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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. ORLANDO DERELL SANDERS, Defendant and Appellant.	B295960 (Los Angeles County Super. Ct. No. YA096230)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt, Judge. Affirmed in part and reversed in part; remanded with directions.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Steven D. Matthews and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

On the evening of May 2, 2017, Xzavier Brown, David Hollis, Jose Castillo, Edward Spriggs, Trevor Woods, and Mario Ibanez were hanging out on the steps of an apartment building on 141st Place in Gardena. Brown was a member of the Shotgun Crips gang, which was allied with the Payback Crips. The apartment complex was in Payback territory. No one but Brown was associated with a gang. Orlando Derell Sanders, a member of the Raymond Avenue Crips, a Shotgun Crips rival, drove up to the building. Sanders and Brown had been acquainted years before, when their respective gangs had a good relationship, and had interacted amicably. Without warning, Sanders fired four or five gunshots at the people on the steps, killing Hollis and wounding Brown, Castillo, and Spriggs. A jury convicted Sanders of Hollis's murder; the attempted murders of Brown, Castillo, and Spriggs; and being a felon in possession of a firearm; and found true various special allegations.

On appeal, Sanders contends the attempted murder convictions relating to Castillo and Spriggs must be reversed based on the trial court's improper jury instruction on the kill zone theory. He also argues the trial court erred in admitting his girlfriend's testimony and in giving an instruction on eyewitness identification, his defense attorney provided ineffective assistance in several respects, and his sentence was illegal.

We agree Sanders's attempted murders conviction as to Castillo and Spriggs must be reversed. We also concur that his sentence was illegal in one respect. In all other respects, we affirm the judgment.

BACKGROUND

As noted, Sanders was a member of the Raymond Avenue Crips, a criminal street gang that had an ongoing feud with the

Shotgun Crips, who were allied with the Payback Crips. On the evening of May 2, 2017, Brown, a Shotgun Crip, was visiting with Hollis, Castillo, Spriggs, Woods, and Ibanez on the steps to an apartment complex on 141st Place in Gardena, in Payback territory. Sanders and Brown knew each other from years earlier, when Raymond Avenue and Shotgun had a good relationship, and they had brief but amicable interactions.

Sanders drove up to the apartment building in a Pontiac, accompanied by Regina Lyles in the passenger seat and a fellow Raymond Avenue Crip in the backseat. Saying nothing, he opened the door and fired a handgun four or five times toward the six people on the steps from a distance of 35 feet, killing Hollis and wounding Brown, Castillo, and Spriggs.

Surveillance video capturing the incident was played for the jury.

Cell phone evidence placed Sanders's phone in the area at the time of the shooting, and Brown and Castillo identified him as the shooter.

Sanders was arrested, and placed in a cell with a *Perkins* agent.[1] Detective Karen Salas visited the cell with shell casings in her hand, and told Sanders, "I know you're probably interested to find out why you're here and everything. [¶] . . . [¶] . . . I'm getting a room ready so we can talk in private and basically . . . I don't know if they told you, but you're here regarding a homicide and I'm a homicide detective. [¶] . . . [¶] . . . I have some pictures and some videos and some stuff I wanted to show you . . . . [¶] . . . [¶] . . . [T]his is in regards to this thing that happened off of

[1] A person tasked by police with obtaining incriminating statements in jail. (*Illinois v. Perkins* (1990) 496 U.S. 292.)

Budlong [a cross street near where the shooting occurred]. . . . I'm going to go get the room ready and I'll be back shortly."

Salas left, and the *Perkins* agent struck up a conversation, asking Sanders's name and gang affiliation. The agent told Sanders that detectives would ask what had happened, "to see is you going to lie." Sanders responded, "I ain't got nothing to say . . . . I'm not talking 'til my lawyer . . . . They ain't going to box me in."

Sanders then asked, "If they don't have no proof that that's that man car, it's not in my name. It's not in that—the girl name. . . . [T]hen what?" The *Perkins* agent replied, "[T]hey going to DNA the car." Sanders said, "They don't have [the car]," and said, the gun was "nowhere around me." He indicated his DNA would not be on any shell casings because he "used socks" when loading the gun. (Detective Salas had not mentioned any car or gun.) Sanders said that one of the victims had been shot in the "ass," and said that Regina Lyles would "stay solid." (Detective Salas had mentioned neither Lyles nor any victim's injury.)

An audio-video recording of the conversation was played for the jury.

At trial, Castillo identified Sanders as the shooter.

Lyles, who had received a reduced sentence in exchange for her testimony, testified that on the drive to 141st Place, Sanders had said he wanted to "check something out." When they arrived at the apartment building, he opened the driver's door and "open[ed] fire on a crowd of people" who stood out front. The Raymond Avenue Crip in the back seat yelled, "Raymond," and made a hand gesture related to the gang. As they drove away, Sanders said, "Hey, I think I got one." Lyles had not known that

Sanders was going to commit the shooting. When she asked him why he had done so, he only smirked.

The trial court dismissed an attempted murder charge as to Woods, finding he was 10 feet away from the others on the steps, and was thus not an intended target.

A jury convicted Sanders of the first degree murder of Hollis, the attempted willful, deliberate, and premeditated murders of Brown, Castillo, and Spriggs, and possession of a firearm by a felon. (Pen Code, §§ 187, subd. (a), 664/187, subd. (a), 29800, subd. (a)(1).)[2] The jury found that Sanders had personally and intentionally discharged a firearm causing death and great bodily injury, personally and intentionally discharged a firearm, and committed the murder and attempted murders to benefit a criminal street gang. (§§ 12022.53, subds. (c)-(d), 12022.7, subd. (a), 12022.53, subd. (c), 186.22, subd. (b)(1)(C).)

The trial court found Sanders had one prior serious felony conviction (§§ 667, subd. (a)(1), 667, subd. (d), 1170.12, subd. (b)), and sentenced him to a total term of 95 years to life for the murder, with concurrent terms for the attempted murders and firearm possession.

Sanders appeals from the judgment of conviction.

DISCUSSION

A. Instruction on the Kill Zone Theory of Attempted Murder

Sanders contends the trial court prejudicially erred in instructing the jury pursuant to CALCRIM No. 600 on the kill zone theory of attempted murder of Castillo and Spriggs. We

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[2] Undesignated statutory references will be to the Penal Code.

agree the instruction was unwarranted, and the error was prejudicial.

1. The Victims' Placement

The shooting was recorded by a video surveillance camera. The recording showed the victims standing on an exterior staircase running parallel to the apartment building and the street. The staircase had railings on both sides and a landing and a gate at the top. As described by the trial court in denying Sanders's section 1181.1 motion, the victims were "congregating on basically one set of stairs that has approximately ten steps. It's a very small area; a very tight area. They are all, with the exception of Trevor [Woods], within probably an arm's reach of each other. Even Mr. Spriggs could easily reach out with one arm and touch the individuals that are on the next—to the stair or the landing stairs."

During a jury instruction conference, the court further described the scene: "Everyone is gathered at the top of the landing. Mr. Castillo is holding the gate open with his body. Mr. Hollis is at the top of the stairs. Mr. Brown is at the top of the stairs. . . . And then there's Mr. Spriggs who is probably four steps down and . . . if he stuck his arm out and if someone else stuck their arms out, they could probably high five each other; they're that close."

2. Instruction and Argument on the Kill Zone Theory

The trial court instructed the jury as to the kill zone theory of attempted murder using CALCRIM No. 600 as follows:

"A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict [Sanders] of the attempted murder of Jose Castillo (Count 3) and Edward Spriggs (Count 4),

the People must prove that [he] not only intended to kill Xzavier Brown but also either intended to kill Jose Castillo and Edward Spriggs or intended to kill everyone in the kill zone. If you have a reasonable doubt whether [Sanders] intended to kill Jose Castillo and Edward Spriggs, or intended to kill Xzavier Brown by killing everyone in the kill zone, then you must find [Sanders] not guilty of the attempted murder of Jose Castillo (Count 3) and Edward Spriggs (Count 4)."

The prosecutor argued as to the attempted murder charges:

"Now, there's another concept I want you to understand, and that's called the kill zone concept. That is the person intends to kill a specific victim or victims. In this case, it would be Xzavier Brown, the Shotgun Crip gang member. And at the same time intend to kill everyone in a particular zone o[f] harm. We call that the kill zone. Then he can be guilty of attempted murder for those individuals in that kill zone. . . .

"[T]here are two elements for attempted murder under the kill zone theory. Number one, [Sanders] intended to kill Xzavier Brown. We discussed that earlier, rival gang member and Shotgun Crips. And two, everyone within the kill zone.

"Now, look at the kill zone. You had Castillo, David Hollis, and Xzavier Brown at the very top of that staircase. They're all standing there hanging out. You saw it on the surveillance video. And just a step below it was Edward Spriggs. They're all within arms' distance from each other. They all can touch each other, or very close. . . .

"So when [Sanders] fired and saw that his enemy was right there and he's shooting, not once but multiple times, everybody that's in that kill zone, he's on the hook for attempted murder."

3. Applicable Law

"To prove the crime of attempted murder, the prosecution must establish 'the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citation.] When a single act is charged as an attempt on the lives of two or more persons, the intent to kill element must be examined independently as to each alleged attempted murder victim; an intent to kill cannot be 'transferred' from one attempted murder victim to another under the transferred intent doctrine. [Citation.]" (*People v. Canizales* (2019) 7 Cal.5th 591, 602 (*Canizales*).)

The kill zone theory, first approved by our Supreme Court in *People v. Bland* (2002) 28 Cal.4th 313, yields a way in which a defendant can be guilty of the attempted murder of victims who were not the defendant's "primary target." In *Canizales*, the Supreme Court clarified "that a jury may convict a defendant under the kill zone theory only when the jury finds that: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target; and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm. Taken together, such evidence will support a finding that the defendant harbored the requisite specific intent to kill both the primary target and everyone within the zone of fatal harm." (*Canizales*, *supra*, 7 Cal.5th at pp. 596-597.)

Canizales noted that, "[a]s past cases reveal, there is a substantial potential that the kill zone theory may be improperly applied, for instance, where a defendant acts with the intent to kill a primary target but with only conscious disregard of the risk that others may be seriously injured or killed." (*Canizales*, *supra*, 7 Cal.5th at p. 597.) For this reason, the court cautioned "that trial courts must be extremely careful in determining when to permit the jury to rely upon the kill zone theory" (*ibid.*), and "there will be relatively few cases in which the theory will be applicable and an instruction appropriate" (*id.* at p. 608).

"[W]hen a trial court instructs the jury on an alternative theory that is improper simply because that alternative theory is not factually supported by the evidence adduced at trial, the factual inadequacy is generally something that 'the jury is fully equipped to detect.' [Citation.] For this reason, . . . 'instruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice, for there would be a valid basis for the verdict. . . . [T]he appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.' " (*Canizales*, *supra*, 7 Cal.5th at pp. 612-613.)

4. The Trial Court Erred in Giving the Kill Zone Instruction

Although the jury could infer that Sanders's use of force endangered Castillo and Spriggs, endangerment "is insufficient to support a kill zone instruction." (*Canizales*, *supra*, 7 Cal.5th at p. 608.) " '[I]n a kill zone case, the defendant has a primary

target and reasons [that] he cannot miss that intended target if he kills everyone in the area in which the target is located.' " (*Id.* at p. 607.) Thus, a kill zone instruction was appropriate only if there was evidence of a primary target (*id.* at p. 609), and "there is sufficient evidence to support a jury determination that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm" around that primary target, and not merely endanger or harm them (*id*. at p. 608).

The requirements set forth in *Canizales* were not met here. Assuming Brown was the primary target (there was scant evidence this was so), the prosecutor argued that Sanders intended to kill in addition only Castillo, Spriggs, Hollis, and Woods, not Ibanez, the other person on the steps; and there was no evidence that Sanders pointed a gun at Woods or Ibanez, or that he intended to kill all six people with only five shots.

The Attorney General argues the relevant victims, Brown, Hollis, Castillo, and Spriggs, were standing together, on or near the upper landing, a small area with railings and a limited means of escape, and the only reasonable inference is that Sanders intended to create a zone of fatal harm around Brown there.

In that sense the relevant zone was not the entire staircase—Woods and Ibanez were on the steps too, yet outside the kill zone—but only the top portion of it, where Brown and the other three injured (or killed) victims stood, three on the landing, including Castillo at the gate into the building, and one four steps down. There was an avenue of escape from that area, either down the steps toward Woods and Ibanez (who were admittedly outside the kill zone) or through the gate and into the building,

but we will grant that the area was somewhat restricted, especially as the court and jury viewed surveillance footing. (See *Canizales*, *supra*, 5 Cal.5th at p. 607 ["In determining the defendant's intent to create a zone of fatal harm and the scope of any such zone, the jury should consider the circumstances of the offense, such as the type of weapon used, the number of shots fired (where a firearm is used), the distance between the defendant and the alleged victims, and the proximity of the alleged victims to the primary target"].) Even so, that Sanders intended to kill everyone surrounding Brown was not the only reasonable inference from his conduct. An equally reasonable inference was that he intended only to endanger and terrorize others on the steps by shooting at Brown.

There was thus insufficient evidence in the record to support the trial court's instruction on the kill zone theory, and the court erred by giving the instruction. (See *Canizales*, *supra*, 5 Cal.5th at p. 608 [kill zone instruction inappropriate where more than one reasonable inference may be drawn].)

This error was prejudicial. As stated above, an instruction on a factually unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on a valid ground, or on both a valid and invalid ground, there would be no prejudice. (*Canizales*, *supra*, 7 Cal.5th at pp. 612-613.) Here, the jury was told that it could return a verdict of guilt as to the attempted murders of Castillo and Spriggs if it found either that Sanders intended to kill them specifically or intended to kill everyone near Brown. In light of the prosecutor's acknowledgement that Sanders targeted only Brown, and there being no apparent motive to kill Castillo or Spriggs specifically, a reasonable probability exists that the jury

in fact found Sanders guilty of their attempted murders solely on the unsupported kill zone theory. Hence, Sanders's convictions as to Castillo and Spriggs (counts 3 and 4) must be reversed.

B. Instruction on Witness Certainty

Citing scientific studies that show a lack of correlation between an eyewitness's confidence in his or her identification of a suspect and the accuracy of the identification, Sanders contends the trial court violated his due process rights by failing to modify CALCRIM No. 315 so as to omit eyewitness certainty as a factor for jury consideration.

Here, Castillo first identified Sanders from a photo array, but indicated he was uncertain. He said, "I believe he might be the gunman. The shape of his face looks like the gunman and the hairstyle." Castillo later told Detective Salas that he was confident about his selection, and at trial testified he was sure. Dr. Iris Gidlin, an eyewitness identification expert, testified for the defense that "post-event factors . . . can manipulate the confidence people express about their memories"; "confidence can be increased, artificially inflated by [a] post-event factor or decreased. . . . [W]e have to look at the entire context and the factors before we can take confidence as a sign of accuracy."

The trial court instructed the jury with CALCRIM No. 315, which sets forth a list of factors to consider in evaluating the credibility of identification testimony, including, "How certain was the witness when he or she made an identification?" Sanders offered no objection to the instruction. (Whether the certainty portion of CALCRIM No. 315 violates a defendant's due process rights is currently pending before our Supreme Court in *People v. Lemcke*, review granted Oct. 10, 2018, S250108.)

Because Sanders did not request at trial that CALCRIM No. 315 be modified, his claim on appeal has been forfeited. (*People v. Sánchez* (2016) 63 Cal.4th 411, 461 ["If defendant had wanted the court to modify the instruction, he should have requested it. The trial court has no sua sponte duty to do so"].)

Sanders argues that his defense attorney provided ineffective assistance by failing to object to the instruction. We disagree.

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692; *People v. Williams* (1997) 16 Cal.4th 153, 215.) "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

Here, the record is silent on why Sanders's attorney offered no objection to CALCRIM No. 315. We will therefore affirm unless there could be no satisfactory explanation.

But such an explanation readily presents itself. Castillo identified Sanders three times, and was uncertain the first time but certain in court. Dr. Gidlin testified that an eyewitness may

become artificially more certain in his or her identification of a suspect as time passes. From these facts it is unclear that Sanders's attorney would have wanted a modification to CALCRIM No. 315. "This case involved many identifications, some certain, some uncertain. Defendant would surely want the jury to consider how *uncertain* some of the identifications were, as [CALCRIM No. 315] instructs." (*People v. Sánchez*, *supra*, 63 Cal.4th at p. 462.)

C. Lyles's Testimony was Not Coerced

Lyles testified pursuant to a plea agreement under which she received a seven-year sentence in exchange for truthful testimony. The agreement began with a recitation of acts, stating, "It is believed" that Lyles accompanied Sanders when he killed Hollis and wounded Brown, Castillo and Spriggs. The agreement obligated Lyles to "[a]ppear as required and testify truthfully" in this case.

Sanders contends the language "it is believed" coerced Lyles to testify in accordance with the agreement's statement of "believed" facts, and his attorney rendered ineffective assistance by failing to object to her testimony on that basis. We disagree.

" '[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion.' [Citations.] Because of this, '[i]mmunity or plea agreements may not properly place the accomplice under a strong compulsion to testify in a particular manner—a requirement that he or she testify in conformity with an earlier statement to the police, for example, . . . would place the witness under compulsion inconsistent with the defendant's right to fair trial.' " (*People v.*

Anderson (2018) 5 Cal.5th 372, 398.) " 'Although . . . there is some compulsion inherent in any plea agreement or grant of immunity, . . . "an agreement requiring only that the witness testify fully and truthfully is valid." ' " (*Ibid.*) "The agreement is not improperly coercive unless it 'is expressly contingent on the witness sticking to a particular version.' " (*Ibid.*)

Sanders's defense attorney may have had a simple reason not to object to Lyles's testimony on the ground that it was coerced: The objection would have been overruled. (See *People v. James Anderson* (2001) 25 Cal.4th 543, 587 ["Counsel is not required to proffer futile objections"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1080 [failure to make a meritless objection does not constitute deficient performance].) Although the preamble in the plea agreement set forth facts that the district attorney's office "believed," nothing in it required that she testify in accordance with those facts. On the contrary, the agreement obligated her to testify truthfully. Any objection to Lyles's testimony as coerced would therefore have been overruled.

D. Sanders's Statements to the *Perkins* Agent

As noted above, upon arresting Sanders, police placed him in a jail cell with an individual they had planted in hopes of obtaining incriminating statements, a *Perkins* agent. After Detective Salas indicated she was going to look for an open interrogation room, the *Perkins* agent told Sanders that detectives would ask what had happened, "to see is you going to lie." Sanders responded, "I ain't got nothing to say . . . . I'm not talking 'til my lawyer . . . . They ain't going to box me in." He thereafter made statements, related above, indicating he participated in the 141st Place shooting.

Sanders contends his statement that he would not speak to law enforcement absent a lawyer constituted an invocation of his *Miranda*[3] rights; subsequent statements to the *Perkins* agent were inadmissible under *Miranda*; and his defense attorney was ineffective for failing to move to suppress the statements. The argument is without merit.

Even if Sanders's initial response to the *Perkins* agent constituted an invocation of his *Miranda* rights, " '[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*,' " because " '[t]he essential ingredients of a "police-dominated" atmosphere and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate.' " (*People v. Webb* (1993) 6 Cal.4th 494, 526.) That such a conversation occurs after invocation of *Miranda* is "without legal significance." (*People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1541 (*Guilmette*); see *People v. Mayfield* (1997) 14 Cal.4th 668, 758 (*Mayfield*) [under *Perkins*, " '[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda' "*]; *People v. Orozco* (2019) 32 Cal.App.5th 802, 814 (*Orozco*) ["there is no 'interrogation' when a suspect speaks with someone he does not know is an agent of the police"].)

Sanders's defense attorney was not ineffective in failing to raise a meritless objection to admission of his jailhouse statements.

Sanders argues that California cases holding that statements made to an undercover agent after invocation of *Miranda* are admissible—*Guilmette*, *Orozco*, and *Mayfield*—were

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

wrongly decided. We disagree, but in any event one of those cases, *Mayfield*, came from our Supreme Court, which we would be powerless to disregard.

Sanders argues that Detective Salas's informing him in the presence of the *Perkins* agent of incriminating evidence—"some pictures and some videos and some stuff [she] wanted to show [him]"—constituted her active participation in his conversation with the agent, rendering the conversation "a police action designed to elicit an incriminating response," i.e., an interrogation, even in Salas's absence, implicating *Miranda*. We disagree. What matters is whether Sanders knew he was talking to a police agent, not who initiated that talk. Had Sanders answered Salas with an incriminating statement, he would have been interrogated. But he did not; he said nothing, and Salas left. At that point Sanders conversed one-on-one with his cellmate, completely unaware the cellmate was a police agent. His statements were accordingly not the product of an interrogation. (See *Orozco*, *supra*, 32 Cal.App.5th at p. 816 [jailhouse conversation with an undercover agent after police bearing incriminating evidence had come and gone was not an interrogation].)

E. Sentencing

1. Minimum Parole Term Enhancement

Sanders was sentenced for first degree murder to 90 years to life, comprising 25 years to life, doubled due to a prior strike, plus 25 years to life for the firearm enhancement, and "[a]n additional term of parole of 15 years . . . pursuant to . . . section 186.22(b)([5])." Sanders contends the additional 15 years was illegal. Respondent concedes the point, and we agree. Section 186.22, subdivision (b)(5), which imposes a minimum parole

eligibility term of 15 years, has no practical effect for a person convicted of first degree murderer, who now has a minimum parole eligibility term of 25 years. (§ 190, subds. (a), (e); *People v. Lopez* (2005) 34 Cal.4th 1002, 1009.) Accordingly, the sentence must be reduced to 75 years to life.

2. Firearm Enhancements

As to each count relating to three of the victims, the jury found two discrete firearm enhancement allegations to be true. We will call them the "subdivision (c)" and "subdivision (d)" enhancements. The jury found that Sanders both discharged a firearm upon the victim within the meaning of subdivision (c) of section 12022.53, and discharged a firearm causing death or great bodily injury within the meaning of subdivision (d) of that section. As to the shooting of Spriggs, the jury found only the subdivision (c) allegation to be true.

At sentencing on January 30, 2019, the trial court denied Sanders's request to strike all enhancement allegations, stating it "recognize[d] its discretion in all areas to strike enhancements that are alleged in this matter," and "decline[d] to strike any of the enhancements[.]" The court further stated, "For this court to exercise its discretion to strike any of the enhancements in this case, I believe in light of the circumstances and the facts of this case, would be an abuse of my discretion," and stated its intention was to impose the "maximum sentence as required by law."

The court imposed three 25-year enhancements for the subdivision (d) findings and a 20-year enhancement for the subdivision (c) finding as to Spriggs.

After sentencing, *People v. Morrison* (2019) 34 Cal.App.5th 217, 222 held that when no subdivision (c) enhancement has been

charged, a court may nevertheless strike a subdivision (d) allegation and instead impose the lesser subdivision (c) enhancement.

Sanders contends the matter should be remanded to afford the trial court an opportunity to exercise its newfound discretion to impose the lesser subdivision (c) enhancement in lieu of any subdivision (d) enhancement. We disagree.

A year before sentencing, Senate Bill No. 620 (2017-2018 Reg. Sess.) amended section 12022.53, subdivision (h) to give a trial court discretion to "strike or dismiss" enhancements imposed under this section "in the interest of justice pursuant to [s]ection 1385." (Stats. 2017, ch. 682, § 2.) Section 1385, subdivision (a) also provided that the court may, "in furtherance of justice, order an action to be dismissed." "[T]he power to dismiss an 'action' under section 1385 includes the power to dismiss or strike an enhancement." (*People v. Thomas* (1992) 4 Cal.4th 206, 209.)

At sentencing here, the court indicated it already knew it had discretion to strike a subdivision (d) allegation and impose an enhancement under subdivision (c) instead. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1390 ["Absent evidence to the contrary, we presume that the trial court knew and applied the governing law"].) Remand is therefore unwarranted.

DISPOSITION

The judgment of conviction for attempted murder is reversed as to counts 3 and 4 for instructional error and the case is remanded for resentencing and possible retrial on those attempted murder counts as long as any retrial is not based on a kill zone theory. The 15-year parole enhancement is stricken, and the trial court is directed to forward an amended abstract of

judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

CHANEY, J.

We concur:

BENDIX, Acting P. J.

WEINGART, 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.