Filed 12/14/22 P. v. Ortega CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ORTEGA, Defendant and Appellant.	E077231 (Super.Ct.No. RIF2001362) OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge. Affirmed.

Robert J. Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Senior Assistant Attorney General, and Junichi P. Semitsu and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Friends of defendant William Ortega had gotten into fights with members of the family of the two victims; defendant himself had been in one of those fights. One night,

defendant's friends drove him past the victims' house. He saw the victims out in front of the house, got out, walked toward them, pointed a gun directly at one of them, and fired. The victims dove to the ground behind a pickup truck. Thus, they did not see defendant as he fired four more shots, then was driven away. None of the shots hit the victims, the truck, or the house.

In a jury trial, defendant was found guilty on two counts of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)),[1] each with an enhancement for personally and intentionally discharging a firearm (§ 12022.53, subd. (c)). In a bifurcated proceeding, after waiving a jury trial, he admitted two prior serious felony enhancements (§ 667, subd. (a)) and two "strike" priors (§§ 667, subds. (b)-(i), 1170.12). He was sentenced to a total of 134 years to life.

Defendant contends:

(1) There was insufficient evidence of intent to kill to support the convictions for attempted murder.

(2) Defense counsel rendered ineffective assistance by failing to object when the prosecutor, in closing argument, supposedly asserted facts not in evidence.

(3) The trial court erred by refusing to strike any of the enhancements or strikes.

We find no error. Hence, we will affirm.

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

I

STATEMENT OF FACTS

A. *The Victims' Prior Run-Ins with Defendant*.

Victims Juan V. and Angel M.[2] were cousins. They and their family lived in the southern half of a duplex on the east side of a cul-de-sac in Jurupa. They had "seen [defendant] around" and knew his name was "Bill." Until early 2020, they had had no problems with him.

About a month before the charged crimes, however, five of defendant's "friends" "jumped" Angel at a park.

Two or three days before the charged crimes, Juan, Angel, and Anthony — who was Angel's brother and Juan's cousin —went to La Noria, a local carniceria. They saw one of the guys who had jumped Angel. Anthony challenged him to "a one-on-one."

"[O]ut of nowhere," defendant, armed with a metal stick, and another man came running up. The other man had also taken part in jumping Angel. Anthony and the other man started fist-fighting. Anthony managed to knock him down. "[T]hat's when they all . . . came . . . running at [Anthony]."

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[2] The trial court ordered that the victims' names appear in the record as "John Doe (J.V.)" and "John Doe (A.M.)." However, "Juan" and "Angel" are very common names; we believe using them will enhance readability without threatening either the victims' safety or their privacy.

Defendant swung the stick at Anthony, but Anthony caught it with his hand. Meanwhile, Juan tried to help Anthony by "concentrating . . . on the other people." After that, defendant's group "just left."

On May 28, 2020, in the afternoon, Juan and Anthony drove to the Jimenez Market, another local carniceria. A group of five or six men, including defendant, was standing in the parking lot. As Juan and Anthony were pulling in, someone in the group threw a piece of metal that hit Anthony's car. Instead of stopping and going into the store, they left.

B. *The Shooting*.

Later that same day, around 8:30 p.m., Juan and Angel were sitting in the bed of Juan's pickup truck, parked in front of their house, in the driveway, hood facing the house. Other family members, including Juan's mother and her boyfriend, were out on a patio at the side of the house, separated from the driveway by a gated fence.

A black or gray car, with four men in it, drove past the house. It went to the end of the cul-de-sac, turned around, then went back past the house and stopped at the corner. The windows were rolled down halfway; Angel recognized defendant, sitting in the back seat.

Defendant and a second man got out and ran toward the house. Angel ran toward the patio and told everyone there to go inside. He said, "[T]hey[']re outside," "[T]hey ha[ve] a weapon."

Juan started to walk toward the patio but ran into his mother and her boyfriend, who were just coming out from the patio to find him.

Defendant and the other man stopped in the middle of the street. Juan saw defendant point a gun at him and fire. He saw "the spark, boom, the flame . . . ." He, his mother, and her boyfriend all hit the ground behind the driver's side of the pickup truck.[3] At the same time, Angel "ducked" behind the front of the pickup truck. They heard four more shots, all one right after the other. When they looked up, the car and the men in it were gone. Five nine-millimeter casings were found in the street.

Defendant was arrested about three hours later. The police found 11 nine-millimeter bullets in the trunk of the car that he was in.

II

THE SUFFICIENCY OF THE EVIDENCE OF INTENT TO KILL

Defendant contends that there was insufficient evidence of intent to kill.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of

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[3] The jury acquitted defendant of attempted murder of Juan's mother and her boyfriend.

fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court '"'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" [Citation.]' [Citation.]" (*People v. Morales* (2020) 10 Cal.5th 76, 88.)

"'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.) "Direct evidence of intent to kill is rare, and ordinarily the intent to kill must be inferred from the statements and actions of the defendant and the circumstances surrounding the crime. [Citations.]" (*People v. Canizales* (2019) 7 Cal.5th 591, 602.)

"'The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill.'" [Citations.]" (*People v. Cardenas* (2020) 53 Cal.App.5th 102, 119.) "[T]he fact that the victim or victims may have escaped death due to the shooter's poor marksmanship does not necessarily establish a less culpable state of mind. [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 745.)

Defendant and his "friends" had a beef with Angel and Anthony. Inferably this beef extended to Juan — Juan was a member of the same family and had backed up Anthony during the fight at La Noria. While this established defendant's motive for the shooting, it was insufficient, standing alone, to establish that he shot to kill rather than to frighten.

Defendant's argument is based on where he was, where the victims were, and where the bullets struck, so we elaborate on these points.

Attached to this opinion are copies of exhibits 1, 7, and 28. Exhibit 7 shows the driveway, the duplex, and the gate to the patio. Exhibit 1 shows where Juan's pickup was parked; it is marked with a "T." On Exhibit 7, Juan's pickup is not shown; however, it was parked where the house number is written.

When defendant first fired, he was standing in the middle of the street, a little south of the house, as shown by the "X" on Exhibit 28.[4] On Exhibit 7, either the "X" in the middle (according to Juan) or the "J" (according to Angel) marks where Juan was when he saw defendant fire and when he hit the ground; the triangle marks where Angel was when he ducked down.

A van was parked in the street in front of the house, just south of the driveway, facing south (i.e., the wrong way). The shooting left four bullet holes in the van. These were consistent with one bullet going front to back, i.e., hitting the front passenger side windshield, the front passenger headrest, and then the rear windshield; and a second bullet going side to side, i.e., hitting the rear passenger side door and then the rear driver's side window.

There was a bullet strike on the north half of the duplex, just above the garage door. The shot that went through the van front-to-back lines up roughly with this bullet

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[4] His position is also described as behind the red car, part of which can be seen in Exhibit 1.

strike. There were also two bullet strikes on the roof of the next house to the north, as shown by the "X" at the left of Exhibit 7.[5]

Only one spent bullet was found, on the walkway of the other half of the duplex. It could have been a bullet that went through the van, but this could not be definitively established.

Two bullet casings were found near where Juan saw defendant standing; two were found directly across the street from the house; and one was found in between.

None of the bullets hit the pickup behind which Juan and Angel were hiding; none of them hit the southern half of the duplex.

With regard to the attempted murder of Juan, Juan testified that defendant stopped, pointed the gun at him, then fired. This deliberate aiming is sufficient to show the intent to kill Juan. "It is well settled that 'unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.' [Citation.]" (*People v. Ghobrial* (2018) 5 Cal.5th 250, 281.)

Defendant argues that Juan's testimony is inconsistent with the physical evidence. The bullet missed, so defendant's aim was not perfect; nevertheless, Juan's testimony demonstrates an *attempt* to aim and thus to kill. It could have been this shot, rather than the shot that went through the van, that hit the north half of the duplex. In any event, of

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[5] Defendant asserts that he fired both north of the victims (citing the bullet strikes on the two houses) and south of them (citing the bullet holes in the van). Actually, the shot that went through the van front-to-back seems to have been aimed in the same general direction as the shots that hit the houses; however, the van got in the way.

the five bullets, only three left strike marks; it is not physically impossible that this bullet narrowly missed Juan, then flew off without hitting anything else. Moreover, all three strike marks were high, near the roofline, suggesting that defendant was aiming fine, but recoil from the gun was giving him trouble. The shot that went through the van side-to-side could not have missed the pickup behind which the victims were hiding by much. The jury could find that the rest of defendant's shots went wide due to poor marksmanship. While three shots landed north of the victims, it must be remembered that he was approaching them from the south, so his aim was not all that far off.

With regard to the attempted murder of Angel, defendant and his cohorts drove past the house twice. Angel saw defendant, so defendant was able to see Angel. Defendant had the same motive to kill Angel as he had to kill Juan. Therefore, given that defendant intended to kill Juan, it would be unreasonable to suppose that he intended merely to frighten Angel; rather, it is inferable that he also intended to kill Angel.

As the prosecutor argued in closing, it was inferable that only two bullets went through the van, fired from different angles, which showed that defendant was moving closer to the house.[6] The evidence also showed that, while an ejected casing can fly some five to fifteen feet, casings do indicate the "approximate area" of a shooting, unless

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[6] After Juan was excused, the parties stipulated that he would testify that defendant "was running, and then . . . stopped to shoot." Defendant claims this establishes that he was not moving when he shot. Actually, it establishes only that he was not moving when he fired the *first* shot. Juan did not see the *other* shots fired.

they have been moved since. Thus, the trail of casings tended to confirm that defendant was moving closer to the house, until he was directly across the street.

If he only intended to frighten the victims, that was unnecessary. Indeed, it increased the risk that they might shoot back and hit him. Rather, it is inferable that defendant was hunting the victims down. They had taken cover; he was trying to get a better shot at them. Moreover, it was dark; he did not necessarily know exactly where they were hiding. Meanwhile, he continued to fire, presumably hoping that he might hit them even if he could not see them.

After five shots, for whatever reason — perhaps the likelihood that the police had been called, or perhaps a lack of ammunition — defendant desisted. However, this is perfectly compatible with an initial intent to kill.

Defense counsel argued defendant's present contention to the jury as the sole defense. He said: "This case is a simple case. It's what was in [defendant's] brain at the time he fired that gun." "[S]hooting a gun to scare does not equal attempted murder." "Here, [defendant] shoots at a car and a house off in a distance, not in the direction of these people." "If he really wanted to kill them, he would have done it." Evidently, with respect to Juan's mother and her boyfriend, the jury agreed; it acquitted defendant of attempted murder as to them. However, as to Juan and Angel, it disagreed. We recognize that our substantial evidence review operates regardless of the jury's findings. Still, a lay jury was capable of considering defendant's argument and rejected it.

We therefore conclude that there was substantial evidence that defendant intended to kill both Juan and Angel.

III

ARGUING FACTS NOT IN EVIDENCE

Defendant contends that his trial counsel rendered ineffective assistance by failing to object when the prosecutor supposedly argued facts not in evidence in closing.

A. *Additional Factual and Procedural Background.*

The jury instructions stated that attempted murder requires "at least one direct[] but ineffective step toward killing another person . . . ." (CALCRIM No. 600.)

In closing, the prosecutor argued that this requirement was met because defendant took a series of "steps": He loaded the gun, he figured out where Juan and Angel lived, he waited until nighttime, he recruited three other men, he had one of them drive him to the house, he drove by the house to see if the victims were there, he had the driver stop at the corner, he got out, he ran closer to the house, he waited until he saw the victims, he began to shoot, and he fired a total of five shots. Defense counsel did not object.

B. *Discussion.*

Defendant claims there was no evidence that: "[1] [he] had investigated where J[uan] and A[ngel] lived, [2] gathered together his three friends, [3] told them his plan, and [4] had them drive him to the home with the express intent of shooting at [the victims]."

Defense counsel's failure to object to the asserted misconduct forfeited any contention that it constituted reversible error. "'It is well settled that making a timely and specific objection at trial, and requesting the jury be admonished . . . , is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal.' [Citation.]" (*People v. Johnsen* (2021) 10 Cal.5th 1116, 1164.)

Defendant therefore argues that the failure to object constituted ineffective assistance. "To make out a claim that counsel rendered constitutionally ineffective assistance, 'the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.' [Citation.]" (*People v. Hoyt* (2020) 8 Cal.5th 892, 958.)

"It is misconduct for a prosecutor to argue facts that are not in the evidence. [Citations.]" (*People v. Johnson* (2022) 12 Cal.5th 544, 612.) However, "'"[t]he prosecution is given wide latitude during closing argument to make fair comment on the evidence, including reasonable inferences or deductions to be drawn from it."' [Citation.]" (*People v. Steskal* (2021) 11 Cal.5th 332, 362-363.) "'"'Whether the inferences the prosecutor draws are reasonable is for the jury to decide.'"' [Citation.]" (*People v. Johnsen*, *supra*, 10 Cal.5th at p. 1181.)

"When a claim of misconduct is based on remarks to the jury, we consider whether there is a reasonable likelihood the jury construed the remarks in an improper

fashion. [Citation.]" (*People v. Steskal*, *supra*, 11 Cal.5th at p. 350.) "[A]ny allegedly improper statements by the prosecutor must be considered in light of the entire argument. [Citation.] '"In conducting [our] inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements."' [Citation.]" (*People v. Holmes, McClain and Newborn* (2022) 12 Cal.5th 719, 789.)

First, from the evidence that Juan and Angel had seen defendant around but did not socialize with him, it was reasonably inferable that he did not know where they lived. Defendant argues that he had run into members of the family before, including at a park about a block from their home. However, that does not establish that he knew exactly which house they lived in. Logically, before shooting up a house, one would want to make sure that one's intended victims live there.

Second, just from the fact that the three men were in the car, it was reasonably inferable that defendant gathered them. Presumably he does not take them with him every time he goes anywhere in a car. The previous attack on Angel was by a group of five men; the attack on Anthony was by a group of three, including defendant. Again, logically, one would be picky about who is with one when attempting to commit murder.

Third, it is inferable that defendant told his cohorts exactly what he planned to do. He would want to make sure that they would support him. Moreover, the driver took specific actions in his support of defendant's plan, such as driving past the house so he

could case it, U-turning, and parking where they could make a quick getaway. Another man got out of the car with defendant while defendant was holding a gun.

Fourth, obviously defendant had them drive him to the house. He was the passenger; he would have to tell the driver where to take him. The house was on a cul-de-sac; there was no other reason to go there. And again, the other men took other specific actions in his support.

As the prosecutor specifically argued: "[Y]ou can infer from the information we know. . . . There's four guys in that car as they drive by the . . . residence. Those other guys in the car knew what was going to happen. So he communicated his plan to them; right? They drove him there."

The People aptly cite *People v. Mitcham* (1992) 1 Cal.4th 1027 (*Mitcham*). There, defendant Mitcham robbed a jewelry store on Lakeshore Avenue in Oakland and shot two staff members, killing one. (*Id.* at pp. 1038-1039.) He met up with defendant Hammond, who had been waiting for him at a Baskin-Robbins around the corner; Hammond then drove Mitcham away from the scene. (*Id.* at pp. 1039-1040.)

The evidence included a statement by Hammond that had been "sanitized" so as to describe Hammond's own actions and not Mitcham's. (*Mitcham*, *supra*, 1 Cal.4th at pp. 1043-1044.) In it, Hammond said "that on the day of the crimes, he left Alameda College and drove to a car wash. He then drove to Oakland on the MacArthur Freeway, eventually got off the freeway, and went up Lakeshore Avenue to the Baskin-Robbins store. He entered the store and then returned to his vehicle . . . ." (*Id.* at p. 1044.) He

also described the route that he took away from the Baskin-Robbins. (*Ibid*.) The jury was instructed (twice) to consider the statement as evidence only against Hammond, and not against Mitcham. (*Id*. at pp. 1043-1044 & 1044, fn. 4.)

On appeal, Mitcham claimed it was misconduct for the prosecutor to argue "that defendant and Hammond drove around Oakland together before the crimes" and to "speculat[e] concerning possible discussions between the two men." (*Id*. at pp. 1051-1052.)[7] The Supreme Court brushed off the claim: "[T]he prosecutor's comments constituted reasonable inferences drawn from the evidence that Hammond had driven to Lakeshore Avenue prior to the robbery and was observed fleeing with defendant shortly after the robbery." (*Id*. at p. 1052.)

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[7] In discussing a different asserted error, the Supreme Court quoted the prosecutor as arguing: "'Now, they're riding side by side from the carwash on 90th and MacArthur all the way to Lakeshore, seven miles. You suppose there's some conversation between the two as to why Mitcham's dressed like he is? . . . How come you got winter coats on? How come you have the two coats on? How come you got a bag full of pillow or blanket? . . . You believe that? . . . [If] you believe that Hammond just happened to be in that position to provide Mitcham with a getaway from that robbery, you'll believe anything." (*Mitcham*, *supra*, 1 Cal.4th at p. 1050.)

Defendant claims that this is the same as the argument that Mitcham was asserting constituted misconduct. On one hand, it does fit the Supreme Court's description of the challenged argument. On the other hand, the Supreme Court never *said* it was the same argument. Moreover, the quoted argument addressed only Hammond's guilt, using evidence that the jury had been told it could consider only against Hammond. It would be odd that *Mitcham* would be claiming that it constituted misconduct. It would also be odd that the Supreme Court would not note that the argument was harmless as to Mitcham.

Because the point is uncertain, we will accept defendant's claim for the sake of argument.

Defendant argues that *Mitcham* is distinguishable, because there, Hammond's statement was evidence supporting the inference that he and Mitcham drove around Oakland together. The jury, however, was instructed not to consider Hammond's statement as evidence against Mitcham. Also, because Hammond's statement had been sanitized, there was no evidence that Hammond drove Mitcham to the jewelry store, much less around Oakland. For all the jury could tell from Hammond's statement, he and Mitcham could have worked out the whole plan by telephone, and Mitcham could have gotten to the jewelry store on foot or on public transit.

In sum, the inferences that the prosecutor drew here were even more supported by the evidence and even less speculative than the inferences that the prosecutor drew in *Mitcham*. Thus, the prosecutor did not commit misconduct, and defense counsel did not render ineffective assistance by failing to object.

IV

REFUSAL TO STRIKE THE ENHANCEMENTS AND THE STRIKE PRIORS

Defendant contends that the trial court erred by refusing to strike any of the elements of the sentence.

A. *Additional Factual Background*.

Defendant was 21 when the crimes were committed and 22 at sentencing.

A few years after defendant was born, his parents separated. In 2006, his father went to prison. Thus, defendant was raised by his mother and his aunts. He was separated from his mother, once for three years and again for six months, when she was

in an immigrant detention facility. According to defendant, "he did not have a stable parent figure and grew up 'doing what he wanted.'"

Although born in California, defendant spent some of his childhood in Sinaloa, Mexico, and Cali, Colombia, where he "witnessed a lot of violence . . . and saw many people die violently."

When defendant was 11, he joined the West Side Riva gang. He had been shot twice and stabbed once. He dropped out of school after ninth grade.

He used marijuana daily. He drank on weekends, a couple of cans of beer at a time. He had used methamphetamine and cocaine daily, but stopped when he was 14. When he was 20, he used heroin every other day. He had been through two six-week substance abuse treatment programs in prison.

Defendant's criminal record consisted of:

(1) A 2014 juvenile adjudication for possession of less than an ounce of marijuana on school grounds (Health & Saf. Code, former § 11357, subd. (e), Stats. 2011, ch. 15, § 159) and possession of a weapon on school grounds (§ 626.10, subd. (a)(1)), both misdemeanors.

(2) A 2016 guilty plea to carrying a loaded firearm, not registered to him, in public (§ 25850, subds. (a), (c)(6)), as a felony, with a gang enhancement, which made it his first strike. When defendant was 17, he was driving a stolen car while armed with a loaded shotgun and handgun. When the police tried to stop the car, he "led deputies on a high-speed pursuit which ended in a collision." He admitted "that he and his friends were

out hunting for 'Dogs Town' gang members to kill." He was placed on probation on conditions including a year in jail.

(3) A 2017 conviction for second degree robbery (§ 211), a felony and a second strike. When defendant was 18, he walked up to a stranger at a skate park, pointed a shotgun at him, and demanded his backpack. When the victim complied, defendant started to walk away, but he then turned and pointed the shotgun at the victim again. He "fled the scene . . . and led officers on a high-speed chase which ended in a traffic collision." He committed this crime while on probation. He was sentenced to three years in prison. While in prison, he stabbed another inmate. He committed the current crimes while on parole, less than five months after his release.

Defendant had been diagnosed during his first prison term as having depression. While in custody for the charged crimes, he had tried to cut his wrists.

B. *Additional Procedural Background*.

Before sentencing, defendant filed a motion asking the trial court to dismiss the strike priors, citing his "rocky childhood" and his "problems with depression, gangs, and alcohol." He claimed that "addiction was the main cause of his troubles with the law"[8] and that, with the support of prison programs, including drug and alcohol treatment, he could be rehabilitated.

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[8] There was no evidence of this. Actually, it would appear that voluntary gang involvement was the main cause.

The trial court denied the motion. It listed as mitigating factors defendant's "disadvantaged youth," the "many obstacles" he had "faced . . . in his life," his parents' "fail[ure] to provide emotional support," his "addict[ion] to drugs and alcohol," the fact that he had not been provided with rehabilitative services in prison,[9] and his youth. As aggravating factors, it listed the crimes underlying his prior convictions, the fact that his priors were not remote, and the fact that his priors had "failed to impress upon defendant the necessity of becoming a somewhat law-abiding citizen . . . ."

It concluded: "In reviewing defendant's background, history, criminal and otherwise, and the Court trying to look for something that would cause a reasonable judge . . . to strike one or both of the priors, and, although being somewhat sympathetic for a person this young and the punishment that the three strikes could result in, and from a humanitarian, compassionate viewpoint, from a legal point of view, I cannot see my way clear of legally doing anything other than to impose the terms imposed by the law." "I find defendant is not outside the scheme of the three strikes law."

Defense counsel then asked the trial court to strike or stay the enhancements "because of the defendant's youth . . . ." The trial court imposed all of the enhancements; thus, it implicitly denied the request.

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[9] The evidence of this was that, once defendant was placed in isolation for stabbing another inmate, he was unable to earn his high school diploma. As mentioned, he had received substance abuse treatment in prison, twice.

C. *Discussion*.

Under section 1385, a trial court has discretion to dismiss a strike prior. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529-530.) Since January 1, 2018, it also has discretion to strike a firearm enhancement. (§§ 12022.5, subd. (c), 12022.53, subd. (h), Stats. 2021, ch. 721, § 1.) And since January 1, 2019, it has discretion to strike a prior serious felony conviction enhancement. (Compare § 1385, Stats. 2018, ch. 1013, § 2 with former § 1385, subd. (b), Stats. 2014, ch. 137, § 1.)

1. *Striking the strike priors*.

With respect to striking a strike, the focus of the analysis must be on "'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.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

"Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three

strikes scheme must be even more extraordinary." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 375.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at pp. 376-377.)

Defendant seizes on the trial court's comment that it was "somewhat sympathetic," "from a humanitarian, compassionate viewpoint," but "from a legal point of view, I cannot see my way clear of legally doing anything other than to impose the terms imposed by the law." He claims this shows that the trial court misunderstood the scope of its discretion — that it erroneously believed that it could not consider mitigating factors such as defendant's youth and "rocky childhood."

We disagree. "A trial court is presumed to know the governing law . . . ." (*People v. Braxton* (2004) 34 Cal.4th 798, 814.) The trial court's comments do not rebut this presumption. As we understand them, it recognized that defendant had shown some mitigating factors that warranted "sympath[y]" from a "humanitarian" point of view. Indeed, it carefully listed these factors — he "had a disadvantaged youth"; his parents "failed to provide emotional support" and at times "were not physically present"; he "became addicted to drugs and alcohol"; and he was "youthful." However, it then proceeded to list the aggravating factors, namely defendant's criminal record and failure to rehabilitate. Thus, it concluded that, "from a legal point of view" — i.e., under the applicable legal standard of whether defendant was outside the spirit of the three strikes law — he was not entitled to relief. (See *People v. Mendoza* (2022) 74 Cal.App.5th 843, 857 [trial court's reference to defendant's criminal history as "controlling" "can be interpreted as the . . . identification of the factors it relied on most heavily . . . , as opposed to a perceived limit on its discretion."].)

Next, defendant argues that the trial court should not have denied his motion based on his criminal history, because he committed the strikes when he "had only just reached adulthood." The trial court, however, explicitly considered defendant's youth. It could reasonably view this as not such an extraordinary circumstance as to take defendant outside the scope of the three strikes law. In fact, it could view it the other way around: It was extraordinary that someone only 22 years old could already be guilty of three

strikes; this showed extraordinary recidivism, calling for not just incarceration but also incapacitation.

Defendant downplays his criminal record. He argues that his strike priors "exhibited the hallmarks of youth. He robbed a man of his backpack at a skatepark, and was found armed with a weapon in public for the benefit of a gang."

Actually, in the 2016 incident, he was driving around with both a loaded shotgun and a loaded handgun. He was looking for members of a rival gang; if he found them, he was going to kill them. When the police tried to stop him, he fled, at high speed, eventually causing a collision. This is not just a kid carrying a concealed firearm because it makes him feel powerful.

In the 2017 incident, defendant was once again armed with a shotgun. Even after the victim turned over his backpack, defendant continued to menace the victim with the shotgun. And once again, he led the police in a high-speed chase that ended in a collision. He committed this crime only four months after his prior conviction, while he was still on probation. Likewise, he committed the current crimes while he was on parole, only five months after his release from prison.

Defendant also omits the fact that he stabbed another inmate while in prison. This did not result in another prior conviction, because he was not prosecuted for the stabbing; however, he was punished with isolation for 26 months.

Defendant cites *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968 (*Alvarez*) for the proposition that "a defendant's recidivist status . . . is not singularly

dispositive." (*Id*. at p. 973.) *Alvarez*, however, did not involve a *Romero* motion; rather, it involved the trial court's power to reduce a wobbler to a misdemeanor. (*Id*. at pp. 973-974.) A *Romero* motion can be denied, in a suitable case, based solely on a defendant's criminal history. (E.g., *People v. Brugman* (2021) 62 Cal.App.5th 608, 639-640.)

Citing multiple recent statutory amendments, defendant argues that there is an on-going policy shift toward lessening punishment. Be that as it may, none of the cited statutes apply to defendant. We do not administer "policy" in a vacuum; rather, we administer applicable statutes and precedent.

2. *Striking the enhancements*.

"The factors that the trial court must consider when determining whether to strike a[n] . . . enhancement . . . are the same factors the trial court must consider when handing down a sentence in the first instance." (*People v. Pearson* (2019) 38 Cal.App.5th 112, 117.) "[C]ourts 'must evaluate the nature of the offense and the offender . . . .' [Citation.]" (*People v. Brugman*, *supra*, 62 Cal.App.5th at pp. 637-638.)

"'[A] court's discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is' reviewable for abuse of discretion. [Citation.]" (*People v. Carmony*, *supra*, 33 Cal.4th at p. 373; see also *id*. at p. 374.)

Here, the trial court could properly refuse to strike any of the enhancements for much the same reasons as it could properly deny the *Romero* motion. Defendant had committed a lot of serious crimes in a short time. His crimes featured violence, willingness to kill, and disregard of consequences. He was just lucky that, in committing

the current offenses, he did not kill anyone. He was similarly lucky that in 2016, when he was driving around looking for someone to kill, the police stopped him. And he was lucky that he did not kill anyone in either of his two high-speed chases. Prison, parole, and probation did not faze him. The trial court could properly conclude that his youth, his difficult childhood, his substance abuse, and his depression did not take away from the undeniable fact that he was a seemingly incorrigible menace to public safety.

Finally, as defendant notes, since January 1, 2022, a trial court exercising its discretion to strike an enhancement must "consider and afford great weight" to certain mitigating circumstances. (§ 1385, subd. (c), Stats. 2021, ch. 721, § 1.) These include, as relevant here, the fact that "[t]he current offense is connected to mental illness" (§ 1385, subd. (c)(2)(D)),[10] that "[t]he current offense is connected to . . . childhood trauma" (§ 1385, subd. (c)(2)(E)), and that "[t]he defendant was a juvenile when they committed . . . any prior offenses . . . that trigger the enhancement . . . ." (§ 1385, subd. (c)(2)(G).) Moreover, whenever "[m]ultiple enhancements are alleged in a single case . . . , all enhancements beyond a single enhancement shall be dismissed." (§ 1385, subd. (c)(2)(B).)

These amendments, however, are expressly not retroactive. (§ 1385, subd. (c)(7); *People v. Flowers* (2022) 81 Cal.App.5th 680, 686, review granted Oct. 12, 2022, S276237.) Defendant therefore is not entitled to the benefit of them.

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[10] Defendant concedes, however, that "there is no evidence to suggest [mental health issues] played a role in his current offense . . . ."

V

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

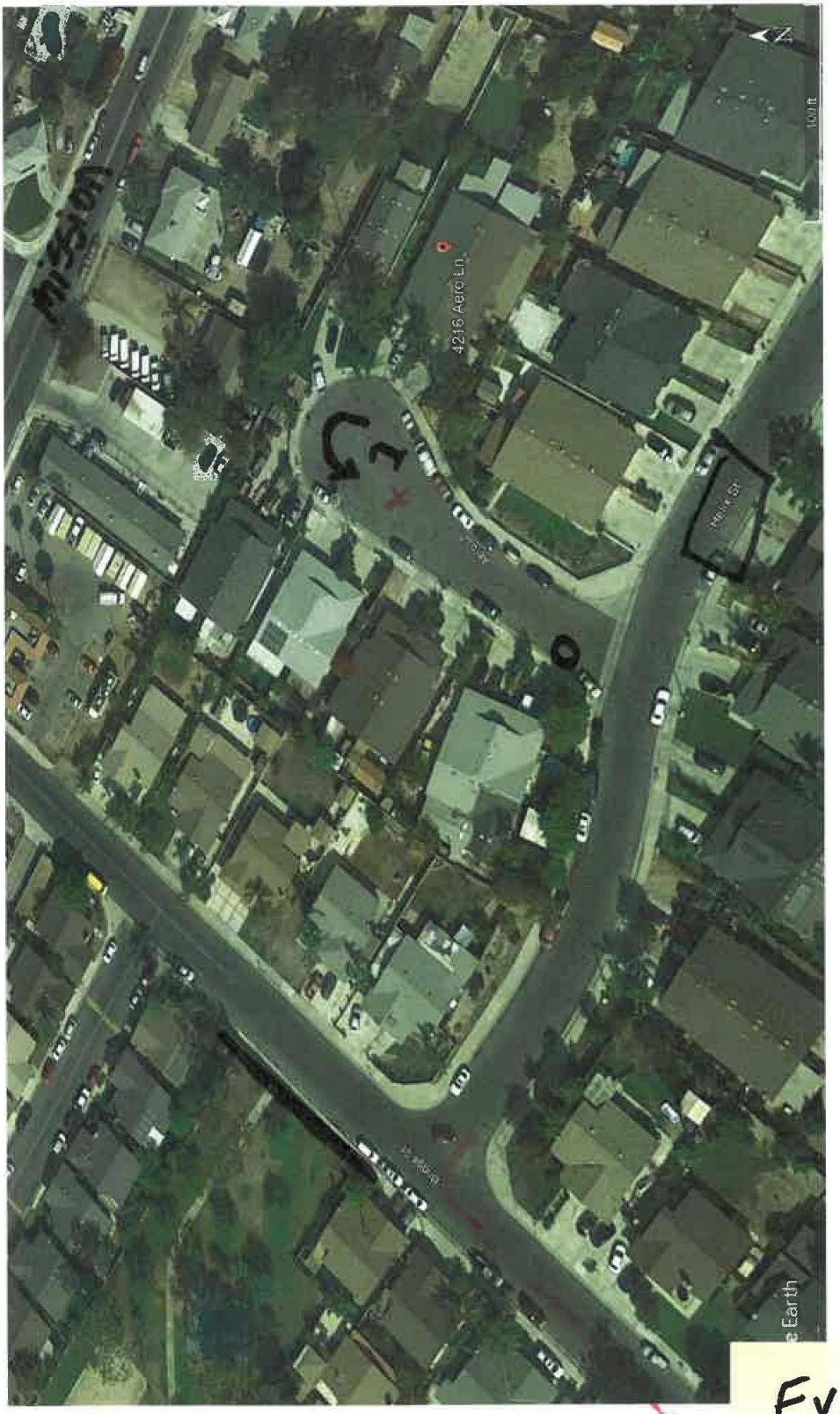
We concur:

McKINSTER
J.

FIELDS
J.

Ex. 1

EX. 7



Ex. 28