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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN MANZO,

Defendant and Appellant.

D063208

(Super. Ct. No. SCS212840)

APPEAL from a judgment of the Superior Court of San Diego County,

Timothy R. Walsh, Judge. Affirmed.

Arthur Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Martin Manzo was convicted of first degree murder (count 1), attempted premeditated murder (count 3) and shooting at the occupied vehicle in which the victims were seated (count 2). Manzo admitted allegations that he had suffered two

prior felony convictions, two prior serious felony convictions and three prior prison terms. The trial court sentenced him to 150 years to life, plus a consecutive five-year determinate term. Manzo appealed, asserting among other things, that the evidence was insufficient to support his Penal Code section 246 conviction for discharging a firearm at an occupied vehicle. (Undesignated statutory references are to the Penal Code.)

We concluded that Manzo could not be convicted of discharging a firearm at an occupied motor vehicle absent evidence that the firearm was outside the vehicle, rather than within the vehicle. The California Supreme Court reversed, concluding that "the Legislature intended section 246 to apply to a person standing outside an occupied motor vehicle and shooting into it, even if the gun has crossed the plane of the vehicle." (*People v. Manzo* (2012) 53 Cal.4th 880, 883 (*Manzo*)). Accordingly, it reversed our judgment to the extent it reversed Manzo's conviction for shooting at an occupied vehicle in violation of section 246. (*Manzo*, at p. 890.) It also reversed the true findings on the allegations related to that conviction, and remanded for resentencing.

In November 2012, Manzo was resentenced to a total of 150 years to life plus 5 years, comprising of (1) 25 years to life on count 1, tripled by two strike priors to 75 years to life, (2) 25 years to life on the gun use enhancement attached to count 1, (3) a consecutive Three Strikes sentence of 25 years to life on count 3, (4) a consecutive Three Strikes sentence of 25 years to life on count 4, and (5) five years for a serious

felony prior. The sentence and gun use enhancements for the conviction under section 246 (count 2) were stayed under section 654. The trial court did not address fines or credits, and the abstract of judgment contains the same fines and fees imposed and credits granted at the original sentencing. Manzo timely appealed. Appellate counsel sent the trial court a letter requesting that the abstract of judgment be changed to reflect Manzo's total days of actual custody up to date of resentencing.

### DISCUSSION

Appointed appellate counsel has filed a brief summarizing the facts and proceedings below. He presented no argument for reversal, but asked this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Under *Anders v. California* (1967) 386 U.S. 738, he listed as possible but not arguable issues, whether (1) the district attorney's dismissal of count 2 at the sentencing hearing on May 4, 2011, should preclude imposing sentence on count 2 at the sentencing hearing on November 27, 2012, and (2) the assaultive nature of the acts underlying the conviction in count 2 under section 246 results in count 2 merging with the murder conviction in count 1. These arguments lack merit.

We take judicial notice of the superior court file. (See Evid. Code, §§ 452, subd. (d), 459 [appellate court may take judicial notice of superior court file].) On May 4, 2011, while this matter was on appeal, the trial court entertained and granted a motion by the prosecution to dismiss count 2. During the pendency of an appeal, the trial court lacks jurisdiction to make any order affecting the judgment. (*People v.*

*Alanis* (2008) 158 Cal.App.4th 1467, 1472.) Accordingly, the trial court's purported dismissal of count 2 was void. (*Ibid.*)

We reject the argument that the conviction in count 2 under section 246 "merges" with the first degree murder conviction in count 1 because the merger doctrine does not apply to first degree felony murder. (*People v. Farley* (2009) 46 Cal.4th 1053, 1117.)

We offered Manzo an opportunity to file a supplemental brief, and he has done so. Manzo submitted a four-page handwritten brief with numerous attachments. In his supplemental brief, Manzo asserted the trial court lacked jurisdiction to resentence him. He also asked us to review the fines imposed.

We reject the argument that the trial court lacked jurisdiction to resentence Manzo. The Supreme Court issued its remittitur on April 16, 2012. The trial court properly resentenced Manzo on November 27, 2012. At the resentencing hearing, the trial court did not address any fines or fees. The court acted properly as the disposition by the Supreme Court required resentencing count 2 and any related allegations. In all other respects, the judgment was affirmed. (*Manzo, supra*, 53 Cal.4th at p. 890.)

Finally, we note that an error in the calculation of Manzo's custody credits has been corrected by the trial court.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to Manzo. Competent counsel has represented Manzo on this appeal.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.