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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KAMAU SANDERS, Defendant and Appellant.	B283460 (Los Angeles County Super. Ct. No. BA454154)

APPEAL from an order of the Superior Court of Los Angeles County, Ray G. Juardo, Judge. Affirmed as modified.

James E. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Susan Sullivan

Pithey and Michael J. Wise Assistant Attorney General for Plaintiff and Respondent.

Kamau Sanders appeals from his convictions for making criminal threats, assault with a deadly weapon, and petty theft. We reject his contentions that: there was insufficient evidence to support the criminal threats and assault convictions; the trial court erred by failing to instruct the jury on the lesser included offense of attempted criminal threats; the court erred by striking evidence that he was intoxicated and by not instructing on intoxication as a defense; and a proper waiver of rights was not taken before he admitted the truth of certain prior conviction allegations.

We agree with Sanders that: the court erred by imposing concurrent sentences for the assault and criminal threats counts and should have stayed sentence on one of them instead; the court erred by twice imposing a five-year sentence enhancement; and his custody credits were not properly calculated. We will modify the abstract of judgment to correct these errors and affirm the judgment as modified.

FACTS AND PROCEDURAL HISTORY[1]

At around 7:30 p.m. on January 30, 2017, Kamau Sanders entered the G & J Market in the Leimert Park neighborhood of Los Angeles. Giryung Chang was working the cash register.

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[1] In accord with the usual rules on appeal, we state the facts in the manner most favorable to the judgment. (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 828, fn. 1.)

When she noticed Sanders, she felt uneasy about him and reached for the phone to contact store manager Fernando Ramirez. As Sanders walked past Chang, he said in a quiet voice, "I'll kill you if call the police." Chang told Ramirez what Sanders had said and asked him to come to the front of the store. Ramirez called Chang's husband, Donghyung Chang, who was working in another part of the market, and told him to go to the front of the store.[2]

Before Ramirez or Chang could make their way to the front of the store, Sanders grabbed about $40 worth of Slim Jim jerky sticks and left without paying for them. Mrs. Chang described Sanders to Ramirez. Ramirez recognized him from previous encounters that led to Sanders being barred from the store because he had shouted expletives at Ramirez and challenged him to fight.

Ramirez and Chang went in search of Sanders in order to retrieve the stolen Slim Jims. Although Sanders was some distance ahead of them, Ramirez saw Sanders hand off the Slim Jims to a man in a parked pick-up truck. Chang and Ramirez caught up with Sanders near that pick-up truck. Chang demanded that Sanders return the Slim Jims, but Sanders replied that he did not have them. Chang approached Sanders in an effort to search his pockets. Sanders then grabbed a five-foot long level made of metal from the back of the pick-up truck, held it like a baseball bat, and tried to swing it at Chang.[3] Sanders

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[2] We will hereafter refer to Giryung Chang as Mrs. Chang and to her husband, Donghyung Chang, as Chang.

[3] Although the record is not entirely clear, we believe this was a bubble level, a long metal bar with cutouts where liquid-

told Chang, "Don't cross me," and "If you get closer, I will hit you." On cross examination, however, Chang testified that Sanders never actually swung the level at him.

Chang was very scared because it looked like Sanders "was going to really strike me." Sanders then said, "If you don't stop following me, I'll hit you." He said this "very loudly" in a "very scary voice." There was nothing between Chang and Sanders that would have prevented Sanders from swinging the metal level and hitting him. Chang then pulled out a canister of pepper spray and held it at his side because he was scared.

Chang kept arguing with Sanders because "there was no retreating." Chang taunted Sanders to try to hit him and the two men shouted profanities at each other. At about this point Ramirez told Chang that he had retrieved the Slim Jims from the man in the pick-up truck. That man stepped from his truck, argued briefly with Sanders, and took back the level. At this point the confrontation defused, with Sanders walking away while Chang took Sanders' photograph.

Chang and Ramirez returned to the market, where Chang called 911 and reported that Sanders had tried to hit him with the level and had threatened his wife.

A jury eventually convicted Sanders of one count each of making a criminal threat (Pen. Code, § 422)[4], petty theft (§ 484,

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filled glass tubes are positioned in order to determine whether a surface is either level or plumb.

[4] All further statutory references are to this code unless otherwise indicated.

subd. (a)), and assault with a deadly weapon (§ 245, subd. (a)).[5] The jury also found true an allegation that Sanders personally used a deadly and dangerous weapon in connection with the criminal threats count. (§ 12022, subd. (b)(1).) Sanders admitted that he had a prior conviction that qualified: as a strike under the Three Strikes law; as a prior serious or violent felony conviction for purposes of a five-year sentence enhancement (§667, subd. (a)(1)); and for a one-year sentence enhancement under section 667.5, subdivision (b).

The trial court imposed sentence as follows: on count three (assault with a deadly weapon), 11 years in state prison calculated as the mid-term of three years, doubled to six years under Three Strikes, plus five years for the serious or violent felony enhancement; on count one (criminal threats) a 10-year state prison sentence calculated as the two-year mid-term sentence doubled under Three Strikes, plus five years for the prior serious or violent felony conviction enhancement and one year for the personal weapon use enhancement; on count four (petty theft), six months to be served in any penal institution. The assault count was selected as the principal term, and sentence on the other counts were run concurrently.

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[5]Sanders had been charged with robbery, but the jury convicted him of the lesser included offense of petty theft. A count of making criminal threats to Mrs. Chang was dismissed before trial.

DISCUSSION

1. *The Criminal Threats Conviction Is Supported By Substantial Evidence*

A conviction under section 422 requires proof that: (1) the defendant willfully threatened to commit a crime which will result in death or great bodily injury to another person; (2) the threat was made with the specific intent that it be taken as a threat, even if there is no intent of carrying it out; (3) the threat was on its face and under the circumstances so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat; (4) the threat actually caused the person threatened to be in sustained fear for his own safety; and (5) the threatened person's fear was reasonable under the circumstances. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 805.)

Sanders contends there was insufficient evidence to support his conviction on this count. In assessing that contention, we must determine whether, on the entire record, a rational trier of fact could find Sanders guilty beyond a reasonable doubt. We must view the evidence in the light most favorable to the judgment, and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1339.)

According to Sanders, his statements that he would strike Chang were conditional and, under the circumstances, did not convey the unequivocality and immediacy required under section 422, in part because Chang was the aggressor and Sanders was

merely trying to protect himself. He also contends that Chang was not in reasonably sustained fear for his safety. We disagree.

Conditional threats can qualify under section 422. (*People v. Bolin* (1998) 18 Cal.4th 297, 339.) By analogizing threats made under section 422 to threats that may constitute assault, the court in *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1161 (*Stanfield*), noted that a conditional threat can be punished as an assault "when the condition imposed must be performed immediately, the defendant has no right to impose the condition, the intent is to immediately enforce performance by violence and defendant places himself in a position to do so and proceeds as far as is then necessary. [Citation.]" (*Ibid*; cited with approval in *People v. Bolin, supra*, 18 Cal.4th at p. 337.)

The starting point for our analysis is section 490.5, subdivision (f)(1),(2), which allows a merchant to use reasonable force to conduct a reasonable detention of someone if the merchant has probable cause to believe that person took items from his store. When a private citizen employs reasonable force to make an arrest, the arrestee is obliged not to resist and has no right of self-defense against such force. (*People v. Adams* (2009) 176 Cal.App.4th 946, 952.) Based on this, Sanders should have submitted to Chang's inquiries about the purloined Slim Jims. Instead, he armed himself with a five-foot long metal level and repeatedly threatened to strike Chang if he did not back off. There was nothing equivocal about that threat which, if carried out, certainly carried the potential of inflicting great bodily injury to Chang, who testified that he found himself at a point of no retreat. (*People v. Butler* (2000) 85 Cal.App.4th 745, 758 [great bodily injury means physical injury that is significant or substantial, greater than minor or moderate harm].)

As to the sustained fear issue, that Chang engaged in a shouting match with Sanders does not take away from the jury's determination, because anger and fear can certainly coexist. Chang testified that he was very scared, that he found himself in a position with no retreat, and, at one point, pulled out a pepper spray canister and held at his side because he was afraid of Sanders. Finally, Chang testified that when he returned to the store, he was still afraid, thus demonstrating the requisite sustained fear. We evaluate a victim's claim to having had sustained fear under all the circumstances. (Evid. Code, § 422 [victim's fear must be reasonable under the circumstance]; *People v. Bolin, supra,* 18 Cal.4th at pp. 339–340 [evaluating prejudicial effect of evidence of threating letter; held that under all the circumstances, the letter was not sufficiently threatening].) Sustained fear is not momentary, fleeting, or transitory, but persists over a sustained period of time. (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201 [15 minutes is sufficient to show sustained fear].) With this in mind, we conclude there was sufficient evidence that Sanders made a criminal threat. To the extent there were evidentiary conflicts in Chang's testimony, these were for the jury to resolve.

2. *There Is Sufficient Evidence To Support The Assault With A Deadly Weapon Conviction*

Sanders contends there was insufficient evidence to support his conviction for assault with a deadly weapon likely to produce great bodily injury for two reasons: (1) he acted in self-defense; and (2) he lacked the present ability to injure Chang because the level was too lightweight to inflict the required degree of harm and because Chang testified that Sanders never swung at him and was too far away to have done so. (*People v.*

Miceli (2002) 104 Cal.App.4th 256, 269 [the crime of assault requires the present ability to inflict injury].) We reject both contentions.

The first fails because, as set forth in Section 1. of our Discussion, Sanders did not have the right to defend himself against Chang's attempt to detain him. The second fails because, at bottom, it turns on evidentiary conflicts in Chang's testimony that the jury must have resolved against Sanders. As noted earlier, Chang testified that Sanders held the level in a threatening manner, like a batter preparing to swing, and made repeated threats to swing the level. On these facts, the jury was free to conclude that Sanders had the present ability to injure Chang.

3. *An Instruction On The Lesser Included Offense Of Attempted Criminal Threats Was Not Warranted*

A trial court has a sua sponte duty to instruct the jury on lesser included uncharged offenses if there is substantial evidence to sustain a conviction on the lesser crime. (*People v. Simon* (2016) 1 Cal.5th 98, 132.) Sanders contends the trial court erred by failing to instruct the jury on the lesser included offense of attempted criminal threats because there was evidence that Chang had not been in sustained fear. We disagree.

Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense had been committed. (*People v. Simon, supra,* 1 Cal.5th at p. 132.) Evidence that is speculative, minimal, or insubstantial does not suffice. (*Ibid.*)

Sanders relies on the following evidence: Chang was the aggressor who acted angry and not scared, and Chang had maintained a safe distance from Sanders, who held only a

lightweight level for his own protection. From this he apparently contends the jury could have drawn the inference that Chang was not in fear at all. We believe it is speculative at best whether the jury might have drawn that inference. As a result, the trial court was not obliged to give the attempted threats instruction.

Even if the trial court erred, however, the error was harmless. We need reverse only if it is reasonably probable the jury would have returned a different verdict had it been instructed on the lesser offense. (*People v. Rogers* (2006) 39 Cal.4th 826, 867–868.) In determining whether the error was prejudicial, we may consider whether the evidence supporting the judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability of a different outcome. (*Id.* at p. 870.) We believe the evidence supporting a finding that Chang suffered sustained fear far outweighs the relatively insubstantial evidence relied on by Sanders. As a result, if error occurred, it was harmless.

4. *The Court Did Not Err By Striking Evidence That Sanders Was Intoxicated And By Not Instructing On An Intoxication Defense*

On direct examination, store manger Ramirez testified that he recognized Sanders from previous negative encounters at the store. Ramirez testified on cross examination that Sanders looked like "he was drugging or drinking," and that Sanders was dragging his left leg when he walked. On redirect, the prosecutor asked Ramirez why he believed Sanders might have been on drugs or alcohol. Ramirez replied that a "normal person" would not be "saying the f-word, acting crazy and thinking himself as someone that can do whatever he wants." The court said it was

"on the verge" of striking the testimony because it was speculative. The prosecutor agreed, adding that the testimony lacked foundation.

A short time later, after both sides had rested and as the parties were discussing jury instructions, defense counsel inquired about an instruction on voluntary intoxication. Defense counsel argued that Ramirez was able to give a layperson's opinion as to whether Sanders appeared intoxicated, especially because Ramirez had seen Sanders in the store before. The trial court disagreed, stating that there was no evidence concerning Ramirez's experience concerning observations of alcohol or drug use and because Ramirez had not made any comparison between Sanders' appearance on earlier occasions and the date of the theft. The trial court then said it would strike the evidence and declined to give the intoxication instruction.

Sections 422 and 484 (theft) are specific intent crimes (*People v. Davis* (1998) 19 Cal.4th 301, 305 [theft]; *People v. Jackson* (2009) 178 Cal.App.4th 590, 596 [section 422]) and voluntary intoxication is a defense to such crimes. (§ 28, subd. (a); *People v. Williams* (1997) 16 Cal.4th 635, 677.)[6] Sanders contends the trial court erred by striking the intoxication evidence and by refusing to instruct the jury on the diminished capacity defense as to those charges. We disagree.

Lay opinion regarding intoxication is admissible so long as a proper foundation is established. (*People v. Navarette* (2003) 30 Cal.4th 458, 493.) A foundation is established where the witness is "sufficiently knowledgeable" about use of the substance in

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[6] Voluntary intoxication is not a defense to general intent crimes such as assault with a deadly weapon. (*People v. Blevins* (1990) 220 Cal.App.3d 1413, 1417.)

question "to give an opinion as to whether defendant was under the influence of that [substance]." (*Id.* at p. 494.) When a lay witness offers an opinion that goes beyond the facts he personally observed, it is inadmissible. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1308.)

Ramirez did not testify concerning his past experiences being in the company of intoxicated persons or otherwise explain how he might conclude that someone was intoxicated. Neither did he testify that he had any basis for determining that Sanders was intoxicated apart from the fact that Sanders was swearing and acting crazy. We therefore agree with respondent that there was insufficient foundation for Ramirez's testimony regarding Sanders' possible intoxication. Because the evidence was properly excluded, there was no basis for an intoxication instruction.

Finally, Sanders contends the trial court erred because it struck the testimony after the close of evidence, giving him no opportunity to lay a foundation. However, Sanders never objected on that basis and did not ask for an opportunity to reopen his case for that purpose. As a result the issue is forfeited. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.)

5. *The Trial Court Properly Advised Sanders Of His Trial Rights Before Taking His Prior Conviction Admissions*

After the jury returned its guilty verdicts, Sanders waived his right to a jury trial on his various prior conviction allegations. After the jury was discharged, he then waived his right to a bench trial and admitted the priors. He contends those waivers were defective because the trial court did not properly advise him

of his right to call witnesses on his behalf or confront and cross examine any witnesses against him.

When accepting a defendant's admission of prior convictions, the trial court must advise the defendant of his or her "'right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea.'" (*People v. Lloyd* (2015) 236 Cal.App.4th 49, 57, quoting *In re Tahl* (1969) 1 Cal.3d 122, 132.) A reviewing court will find a defendant's admission of a prior conviction valid if the record affirmatively shows it was voluntary and intelligent under the totality of the circumstances. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.) In order to comply with this mandate, we set forth in full the trial court's lengthy exchange with Sanders and his lawyer.

"THE COURT: You have a right to have the jury decide whether or not you were convicted in case BA438375. The trial will take place the same way the trial took place here, the charges that the jury just rendered verdicts on.

"THE DEFENDANT: I just want to know what I'm looking at. I don't really care—

"THE COURT: Hold on one second.

"The D.A. would have the burden of proving the allegation that you suffered the prior conviction beyond a reasonable doubt. Your attorney would represent you and cross-examine any witnesses that were called to testify, and also she could use the free subpoena power of the court to subpoena any witnesses and documents to present in your defense. You could testify, if you wanted to, but nobody could force you to say anything against yourself. And then the jury would decide.

"THE DEFENDANT: So I can have a trial on that?

"THE COURT: The jury—hold on one second.

"The jury would decide whether the D.A. proved the prior beyond a reasonable doubt. Do you understand the right to a jury trial on the prior conviction? Do you understand that?

"THE DEFENDANT: I do want a jury trial on that.

"[DEFENSE COUNSEL]: Your honor—

"THE DEFENDANT: Hold on. Could I speak? Because I didn't ever get a chance to have a trial on that. And that was a family matter, and I took a deal at the last minute. And I took a deal at the last minute, and I would like a jury trial on that.

"THE COURT: All the jury is going to decide is that—

"THE DEFENDANT: You said that witnesses would be called, right?

"THE COURT: Well, I don't know what witnesses.

"THE DEFENDANT: I would like to have a trial.

"THE COURT: No. Wait. You don't understand. You are not going to . . . bring in witnesses on the other case. The only issue the jury would decide is whether you were convicted in that case.

"THE DEFENDANT: You said that witnesses would be called.

"THE COURT: It's a theoretical possibility. What usually happens is the D.A. presents documents that show—

"THE DEFENDANT: So what if I have the witnesses come and say on my side?

"THE COURT: You will not be able to present witnesses.

"THE DEFENDANT: It was my brother. He said he was not coming to trial, that it was a family matter.

"THE COURT: That would not be an issue in this trial. The only issue would be were you convicted in that case, and that's it. Nothing about what happened.

"THE DEFENDANT: I thought you said she has the burden of proof.

"THE COURT: The only proof would be whether you were convicted, and that's it. And you know more than anybody else whether that's true or not. And I'm not asking you whether that's true or not.

"THE DEFENDANT: I plead no contest to it."

[The trial court inquires of defense counsel, who has an off-the-record discussion with Sanders.]

"THE COURT: [Defense counsel] is conferring with Mr. Sanders.

"THE DEFENDANT: I will just ask the clerk—the judge to show some leniency on my sentence. Hopefully what you thought about the trial and about the phrases and the stuff that was said, 'Back up. Don't come any closer'—

"THE COURT: We're not at that point."

Sanders then asked again for leniency, and to be sentenced immediately, but the court said it needed to first know whether Sanders understood his jury trial rights. The colloquy continued.

"THE DEFENDANT: I thought she [defense counsel] was talking about calling witnesses. So if that's going to happen, you can decide, sir.

"THE COURT: It's a theoretical possibility.

"All right. So do you understand your right to have a jury trial on the prior, yes or no?

"THE DEFENDANT: Yes.

"THE COURT: All right. Do you waive and give up that right and agree to have the court, myself, decide whether or not you suffered the prior?

"THE DEFENDANT: Yes.

"THE COURT: All right. And is this decision you're making knowingly and intelligently?

"THE DEFENDANT: Yes.

"THE COURT: Has anybody threatened you to make that decision.

"THE DEFENDANT: No."

Defense counsel then joined in that waiver.

After the jury was discharged, the court asked about trying the prior conviction allegation, and the following colloquy ensued:

"[THE PROSECUTOR]: Your honor, I believe Mr. Sanders was saying that he admits. I'm not sure if we need to do all that.

"THE DEFENDANT: I don't need her to be—she did enough . . . .

"THE COURT: All right. And have you [defense counsel] had enough time to talk to Mr. Sanders about admitting the prior, if that's what he wants to do?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: All right. And as I mentioned, Mr. Sanders, you have a right to a—now that you've waived your right to a jury trial on the prior, a right to have the court decide whether or not the D.A. has proven that you have this prior conviction beyond a reasonable doubt. The same rights would apply at any trial – the right to call witnesses, produce documents, the right to testify, and nobody could force you to testify. And after all the evidence was presented, I would decide

whether you were convicted of that Penal Code section 422 charge on January 25, 2016, in Los Angeles.

Do you understand the rights that you would have at that trial, sir?

"THE DEFENDANT: Yes.

"THE COURT: Do you waive and give up those rights and admit that in case BA438375—

"THE DEFENDANT: But it was a family incident that got out of hand. I got hit in the head with a skateboard. I said what I said out of the heat of the moment.

"THE COURT: You can tell me –

"THE DEFENDANT: There's no way that my family can come in?

"THE COURT: Okay. You can tell me all that after you answer this question. Do you admit [the truth of the prior conviction allegation]?

"THE DEFENDANT: It's true."

Sanders contends these advisements were insufficient because, as to his jury trial right, the court told him he could not call witnesses and, as to the bench trial waiver and subsequent admission, the court told him he had already waived his right to a bench trial and did not tell him he had the right to confront witnesses against him. We disagree.

A fair reading of the transcript shows that Sanders mistakenly believed he could call witnesses to relitigate the underlying facts of his prior conviction. When the court told him he could not call witnesses, it was in that context, after the court explained that Sanders could not relitigate the facts of his prior, with any witnesses or evidence limited solely to the truth of whether the conviction occurred.

Sanders' contention that the court then told him he had waived his right to a bench trial is based on the court's statement that "you've waived your right to a jury trial on the prior, a right to have the court decide whether or not the D.A. has proven that you have this prior conviction beyond a reasonable doubt." While admittedly a bit confusing in isolation, when taken in context, with the court then asking whether Sanders was admitting the prior conviction, it appears to us that Sanders knew he still had a right to a bench trial and was being asked whether he wanted to waive that right.

As for the court's supposed failure to advise Sanders of his right to confront witnesses when taking his admission on the prior conviction allegation, we note that Sanders had already been well advised of that right, and that Sanders was again told that he would have the same rights as at any other trial. Under the totality of the circumstances, we conclude that Sanders was fully advised of his rights to call and confront witnesses.

6. *The Trial Court Should Have Stayed The Sentence On The Assault With A Deadly Weapon Count*

The trial court imposed a combined 11-year sentence on count three (assault with a deadly weapon) and a combined 10-year sentence on count one (criminal threats), then ran those sentences concurrently. Sanders contends the trial court should have stayed the sentence on count one pursuant to section 654 instead. We agree.

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Sanders contends that his conduct in wielding the level in a threatening manner and in making the accompanying threats constituted one act under this section.

This requires a two-step analysis because an "act or omission" may include not just a discrete physical act but also a course of conduct comprised of several acts undertaken with a single objective in mind. (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) If the crimes were completed by a single physical act, then the defendant may be punished only once. If multiple acts were involved, we then consider whether the defendant's course of conduct reflects either single or multiple intents and objectives. (*Ibid.*) In doing so, we examine the facts of the case. (*Id.* at p. 312.)

Because the trial court did not make an express finding that Sanders entertained multiple criminal objectives, it is deemed to have impliedly made that finding. (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.) We will uphold that implied finding if it is supported by substantial evidence. (*Ibid.*)

Respondent contends that Sanders had twin objectives during his encounter with Chang: first, to retain his stolen property; and second to avoid apprehension. This contention overlooks the fact that Sanders had already disposed of the Slim Jims by giving them to the man in the pick-up truck. As we read the record, the act that constituted the assault—wielding the level—coincided with Sanders's verbal threats, and were carried out for one purpose only: to make Chang cease his pursuit and thus allow Sanders to continue his escape. (See *People v. Mendoza*, *supra,* 59 Cal.App.4th at pp. 1345–1346 [section 654 applied to defendant's convictions for making criminal threats

and witness dissuasion because the conduct shared a common purpose].

The prosecutor said as much to the jury. When arguing that Sanders had in fact employed a deadly weapon, she argued: "The defendant takes that level. He holds it with both hands. He swings it around over his shoulder, and he's ready. He's ready to hit Mr. Chang just like a baseball player would hit the baseball. He's got the direct and present ability to apply force. *And if that's not enough, ladies and gentlemen, he tells you exactly what he's going to do. I don't even have to prove that the defendant specifically intended at this point to use force, but the defendant communicated what he was thinking. 'If you come any closer, I'm going to hit you.*'" (Italics added.) In short, the prosecutor argued that Sanders's threats to strike Chang were a reflection of his intent in wielding the level.

Based on this, we conclude that the sentence on the criminal threats count should have been stayed under section 654, and we will order that the abstract of judgment be modified accordingly.

7. *One Of The Prior Serious Felony Enhancements Must Be Stricken*

The trial court imposed five-year sentence enhancements concurrently on both the assault and criminal threats counts based on Sanders' prior serious felony conviction. (§ 667, subd. (a)(1).) Sanders contends and respondent concedes that this was error because the enhancement may be imposed only once. (*People v. Sasser* (2015) 61 Cal.4th 1, 6–7.) We will order that the abstract of judgment be modified accordingly.

8. *Sanders Is Entitled To An Additional Day Of Custody Credit*

The trial court awarded Sanders 218 days of custody credits, 109 each for actual and good conduct credits. Although the abstract of judgment reflects the correct total of 218 days, it incorrectly states that Sanders earned 108 days each of actual and conduct credits. Sanders contends and respondent concedes that the abstract of judgment should be corrected to reflect the correct number of days used to calculate the total award of credits. We will therefore order that the abstract of judgment be modified accordingly.

DISPOSITION

The clerk of the Superior Court is directed to prepare a modified abstract of judgment that does the following: strikes the five-year enhancement under section 667, subdivision (a)(1) as to count one (criminal threats); stays the remaining sentence on count one pursuant to section 654; and awards Sanders 109 days

each of both actual conduct custody credits as the basis for the award of 218 total days credit. The clerk is directed to then transmit a copy of the corrected abstract to the Department of Corrections and Rehabilitation. The judgment as modified is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MICON, J.*

We concur:

WILLHITE, Acting P.J.

COLLINS, J.

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