for the firearm enhancement plus a determinate term for the substantive counts. The defense counsel requested the trial court to strike the sentence for the firearm enhancement pursuant to section 1385, subdivision (a), and 12022.53, subdivision (h). (5RT 631-635; 2CT 351-355.) The tenor of the discussion between the attorneys and the trial court suggested the trial court never considered imposing lesser punishment under section 12022.52, subdivisions (b) and (c). (5RT 631-636.)

Appellant argued in the Court of Appeal that the case should be remanded to the trial court to exercise its discretion to determine whether the punishment under subdivision (d), should be stricken and a lesser punishment imposed under either subdivisions (b) or (c). The Court of Appeal rejected this argument. It concluded the trial court was required to either impose the 25 years to life specified in subdivision (d), or strike the punishment in its entirety. (Appendix A at pp. 4-9.) The Court of Appeal expressly disagreed with the holding of *People v. Morrison* (2019) 34 Cal.App.5th 217, which reached the opposite conclusion. (Appendix A at p. 9.)

The published appellate court opinions are squarely in conflict regarding the authority of the trial court to strike the punishment specified under section 12022.53, subdivision (d), and impose lesser punishment under that statute. This Court should grant review and resolve the conflict.

STATEMENT OF THE CASE AND FACTS

On August 12, 2019, the Court of Appeal affirmed the judgment of the Superior Court

in a published opinion. (Appendix A.) Appellant incorporates the statement of facts as set forth in the opinion of the Court of Appeal. (Appendix A at pp. 2-4.)

I

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER PENAL CODE SECTIONS 1385 AND 12022.53, SUBDIVISION (H), AND THE FEDERAL AND STATE DUE PROCESS CLAUSES, REQUIRE REVERSAL OF THE TRIAL COURT'S ORDER DENYING APPELLANT'S MOTION TO DISMISS THE FIREARM ENHANCEMENT BECAUSE THE TRIAL COURT WAS UNAWARE OF ITS DISCRETION TO DISMISS A PORTION OF THE TRUE FINDING TO THE FIREARM ENHANCEMENT AND IMPOSE A MORE JUST SENTENCE

Appellant submitted a sentencing memorandum requesting the trial court to dismiss the firearm enhancement. (2CT 351-355.) It argued the firearm enhancement should be stricken because: (1) appellant was youthful—22 years old—when the offense was committed; (2) appellant's criminal record was minor; (3) appellant had been employed and was a productive member of society; (4) people who knew appellant had a good opinion of him; (5) the shooting was spontaneous and induced by the influence of alcohol; (6) a sentence of around 10 years could still be imposed if the firearm enhancement was dismissed. ((2CT 353-355.) Attached to the sentencing memorandum were reports prepared by the defense investigator of interviews of people who knew appellant. (2CT 357-363.) Appellant had been steadily employed as a cook and then a welder. (2CT 357, 359, 361-362.) Appellant's brother and friends knew him as a kind and decent person. (2CT 359-363.) The prosecution

did not file a written opposition.

The prosecutor orally opposed the motion to dismiss the firearm enhancement. (5RT 631-633.) He noted Phillips was still in pain two years after the incident. (5RT 632.) The trial court concluded the motion to strike the firearm enhancement should be denied. (5RT 633.) The trial court commented that appellant; (1) had been regularly employed; (2) brought a firearm to the convenience store which suggested a willingness to use it; (3) had a minor criminal record; (4) tried to assist Aldaco by initially wrestling with Phillips but was not successful because of the size disparity, and then escalated the situation by shooting Phillips, The trial court also noted that serious punishment was warranted for the shooting. (5RT 633-635.) The trial court agreed “with defense counsel’s position that Mr. Tirado, when we look at defendants, doesn’t have the markers historically that we would expect to see– that I would expect to see considering the gravity of this offense. Obviously, alcohol use has some perhaps loosening of his higher conscience, thoughts, and taking activity, but it doesn’t excuse him.” (5RT 635.) The trial court then sentenced appellant to three years for the robbery conviction and 25 years to life for the firearm enhancement. (5RT 636.)

Section 1385, subdivision (a), grants the trial court the authority to dismiss an entire finding or a part thereof. (E.g., *People v. Rivadeneira* (1985) 176 Cal.App.3d 132, 136 [the authority to dismiss the whole includes the authority to dismiss or strike out a part]; *People v. Burke* (1956) 47 Cal.2d 45, 50-51.) The underlying purpose of striking convictions or allegations under section 1385 is the avoidance of unjust sentences. (*People v. Garcia* (1999)

20 Cal.4th 490, 500.) A defendant is “entitled to a genuine exercise of sentencing discretion by the trial court” (*In re Large* (2007) 41 Cal. 4th 538, 550.) The trial court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Senate Bill 620 became effective January 1, 2018. It amended section 12022.53, subdivision (h), by providing, “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.” Section 12022.53, subdivision (h), applies retroactively to all cases not yet final in which a firearm enhancement was imposed at sentencing. (*People v. Chavez* (2018) 21 Cal.App.5th 971, 1020.)

Under section 1385, subdivision (a), the trial court had the discretion to: (1) refuse to strike any portion of the true finding to the firearm enhancement; (2) strike the great bodily injury finding and thus reduce the punishment to 20 years pursuant to subdivision (c); (3) strike the great bodily injury and personal use findings and thus reduce the punishment to 10 years pursuant to subdivision (b); or (4) dismiss the entire the firearm enhancement completely. It was clear the parties litigated the motion as if the only options were either imposing a sentence of 25 years to life or striking the punishment altogether. A remand to

the trial court for a new sentencing hearing is required when the trial court sentenced a defendant without being aware of its sentencing discretion. (*People v. Woodworth* (2016) 245 Cal.App.4th, 1473, 1480.)

The trial court noted significant factors in mitigation such as appellant's minor criminal history and history of employment, (5RT 633.) The trial court clearly wrestled with the section 1385 motion because it believed the significant injuries suffered by the victim warranted substantial punishment, but the punishment resulting from the firearm enhancement was severe. Neither the attorneys nor the trial court suggested or discussed the option of imposing a term for the firearm enhancement that was less than 25 years to life, but not a full dismissal of that enhancement.

The defendant in *People v. Morrison, supra*, 34 Cal.App.5th 217, was convicted of first degree murder. The prosecutor had alleged the subdivisions (b) and (c), enhancements in the information, but amended the information to omit those allegations leaving only the subdivision (d), allegation. A sentence of 25 years to life was added to the sentence for the murder conviction pursuant to section 12022.53, subdivision (d). The defendant argued on appeal the trial court had the discretion to impose punishment under either subdivisions (b), or (c).

People v. Morrison noted, “[c]ase law has recognized that the court may impose a lesser included enhancement that was not charged in the information when a greater enhancement found true by the trier of fact is either legally inapplicable or unsupported by

sufficient evidence.” (*People v. Morrison, supra*, 34 Cal.App.5th at p. 222.) The Court then concluded, “[u]nder these cases, the court could impose an uncharged enhancement under section 12022.53, subdivision (b) or (c) in lieu of an enhancement under section 12022.53, subdivision (d) if it was unsupported by substantial evidence or was defective or legally inapplicable in some other respect. We see no reason a court could not also impose one of these enhancements after striking an enhancement under section 12022.53, subdivision (d), under section 1385.” (*Id.* at pp. 222-223.) Hence, “[t]he court had the discretion to impose an enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under section 12022.53, subdivision (d), if such an outcome was found to be in the interests of justice under section 1385.” (*Id.* at p. 223.)

The Court of Appeal rejected appellant’s argument that the trial court had the discretion to strike the punishment imposed under subdivision (d), and impose lesser punishment under subdivisions (b), or (c). The Court believed the text of section 1385, subdivision (a), permitted the striking of the entire enhancement, but not a lesser remedy. (Appendix A.) The Court ignored well established precedent that section 1385, subdivision (a), grants the trial court the authority to dismiss an entire finding or a part thereof. (*People v. Rivadeneira, supra*, 176 Cal.App.3d at p. 136.) The Court of Appeal also believed imposition of a lesser punishment interfered with the charging authority of the District Attorney’s Office. (Appendix A at pp. 7-8.) Finally, the Court stated, “[w]e are aware our opinion reaches a holding contrary to that of *People v. Morrison* (2019) 34 Cal.App.5th 217.

We do not find the reasoning in *Morrison* persuasive and respectfully disagree with it.”
(Appendix A at p. 9.) The conflict between the published cases is clear. This Court should
grant review.

Dated: August 27, 2019

/S/ John L. Staley

DECLARATION REGARDING WORD COUNT

I declare under penalty of perjury that this petition contains 2,177 words. Executed
on August 27, 2019, in San Diego, California.

/S/ John L. Staley

PROOF OF SERVICE
(People v. Tirado, Appeal No. FO76836)

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action; My business address is 16935 West Bernardo Drive, Suite 260, San Diego, CA 92127. On August 27, 2019, I served the foregoing document described as: APPELLANT’S PETITION FOR REVIEW on all parties to this action as follows:

Via Truefiling:

California Supreme Court
Clerk's Office
350 McAllister St
San Francisco CA 94102-4797

Central California Appellate
Program
2407 J Street, Suite 301
Sacramento, CA 95816

Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

By placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Kern County Superior Court
1415 Truxtun Ave.
Bakersfield, CA 93301

Office of the District Attorney
Kern County
1215 Truxtun Ave., 4th Floor
Bakersfield, CA 93301

Office of the Public Defender
1315 Truxtun Ave.
Bakersfield, CA 93301

Jose G. Tirado
BF2536
P.O. Box 5000
Delano, CA 93216

I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Diego, California. Executed on August 27, 2019, at San Diego, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/S/ John L. Staley

APPENDIX A; OPINION OF THE COURT OF APPEAL

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

AUG 12 2019

Brian Gottlieb, Clerk

By _____ Deputy

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GUADALUPE TIRADO,

Defendant and Appellant.

F076836

(Super. Ct. No. BF163811A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John D. Oglesby, Judge.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Dina Petrusenko, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Jose Guadalupe Tirado (defendant) was, in pertinent part, charged with robbery. It was alleged he personally and intentionally discharged a firearm, which proximately caused great bodily injury to another person. (Pen. Code,¹ § 12022.53, subd. (d).) The jury found him guilty of robbery and found the enhancement true. At sentencing, the trial court denied defendant's motion to strike or dismiss the firearm enhancement pursuant to section 1385.

On appeal, defendant claims the trial court was unaware of its discretion to substitute, for the section 12022.53, subdivision (d) enhancement, a different enhancement within the same section (§ 12022.53, subs. (b) or (c)).

The only section 12022.53 enhancement charged and found true by the trier of fact was subdivision (d). We conclude that, although the trial court had the discretion to strike or dismiss that enhancement pursuant to sections 1385 and 12022.53, subdivision (h), it did not have the discretion to substitute another enhancement for it. We, therefore, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

During the early morning hours of April 10, 2016, Brian P.² was inside a convenience store. Defendant and his accomplice entered the store. Shortly thereafter, Brian observed the accomplice attempt to leave the store without paying for a case of beer. As Brian moved into the accomplice's path, the accomplice lowered his shoulder and rushed at him. Brian tackled the accomplice. While Brian and the accomplice were on the floor, defendant moved behind Brian, drew a semiautomatic pistol, and shot Brian in the lower back. Defendant and his accomplice fled with the stolen beer. The clerk called 911. Brian was rushed to the hospital where he received emergency medical

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

² For the sake of privacy, we refer to Brian by his first name. No disrespect is intended.

treatment. Surgery was required to remove the bullet.³ The police located defendant's vehicle parked outside a residence in which a party was going on. An empty beer case was in the roadway. When defendant drove the vehicle away from the residence, he was stopped and arrested.

The Kern County District Attorney's Office filed an information charging defendant as follows: count 1 – willful, deliberate, and premeditated attempted murder (§§ 187, 664, subd. (a)); count 2 – second degree robbery (§§ 211, 212.5, subd. (c)); count 3 – participation in a criminal street gang (§ 186.22, subd. (a)); count 4 – carrying a loaded firearm while a participant in a criminal street gang (§ 25850, subd. (c)(3)); count 5 – driving under the influence of alcohol (Veh. Code, § 23152, subd. (a), a misdemeanor); and count 6 – assault with a semiautomatic firearm (§ 245, subd. (b)). As to counts 1 and 2, the information alleged an enhancement for the personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)). As to count 6, the information alleged enhancements for personal use of a firearm (§ 12022.5, subd. (a)) and personal infliction of great bodily injury (§ 12022.7, subd. (a)). The information also alleged as to counts 1, 2, and 6, that defendant acted for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)). Prior to trial, the court granted the People's motion to dismiss counts 3 and 4.

The jury found defendant guilty of second degree robbery (count 2), driving under the influence of alcohol (count 5), and assault with a semiautomatic firearm (count 6). As to the robbery count, the jury found true the enhancement for personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)). As to count 6, the jury found true enhancements for use of a firearm (§ 12022.5, subd. (a)) and personal

³ The bullet fractured Brian's right hip. For the subsequent month, he required the use of a walker. He continues to suffer from great pain when he walks, as well as loss of movement in his foot.

infliction of great bodily injury (§ 12022.7, subd. (a)). The jury was unable to reach a verdict as to attempted murder (count 1) or as to any of the alleged gang enhancements.

Prior to sentencing, defendant filed a motion to strike the punishment for the section 12022.53, subdivision (d) enhancement in the interest of justice pursuant to section 1385. In the motion, defendant argued the court should consider his age, history of employment, limited criminal history, the testimony of several character witnesses, the spontaneous nature of the shooting, and the fact that he was under the influence of alcohol at the time of the offenses. Defendant also noted the court “could still impose a sentence of well over 10 years” based on the remaining charges and enhancements. After hearing argument, the court denied the motion, reasoning the egregiousness of defendant’s conduct — which it characterized as the shooting of a good Samaritan in his lower back, who defendant did not know, “at point blank,” to effectuate a beer run — did not warrant striking or dismissing the enhancement. The court continued, “. . . I think the whole thought behind the 12022.53([d]) is that when you have a felony, serious felony, a robbery such as that is being committed and someone essentially is armed and inflicts bodily injury, there needs to be a serious punishment for that.” The court sentenced defendant on count 2, robbery, to three years in state prison. For the section 12022.53, subdivision (d) enhancement, the court imposed an additional 25 years to life.⁴

DISCUSSION

Defendant contends the trial court committed an abuse of discretion because it was unaware that pursuant to sections 1385 and 12022.53, subdivision (h) it could have

⁴ On count 6, assault with a semiautomatic firearm, the court imposed a concurrent term of six years in state prison enhanced by four years pursuant to section 12022.5, subdivision (a) and three years pursuant to section 12022.7, subdivision (a). On count 5, driving under the influence, the court imposed a concurrent term of 90 days in the Kern County jail.

substituted the section 12022.53, subdivision (d) enhancement with a different enhancement within the same section.⁵ We disagree.

Section 12022.53 sets out three different sentence enhancements for the personal use of a firearm in the commission of certain enumerated felony offenses: subdivision (b) provides for a 10-year enhancement for the personal use of a firearm, subdivision (c) provides for a 20-year enhancement for the personal and intentional discharge of a firearm, and subdivision (d) provides for a 25-year-to-life enhancement for the personal and intentional discharge of a firearm causing great bodily injury or death. Before the enactment of Senate Bill No. 620 (2017-2018 Reg. Sess.) (Stats. 2017, ch. 682, §§ 1 & 2, pp. 5104-5106, eff. Jan. 1, 2018), section 12022.53, subdivision (h) expressly prohibited trial courts from striking section 12022.53 enhancements.⁶ Senate Bill No. 620 amended section 12022.53, subdivision (h) to give trial courts discretion to “strike or dismiss” enhancements imposed under this section “in the interest of justice pursuant to section 1385.” Section 1385, subdivision (a) also provides that the court may, “in furtherance of justice, order an action to be dismissed.” “[T]he power to dismiss

⁵ On appeal, defendant argues, specifically, the court “had the discretion to strike portions of the firearm enhancement.” If the court had stricken “a portion of [the firearm enhancement] finding,” his argument goes, it could have imposed a sentence of less than 25 years to life. Defendant did not raise this issue in the trial court. Because we reject defendant’s claim of error on the merits, we do not address the People’s forfeiture argument.

Additionally, defendant mentions the trial court’s failure to “strike portions of the firearm enhancement” violated the federal and state constitutional due process clauses. Other than that bare mention in the caption to this issue raised in his briefing, however, defendant does not expand on his due process claim. We thus decline to consider it further. (*People v. Wharton* (1991) 53 Cal.3d 522, 563.)

⁶ Former section 12022.53, subdivision (h) stated: “Notwithstanding [s]ection 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.)

an ‘action’ under section 1385 includes the power to dismiss or strike an enhancement.” (*People v. Thomas* (1992) 4 Cal.4th 206, 209.)

The denial of a motion to dismiss pursuant to section 1385 is reviewed for abuse of discretion, and “an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss.” (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

Defendant’s claim is predicated on his interpretation of the court’s power pursuant to sections 1385 and 12022.53, subdivision (h). Since defendant raises a question of statutory interpretation, our standard of review is de novo. (*John v. Superior Court* (2016) 63 Cal.4th 91, 95.)

“ ‘When interpreting statutes, we begin with the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls.’ [Citation.] ‘[W]henver possible, significance must be given to every word [in a statute] in pursuing the legislative purpose[.]’ ” (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131.)

Nothing in the plain language of sections 1385 and 12022.53, subdivision (h) authorizes a trial court to substitute one enhancement for another. Section 12022.53, subdivision (h) uses the verbs “strike” and “dismiss,” and section 1385, subdivision (a) states the court may “order an action to be dismissed.” This language indicates the court’s power pursuant to these sections is binary: the court can choose to dismiss a charge or enhancement in the interest of justice, or it can choose to take no action. There is nothing in either statute that conveys the power to change, modify, or substitute a charge or enhancement.

The reference to section 1385 in section 12022.53, subdivision (h) is also significant. As our high court has noted: “there is a long history of dispute among the various branches of state government over the application of section 1385 to sentencing allegations. . . . The lesson of section 1385’s controversial history is that references to the section in sentencing statutes are not lightly or thoughtlessly made.” (*People v.*

Superior Court (Romero) 13 Cal.4th 497, 521-522.) By including language in section 12022.53, subdivision (h) that the motion must be made pursuant to section 1385, the Legislature tied the court's power to strike or dismiss section 12022.53 enhancements to the "long history in this state of dismissals in furtherance of justice . . . discussed prominently in case law." (*Romero*, at p. 520.) Defendant does not cite us to, nor are we aware of, any authority interpreting section 1385 to include the power to modify, change, or substitute a charge or enhancement. Had the Legislature intended the trial court's power to be broader than what is proscribed by section 1385, it would have said so.

This conclusion becomes even more apparent when we examine statutes that expressly authorize courts to modify a charge or an enhancement. " 'Where a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent.' " (*City of Emeryville v. Cohen* (2015) 233 Cal.App.4th 293, 309.) For example, section 1181, subdivision (6), allows a trial court to grant a motion for a new trial "[w]hen the verdict or finding is contrary to law or evidence." It contains the following modification provision:

"[I]f the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial[.]" (*Ibid.*)

Similarly, section 1260 gives appellate courts the power to "modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense." Had the Legislature intended to grant the trial court the power to modify or reduce a firearm enhancement, it would have done so with express language. Sections 1385 and 12022.53, subdivision (h) contain no such language.

Our conclusion is consistent with the well-settled principle that "prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine . . . what charges to bring." (*People v. Birks* (1998) 19 Cal.4th 108, 134.)

“The district attorney’s discretionary functions extend from the investigation and gathering of evidence relating to criminal offenses [citation], through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial.” (*People v. Eubanks* (1996) 14 Cal.4th 580, 589.) “The prosecution’s authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch.” (*Birks*, at p. 134.)

In the instant case, the prosecution could have alleged all three section 12022.53 enhancements, and if it had done so, the jury would presumably have found all three true. In that circumstance, the court would have had the discretion to strike the section 12022.53, subdivision (d) enhancement and then either impose one of the other two enhancements or strike them as well. However, because the People exercised their charging discretion to allege only one enhancement, the trial court was limited to either imposing or striking that enhancement.


We recognize the trial court has the authority to impose a “ ‘ lesser included enhancement[]’ ” following trial “when the charged enhancement is either factually unsupported or inapplicable to the offense of conviction.” (*People v. Fialho* (2014) 229 Cal.App.4th 1389, 1397; see *id.* at pp. 1391-1392 [trial court imposed uncharged § 12022.5, subd. (a) enhancement in lieu of the § 12022.53, subd. (d) enhancement where the defendant was convicted of voluntary manslaughter as a lesser include offense of murder, rendering the § 12022.53, subd. (d) legally inapplicable]; see *People v. Lucas* (1997) 55 Cal.App.4th 721, 742-743 [uncharged § 12022, subd. (a)(1) arming clause imposed in lieu of the § 12022.5, subd. (a) firearm enhancement that trial court found not supported by substantial evidence].) However, the enhancement at issue here was neither unsupported by the law nor unsupported by the evidence.

We are aware our opinion reaches a holding contrary to that of *People v. Morrison* (2019) 34 Cal.App.5th 217. We do not find the reasoning in *Morrison* persuasive and respectfully disagree with it.

The trial court understood its discretion under sections 1385 and 12022.53, subdivision (h). As such, it did not err.


DISPOSITION

The judgment is affirmed.



DETJEN, Acting P.J.

WE CONCUR:



SMITH, J.



DE SANTOS, J.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **People v. Tirado**
Case Number: **TEMP-XVHXGB23**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **johnlstaley@aol.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
PETITION FOR REVIEW	F076836_PR_Tirado

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/26/2019

Date

/s/john staley

Signature

staley, john (129624)

Last Name, First Name (PNum)

John L. Staley, Attorney

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