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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DANIEL GARY ESQUIVEL, Defendant and Appellant.	B269545 (Los Angeles County Super. Ct. No. SA084395)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge. Remanded for resentencing.

Patricia S. Lai, 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, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

A group of people were gathered outside a house to remember a slain friend when Daniel Gary Esquivel stepped out of his car and fired multiple shots intending to kill Jose Macias. The shots struck both Macias and Carlos Juarez. Both were injured; neither was killed. The trial court instructed the jury on the kill zone theory, and the jury convicted Esquivel of two counts of attempted murder. Esquivel challenges his conviction for the attempted murder of Juarez. He does not challenge his conviction for the attempted murder of Macias.

Esquivel contends (1) the evidence did not support instructing the jury on the kill zone theory; (2) the kill zone instruction as given was erroneous; and (3) the trial court erred by failing to conduct an inquiry into possible juror misconduct. None of the arguments has merit. Accordingly, we affirm the judgment of conviction. Esquivel also requests that his case be remanded for resentencing in light of the recent legislation giving the trial court discretion to strike the firearm enhancements. We agree and therefore vacate the sentence and remand the matter for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

The district attorney filed an information charging Esquivel with the attempted murders of Macias and Juarez, alleging that the crimes attempted were willful, deliberate, and premeditated (Pen. Code, § 187, subd. (a), 664, subd. (a)).[1] As to

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[1] All undesignated statutory references are to the Penal Code.

both counts, the information alleged that Esquivel personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)), personally and intentionally discharged a firearm (*id.*, subd. (c)), and personally used a firearm (*id.*, subd. (b)). The information also alleged that Esquivel committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).[2]

B. *Esquivel Shoots To Kill Macias and Wounds Juarez*

On the afternoon of June 8, 2013, several people gathered outside a house near Culver Boulevard and Slauson Avenue to remember Terrance Wilson, who had been killed the previous night. Macias was there with his girlfriend, Arlene Velasquez, drinking alcohol. People were standing in the driveway area near a fence. They were standing on the driveway, around the apron of the driveway, and on portions of the front yard.

At approximately 4:30 p.m., the police responded to a call that shots had been fired at the scene. Macias was shot in his hand, hip, left leg, and left ankle. Juarez was shot in the shin. Officer Helene Noriega-Godoy of the Los Angeles Police Department (LAPD) and her partner were the first police officers to arrive. Velasquez told Officer Noriega-Godoy that her boyfriend had been shot and that the shooter was in a silver or black four-door Infiniti. Velasquez identified the shooter as Daniel Esquivel, also known as Dan-Dan of the Culver City Boys, a local gang. Velasquez stated that Esquivel drove up, stepped out of the car, pointed a handgun at Macias, fired multiple

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[2] The People dismissed the gang allegation under section 186.22, subdivision (b)(1)(C), prior to trial.

rounds at Macias, and then stepped back into the car and drove away.

Officer Thomas Harrison of the LAPD also arrived at the scene shortly after the call was broadcasted. Officer Harrison heard Velasquez calling out for an ambulance and shouting, "I don't give a fuck if I'm a snitch. Dan-Dan fucking shot my boyfriend." Later at the hospital, Velasquez told Officer Harrison that Esquivel pulled up in his car, stepped out of the car, and before shooting at Macias said, "Bitch, I told you I was going to kill you," and then fired several shots at Macias, got back into his car, and left. Velasquez stated that she heard six or seven shots.[3] Velasquez also identified Esquivel as the shooter in a recorded interview with another officer at the hospital and stated that Esquivel and Macias had been enemies since high school.

A police detective found 12 nine-millimeter shell casings at the scene and three bullet fragments, indicating that at least 12 bullets were fired. A surveillance video from a store nearby showed a light-colored four-door car stop next to a parked car for 20 to 25 seconds and then drive away as people ran from the area. The police determined that a 2006 Infinity was registered to Esquivel and his girlfriend.

The police also interviewed Macias at the hospital. Initially he refused to identify the shooter. Eventually Macias identified "Dan-Dan" as the shooter and picked Esquivel's

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[3] At trial, Velasquez denied making those statements to the police and testified that she never saw the shooter and never identified Esquivel as the shooter. Velasquez testified that she had known Esquivel since their childhood, she knew him as "Dan-Dan," and their parents knew each other. She acknowledged that she was reluctant to testify.

photograph from a six-pack lineup. Macias testified at trial that he heard tires screeching, saw Velasquez jump in front of him, and then heard shots fired and pushed her out of the way. Macias then began running. Juarez testified that he was leaning against a gate and smoking a cigarette when the shooting occurred.

Officer Pompello Calderon of the LAPD testified as a gang expert regarding the criminal conduct of gang members, their practice of instilling fear in a community, and their efforts to earn respect. Officer Calderon opined that both Esquivel and Macias were members of the Culver City Boys at the time of the shooting.

C. *Esquivel's Alibi*

Esquivel's cousin Pauline Rodriguez testified that on June 8, 2013, she attended a children's baseball event known as Trophy Day at the park, and Esquivel was present at the event from noon until at least 5:30 p.m., when she saw him help taking down the tents. Rodriguez testified that she would have noticed if Esquivel had left the park. Esquivel's cousin Linda Morena also testified that she attended Trophy Day from noon until 5:30 p.m., and Esquivel was present that entire time.

Moreno's friend Estrella Sanchez testified that she attended Trophy Day from 4:00 p.m. until about 7:00 p.m., and saw Esquivel there from 4:00 p.m. until 6:30 p.m. Mark Espinoza, a baseball coach, testified that when he arrived at the park at 2:00 p.m. Esquivel was already there, and Esquivel left sometime before 8:00 p.m. Espinoza stated that he would not have noticed if Esquivel had left the park during that time because there were many people at the event.

D. *The Attempted Murder Instruction*

The trial court instructed the jury on attempted murder pursuant to CALCRIM No. 600:

"To prove that the defendant is guilty of attempted murder, the People must prove that:

"1. The defendant took at least one direct but ineffective step toward killing another person;

"AND

"2. The defendant intended to kill that person. [¶] . . . [¶] 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 the defendant of the attempted murder of Carlos Juarez, the People must prove that the defendant not only intended to kill Jose Macias but also either intended to kill Carlos Juarez or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Carlos Juarez or intended to kill Jose Macias by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Carlos Juarez."

E. *The Verdict and Sentencing*

The jury found Esquivel guilty of the attempted murders of both Macias (count 1) and Juarez (count 2) and found that the attempted murder of Macias, but not that of Juarez, was willful, deliberate, and premeditated (§ 664, subd. (a)). The jury found that Esquivel personally and intentionally discharged a firearm, causing great bodily injury, in committing both attempted murders (§ 12022.53, subd. (d)). The trial court sentenced Esquivel to life in prison for the attempted murder of Macias,

plus a consecutive term of 25 years to life for the true firearm allegation. The court also sentenced Esquivel to a term of five years for the attempted murder of Juarez to run concurrently with his sentence on count 1, plus a term of 25 years to life for the true firearm allegation, consecutive to the five-year term.

DISCUSSION

A. *The Evidence Supported Giving the Kill Zone Instruction*

"When a legally correct instruction is requested, . . . it should be given 'if it is supported by substantial evidence . . . .'" (*People v. Wilkins* (2013) 56 Cal.4th 333, 347.) Substantial evidence means evidence that would allow a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890 [substantial evidence 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"]; *People v. Cole* (2004) 33 Cal.4th 1158, 1206 ["A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof"].)

Esquivel contends the evidence did not support instructing the jury on the kill zone theory for two reasons: (1) the crime scene was not a confined space, and (2) the force he used, 12 shots, was insufficient to establish a kill zone. A defendant is guilty of attempted murder only if the defendant had a specific intent to kill and committed a direct but ineffectual act toward accomplishing that goal. (*People v. Perez* (2010) 50 Cal.4th 222,

229.) The defendant's intent to kill a particular person cannot be transferred to another person. "Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*People v. Bland* (2002) 28 Cal.4th 313, 328 (*Bland*).)

However, a person may intend to kill a primary target and concurrently intend to kill others as well. If a person uses a degree of lethal force sufficient to kill everyone in the immediate vicinity of the primary target, the jury may reasonably conclude that he or she intended to kill everyone in the immediate vicinity of the primary target so as to ensure the death of the primary target. (*Bland*, *supra*, 28 Cal.4th at pp. 329-330.) Thus, "'the nature and scope of the attack'" may support a reasonable inference that the defendant intended to kill everyone within a particular area by creating what is known as a "kill zone." (*Id.* at p. 329.)

The California Supreme Court in *Bland* gave an example of a kill zone involving a bomb on an airplane where the assailant intends to kill a primary target and, by the method of attack, ensures that all passengers will be killed. (*Bland*, *supra*, 28 Cal.4th at pp. 329-330.) *Bland* gave another example where the assailant drives by a group of three people and attacks them using automatic weapon fire or an explosive device devastating enough to kill everyone in the group. "'The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.'" (*Id.* at p. 330.) *Bland* also cited a kill zone case where the defendants shot at two houses using high-powered, wall-piercing weapons, and the jury drew a

reasonable inference that the defendants intended to kill all 11 occupants of the two homes. (*Ibid*.) Turning to the facts in *Bland*, the Supreme Court held that where the defendant and an accomplice fired a flurry of bullets at a fleeing car intending to kill the driver, the evidence permitted and "virtually compel[led]" an inference that the defendant had a concurrent intent to kill the passengers as well. (*Id*. at pp. 330-331.)

Esquivel argues the evidence did not support instructing the jury on the kill zone theory because the attack did not occur within a "confined space" or a "defined space" capable of being saturated with deadly force. Esquivel argues the attack occurred in a relatively open area adjacent to a two-lane street lined by houses with front lawns where the people were able to run away from the attack.[4] He contrasts the scene of the attack here with other attack scenarios where victims are located in a car (*Bland*, *supra*, 28 Cal.4th at p. 318; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1233), in a house (*People v. Vang* (2001) 87 Cal.App.4th 554, 558), or on an airplane (*Bland*, at pp. 329-330).

But a kill zone instruction is appropriate if the trier of fact could reasonably conclude based on the evidence presented at trial that the defendant used a degree of lethal force sufficient to kill everyone in the immediate vicinity of the primary target and that the alleged attempted murder victim inhabited that kill zone. (*Bland*, *supra*, 28 Cal.4th at pp. 329-330; *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023.) In those circumstances, the method of the attack could support a reasonable inference the

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[4] The photographs of the location where people were gathered show a short driveway, a small front yard surrounded by a fence, and a small area in the apron of the driveway, rather than an expansive open area as Esquivel's description suggests.

defendant intended to kill the primary target and concurrently intended to kill the attempted murder victim. (*Bland*, at p. 330; see *People v. Perez*, *supra*, 50 Cal.4th at p. 232.) None of the cases cited by Esquivel indicate that a kill zone must be contained within a solid barrier or a confined space. To the contrary, *Bland*, in citing the example of an assailant who creates a kill zone by driving by a group of three people and attacking them with automatic weapon fire or an explosive device, made no mention of any barrier or confined space. (*Bland*, at p. 330.)

Esquivel's second argument is similarly misplaced. He argues that given the number of shots fired—no more than 12 and maybe as few as six or seven—the degree of lethal force was insufficient to create a kill zone. The argument is both unpersuasive and unsupported by the case law. On this record, the jury could reasonably conclude that in firing 12 shots toward a group of people, including Macias, Esquivel intended to kill not only Macias but also everyone in the immediate vicinity of Macias. As the court pointed out in *People v. Vang*, *supra*, 87 Cal.App.4th at page 564, "Defendant's argument might have more force if only a single shot had been fired in the direction of where the [targets] could be seen." But shooting a dozen bullets at a target standing in a group of people matches the *Bland* court's description of a "hail of bullets" sufficient to create a kill zone. (*Bland*, *supra*, 28 Cal.4th at p. 330 ["When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death"]; *People v. Campos*, *supra*, 156 Cal.App.4th at p. 1244 ["The evidence of [the

defendant's] intent to kill [the victim] was overwhelming under the 'kill zone' theory or otherwise" where the defendant pulled up in a truck and "sprayed the car with nearly a dozen bullets, from close range"]; see *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1391, 1393-1397 [kill zone instruction properly given where the defendant fired seven shots at a group of people].)

Accordingly, the trial court did not err by giving the kill zone instruction.

B. *The Kill Zone Instruction Was Proper*

We review de novo whether jury instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218 ["The independent or do novo standard of review is applicable in assessing whether instructions correctly state the law"].) "'When we review challenges to a jury instruction as being incorrect or incomplete, we evaluate the instructions as a whole, not in isolation. [Citation.] "For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction."' [Citation.]" (*People v. Nelson* (2016) 1 Cal.5th 513, 544; accord, *People v. Moore* (2011) 51 Cal.4th 1104, 1140.)

Esquivel makes two arguments. First he contends the kill zone instruction was erroneous because it allowed the jury to convict him without finding he intended to kill Juarez, and second, he argues the court was required to include additional language informing the jury that Esquivel could not be found guilty of attempted murder if the evidence showed only that he

subjected the people located nearby Macias to a lethal risk and was indifferent as to whether they were killed.[5]

The central problem with the first argument is that Esquivel does not explain how the language of the instruction as given permitted the jury to convict him without finding he intended to kill Juarez. The trial court instructed the jury that to convict Esquivel of the attempted murder of Juarez, the prosecution had to prove either that Esquivel intended to kill Juarez or that Esquivel intended to kill everyone within the kill zone. Thus, the instruction expressly required an intent to kill either Juarez or everyone within the kill zone and did not allow the jury to convict Esquivel without finding such an intent to kill. (See *Bland*, *supra*, 28 Cal.4th at pp. 329-330 [the kill zone theory applies when the nature and scope of the attack support a reasonable inference the defendant intended to kill the primary target and concurrently intended to kill everyone in the immediate vicinity of the primary target].)

Next, Esquivel argues the kill zone instruction was erroneous because it lacked clarifying language. But trial counsel failed to propose such language and, thus, to the extent Esquivel claims the instruction was erroneous because it was incomplete, he forfeited his claim. "'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'

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[5] The California Supreme Court has granted review in a case presenting the issue whether the trial court in instructing the jury with CALCRIM No. 600 properly instructed the jury on the kill zone theory. (*People v. Canizales* (2014) 229 Cal.App.4th 820, review granted Nov. 19, 2014, No. S221958.)

[Citations.]" (*People v. Landry* (2016) 2 Cal.5th 52, 99-100 [the defendant forfeited claim that the jury should have been instructed that instructions on circumstantial evidence applied specifically to expert testimony]; accord, *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 901 [the defendant forfeited claim that instruction regarding natural and probable consequences should have incorporated a reasonable person standard]; *People v. Grimes* (2016) 1 Cal.5th 698, 724 [the defendant forfeited claim that instruction regarding direct evidence should have explained the requirement of proof beyond a reasonable doubt as applied to direct evidence].)

Even if we were to reach the argument, the case upon which Esquivel relies, *People v. McCloud* (2012) 211 Cal.App.4th 788, fails to support his contention that a kill zone jury instruction requires clarification of the disqualifying circumstances, let alone imposes a sua sponte obligation upon the trial court to so instruct. In *McCloud* the court found, "The record contains no evidence to support application of the kill zone theory," not that the instruction given was erroneous due to its lack of clarifying language. (*Id.* at p. 792.) *McCloud* stated that where a defendant only subjected people nearby the primary target to a lethal risk and was indifferent to whether they were killed, the kill zone theory did not apply. (*Id.* at p. 798.) The *McCloud* court went on to find that the facts presented did not support a kill zone instruction because (1) the defendants fired only 10 shots at a group of 46 people and there was no evidence the defendants intended to kill all 46 people with 10 bullets (*id.* at pp. 799-800) and (2) the prosecution did not argue there was a primary target, "so the argument presented no factual basis for application of the kill zone theory. The theory applies only if the

defendant chooses, as a means of killing the primary target, to kill everyone in the area in which the primary target is located; with no primary target, there can be no area in which the primary target is located and hence no kill zone." (*Id.* at pp. 801-802.) *McCloud* did not state a kill zone instruction must include specific language that a defendant who was merely indifferent to the death or survival of nontargeted individuals cannot be guilty of attempted murder. Nor does Esquivel cite to any case that stands for such a proposition, or point to any a case that criticizes CALCRIM No. 600 for failing to include such language. Accordingly, the instruction as given was not erroneous.

C. *The Trial Court Properly Declined To Conduct an Inquiry into Possible Juror Misconduct*

1. *The Trial Court Proceedings*

On September 28, 2015, at 1:35 p.m. the jury began its deliberations, and shortly thereafter, requested testimony to be read back and asked to view the video recordings presented at trial. The trial court excused the jury at 4:30 p.m.

The next morning, the deliberations resumed, and shortly thereafter, the jury requested clarification on the kill zone instruction. Counsel agreed the appropriate response was to refer the jury to CALCRIM No. 600. Later that same morning, the jury submitted another written request, stating: "Several jurors have concern for safety/retaliation after the trial. What is the procedure for the jurors leaving the courthouse after the verdict is read? One of the jurors is concerned she might have been followed after leaving yesterday."

Discussing the matter with counsel, the trial court stated: "I don't know if it's going to create an issue with regard to

whether or not she is able to continue to deliberate and who is responsible for following her. There are a lot of questions that could be asked, or there could be no questions asked, frankly. They are not asking—that person is not asking to be relieved from their service. They haven't indicated that they have—that they are so fearful they can't make a decision."

The trial court continued: "I'm intending to tell them they'll be escorted out and I am reminding them that they must make their decision based only on the evidence that they receive in the courtroom and nothing else . . . ." Then the following discussion occurred:

Defense counsel: "I would ask the court to remind them and tell them the procedural information leaving the courtroom. And I don't have any other concession."

The court: "Okay. So you—at this time you are not asking to—this court to inquire any further?"

Defense counsel: "No."

The court: "Okay. And that's a double negative. It's my fault. Are you asking this court to do—inquire any further?"

Defense counsel: "No."

The court responded in writing to the jury: "The jurors will be escorted from the courtroom and from the building, when you are ready and if requested, by a sheriff deputy. [¶] Please note all of CALCRIM [No.] 222—particularly in this context—in reaching your verdict, you must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses. [¶] Please do not hesitate to raise this concern again. As you know, I am here to answer your questions." Both counsel approved of the court's written response.

After the verdict, two jurors requested an escort out of the courthouse.

2. *Standard of Review*

"'"'"The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial.'" [Citation.] A hearing is required only where the court possesses information which, if proved to be true, would constitute "good cause" to doubt a juror's ability to perform his or her duties and would justify his or her removal from the case.' [Citation.]" (*People v. Williams* (2013) 58 Cal.4th 197, 290; accord, *People v. Sánchez* (2016) 63 Cal.4th 411, 459.)

3. *The Trial Court Acted Within Its Discretion*

Esquivel contends the trial court erred by failing to conduct an inquiry into possible juror misconduct. "'An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is "'capable and willing to decide the case solely on the evidence before it'" [citations].' [Citation.]" (*People v. Hensley* (2014) 59 Cal.4th 788, 824.)

A juror's receipt of information about a party or the case outside of the evidence presented at trial is improper and is considered juror misconduct even if the juror receives the information passively or involuntarily. (*People v. Cowan* (2010)

50 Cal.4th 401, 507.) The trial court has a duty to investigate when it becomes aware of the possibility that a juror has committed misconduct or has been exposed to improper influences. (*People v. Linton* (2013) 56 Cal.4th 1146, 1213.) The court must make whatever inquiry is reasonably necessary to determine whether to discharge the juror and whether the impartiality of other jurors has been affected. (*Ibid.*; *People v. Davis* (1995) 10 Cal.4th 463, 535.) "However, '"not every incident involving a juror's conduct requires or warrants further investigation."'" (*Cowan*, at p. 506; see *People v. Williams*, *supra*, 58 Cal.4th at p. 290.)

The note from the jury stated that several jurors were concerned about retaliation and their safety, asked about the procedure for leaving the courthouse after the verdict was read, and stated that one juror thought she might have been followed. The court noted that the juror who believed she might have been followed was not asking to be relieved from service and did not indicate that she could not serve as an impartial juror. In its written response to the jury, the court stated that a peace officer would escort the jurors from the building after the trial if requested, referred the jury to CALCRIM No. 222, and reiterated the instruction to disregard anything the jurors perceived outside of the trial.[6] If the jury had any further concerns about their safety, the court invited them to raise the issue again. Apparently satisfied with the court's response, the jury did not raise any further concerns about their safety.

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[6] Defense counsel did not object to this response and specifically stated no further inquiry was necessary.

We conclude the trial court acted within its discretion when it chose not to conduct any further inquiry. The court's response addressed the jury's stated concern regarding safety and reminded the jurors of their duty to disregard external influences. The court reasonably concluded that providing an escort after the end of trial would satisfy the jury's concerns and that the jury, which had already submitted several written requests and was not reluctant to express its concerns, had no further concerns regarding its safety. The juror who said she might have been followed did not seek to be excused. Given its direct and remedial response to the jury's concerns, the court did not abuse its discretion when it chose not to conduct a further formal hearing. (*People v. Williams*, *supra*, 58 Cal.4th at pp. 289-291.)

D. *The Case Must Be Remanded for Resentencing*

At the time of Esquivel's sentencing in December 2015, section 12022.53, subdivision (h), expressly precluded the court from striking a firearm enhancement under the statute. (Stats. 2010, ch. 711, § 5.) As amended by Senate Bill No. 620 (2017-2018 Reg. Sess.), effective January 1, 2018, section 12022.53, subdivision (h), now gives the sentencing court the discretion to strike a firearm enhancement in the interest of justice pursuant to section 1385.[7] (Cal. Const., art. IV, § 8, subd. (c)(1) [statutes

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[7] "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

enacted at a regular session go into effect on Jan. 1 of the following year].)

In re Estrada (1965) 63 Cal.2d 740 held that, absent evidence to the contrary, the court must presume the Legislature intended that any statutory amendment mitigating punishment for a particular crime applies retroactively to all defendants whose judgments were not yet final on the operative date of the amendment.[8] (*Id.* at pp. 747-748; see *People v. Brown*, *supra*, 54 Cal.4th at p. 324.) The *Estrada* rule applies not only to amendments reducing the penalty for a crime, but also to amendments giving the court discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 76.)

The *Estrada* rule applies here because section 12022.53, subdivision (h), as amended, gives the trial court the discretion to impose a lesser sentence by striking firearm enhancements, and the amendment became effective before this case became final on appeal. The People concede the *Estrada* rule applies, and the amendment applies retroactively.

"'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the

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8 The *Estrada* rule is an exception to the general rule that penal statutes are presumed to operate prospectively only unless expressly stated otherwise. (§ 3; see *People v. Brown* (2012) 54 Cal.4th 314, 324.)

record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

In this case, the record does not clearly indicate the trial court would have declined to strike the firearm enhancements if it had the discretion at the time of sentencing. The court commented the shooting was "egregious," yet imposed a concurrent, rather than consecutive, sentence for the attempted murder of Juarez. Thus, the court did not impose the maximum aggregate sentence. Accordingly, the trial court must be given the opportunity to decide whether to exercise its discretion under section 12022.53, subdivision (h), as amended.

DISPOSITION

The judgment of conviction is affirmed; the sentence is vacated and the matter is remanded for the limited purpose of allowing the trial court to resentence Esquivel in accordance with the principles expressed in this opinion.

BENSINGER, J.*

We concur:

PERLUSS, P. J.

ZELON, 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.