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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO CARLOS GARCIA, Defendant and Appellant.	B272046 (Los Angeles County Super. Ct. No. TA135154)

APPEAL from the judgment of the Superior Court of Los Angeles County, H. Clay Jacke II, Judge. Affirmed in part, vacated in part, and remanded with directions.

Leonard J. Klaif, 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, Victoria B. Wilson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Roberto Carlos Garcia, a gang member, approached a group of people near the staircase of an apartment complex in rival gang territory. He uttered gang challenges and, from about eight to 15 feet away, fired eight shots from a .40-caliber semiautomatic handgun. Andrew Duvea, a member of a rival gang, and Uzziel Curry, who was seated on the stairs near Duvea, were both hit by gunfire but survived. Appellant was charged with, among other things, two counts of attempted willful, deliberate, and premeditated murder as to Duvea and Curry, each with Penal Code section 12022.53 firearm enhancement allegations and gang allegations. The defense was misidentification.[1] The jury rejected the defense and convicted appellant of all charges and allegations. On appeal, appellant's principal contention, which we reject, is that the trial court committed error in giving a "kill zone" instruction as to victim Curry. We affirm his conviction, but we vacate his sentence with directions.

FACTUAL AND PROCEDURAL SUMMARY

On September 20, 2014, about 10:20 p.m., Amber Haynes was at the Wilmington Arms apartment complex in Compton. Haynes was "hanging" outside with a group of people, including her friend Uzziel Curry, who lived out of state and was visiting.

Haynes looked up from her phone and saw appellant approaching from a nearby walkway. Appellant smiled and began walking in her direction. Haynes smiled back and looked back down at her phone.

Haynes looked up again and saw appellant holding in his gloved hand a black semiautomatic handgun which he had

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[1] The fact appellant was the shooter is not at issue in this appeal.

retrieved from his waistband.[2] Appellant, about 10 feet from Haynes, pointed the gun directly at her. Then, he turned and pointed it at the crowd and twice angrily yelled, "Where are you from, fool?" His taunt got the crowd's attention; everyone turned to him.

Haynes initially froze, but a male "in the circle standing next to [Haynes]" hit her. At that time, appellant fired the first gunshot and "the crowd – everybody ran." Andrew Duvea was "near that circle near the stairwell" when the shooting occurred. Curry was sitting on the staircase when the shots rang out.

Haynes also testified she heard one shot while she was standing, then heard three or four simultaneous gunshots while she was running towards a car. The "first couple of shots" she heard seemed like they were coming in her direction. A few seconds later, Haynes heard a second volley of shots. They could have come from a second gun unless appellant had reloaded. The second volley "seemed more distant" than the first. Once Haynes arrived at the car, she noticed Curry was limping. Curry told Haynes he had been hit.

Swandrea Davis was at the Wilmington Arms, standing and talking with friends and family. According to Davis, Duvea and Curry were "hanging out" with her. Davis testified there were about eight or nine persons standing with Davis when appellant walked up, presented a gun, and asked "where were we from." Davis was standing near a staircase, Duvea was on the bottom stair, and Curry was on the stairs. Davis, using profanity, asked if appellant was serious. Appellant asked the

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[2] The parties stipulated appellant had suffered a prior felony conviction for purposes of count 3.

question again and no one replied. He asked a third time, no one replied, and he began shooting.

Appellant was about nine feet from the group when he opened fire. He opened fire "on [Duvea] and the others." During the first few shots, appellant was aiming at Duvea, who was on the bottom stair. Davis began running after perhaps the third or fourth gunshot. Davis thought that, after she fled, appellant "shot a little more" then left. Davis testified it was possible the focus of the shooter was on Duvea, "[b]ecause when [the shooter] came around the wall, that's where his aim was."

Duvea testified he was with a group, including Davis, sitting on the stairs next to Curry. A person approached and, two times, asked the group, "Where you guys from?" The person, near a wall, began repeatedly shooting. The gun was a black semiautomatic Beretta. The shooter fired four times before Duvea fled and, while running, Duvea was shot in the buttocks. Duvea testified the bullet went in and out. Duvea was a member of the "Park Village Compton Crips." At trial, he denied that appellant was the shooter. Instead, Duvea identified the photograph of Jose Sosa, a person he knew as "Crayzo," as the shooter.

About 10:22 p.m., Los Angeles County Sheriff's Deputy[3] Raul Ibarra was at the Compton sheriff's station when he learned about the shooting. Ibarra and his partner, both in uniform, drove towards Wilmington Arms in an unmarked patrol car equipped with red lights and a siren. No more than perhaps a minute after Ibarra left the station, he saw appellant standing

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[3] All deputies in this case are Los Angeles County Sheriff's deputies.

next to bushes near Center Avenue and Cypress. The intersection was about a quarter of a mile from Wilmington Arms.[4]

Appellant saw the deputies and fled, but the deputies detained him. As Ibarra escorted appellant to the sidewalk, Ibarra saw Sosa, aka Crayzo, in the bushes and detained him. As Deputy Jaime Juarez escorted appellant to a patrol car, appellant broke free from Juarez's grasp and resisted Juarez's ultimately successful effort to put him in the car. (Count 4.) Deputy Brian Reza searched the jacket appellant was wearing. Reza found inside about 4.5 grams of methamphetamine. (Count 5.)

About 10:25 p.m., Deputy Ruben Jimenez went to Wilmington Arms. A total of eight .40-caliber shell casings, and two bullet fragments near the staircase, were located at the crime scene. Five casings were in a grassy area perhaps 10 to 15 feet from the staircase. Three casings were found in dirt or grass. Jimenez saw three bullet strike marks on the wall under the staircase where the group had been gathered.

Dr. Angela Neville, a trauma surgeon at Harbor UCLA Medical Center, treated Duvea and Curry after the shooting. Duvea had a gunshot hole in his right buttock and a gunshot hole in his front upper right thigh. (Count 1.) Curry, in the posterior area of his left calf, had two gunshot holes and "small [bullet] fragments indicating" where he had been shot. (Count 2.)

Early the next morning, at the hospital where Curry and Duvea were being treated, Haynes identified appellant's photograph in a photographic lineup and wrote on the lineup

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[4] Another deputy who assisted Ibarra testified the distance was about 100 yards.

card, "I saw him point the weapon at me first, then smile, then point to the other males."

On September 21, 2014, a deputy went near Center Avenue and Cypress to an area that was between the shooting scene and the location where appellant had been detained. Various items were behind a tree in the area, including two guns and gloves. One gun was an unloaded .40-caliber Beretta. Ballistics tests determined the previously mentioned eight casings and a bullet fragment found at the shooting scene were fired from the Beretta. The other gun was a .45-caliber handgun containing two bullets in the magazine and one in the chamber. At trial, Haynes and Davis identified the gloves as those worn by appellant during the shooting.

Deputy David Milliman was working in the jails on September 11, 2015, and spoke with Duvea, whom he knew as Jones, after he had refused to go to court. Duvea told Milliman, inter alia, "I'm the victim in this case; this Mexican dude came over and started shooting at us."

Deputy Scott Giles, a gang expert, testified as follows. The Compton Varrio 124 gang (Varrio) was a criminal street gang. Appellant was a Varrio member. The "Park Village Compton Crip" gang was a rival gang that claimed the territory in which Wilmington Arms was located. The question, "Where are you from?" typically led to violence; there was no right or wrong answer to the question. Giles opined the shooting was committed for the benefit of Varrio.

Appellant appeals from the judgment entered following his two convictions by jury for attempted willful, deliberate, and

premeditated murder (Pen. Code, §§ 664, 187; counts 1 & 2),[5] each with a finding he personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b) – (d)), for possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3), with a finding as to each of counts 1 through 3 the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), for resisting an executive officer (§ 69; count 4), and for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 5), with an admission he suffered a prior felony conviction for which he served a separate prison term (§ 667.5, subd. (b)). The court sentenced appellant to prison for a total indeterminate term of 86 years to life. We affirm, except we vacate appellant's sentence and remand for resentencing with directions to the trial court to exercise its discretion under Senate Bill No. 620 to strike one or more of the section 12022.53 enhancements.

ISSUES

Appellant claims (1) the trial court erroneously failed to instruct on assault with a firearm as a lesser included offense of counts 1 and 2, (2) the trial court erred as to count 2 by giving CALJIC No. 8.66.1 to the jury, (3) insufficient evidence supports appellant's conviction on count 2, (4) section 654 bars punishment on count 3, (5) the court erroneously imposed section 667.5, subdivision (b) enhancements, (6) this matter must be remanded to permit the trial court to exercise its discretion under Senate

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[5] Unless otherwise indicated, subsequent section references are to the Penal Code.

Bill No. 620 as to the section 12022.53 enhancements, and (7) the abstract of judgment must be corrected.

DISCUSSION

I. *THE COURT DID NOT ERR BY FAILING TO INSTRUCT ON ASSAULT WITH A FIREARM AS A LESSER INCLUDED OFFENSE OF COUNTS 1 AND 2.*

Appellant asked the trial court to instruct on assault with a firearm (§ 245, subd. (a)(2)) as a lesser included offense to attempted murder. The trial court refused the request, relying on case law holding that an assault with a firearm is not a lesser included offense to attempted murder. Appellant claims the trial court's above refusal was error. We reject the claim.

Trial courts have a sua sponte duty to instruct the jury on lesser included offenses supported by substantial evidence. (*People v. Licas* (2007) 41 Cal.4th 362, 366, citing *People v. Cole* (2004) 33 Cal.4th 1158, 1218.) "We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense." (*Cole*, at p. 1218.) A lesser offense is necessarily included in a greater charged crime if either: "(a) the greater offense cannot be committed without committing the lesser [the statutory elements test], or (b) the language of the accusatory pleading encompasses all the elements of the lesser offense [the accusatory pleading test]." (*People v. Wolcott* (1983) 34 Cal.3d. 92, 98 (*Wolcott*).) In *Wolcott*, our high court held that a firearm enhancement to a charged crime, in that case a robbery, is not to be considered in assessing whether assault with a firearm is a lesser included offense. The court ultimately concluded that assault with a firearm is not a lesser included offense to robbery even when committed with a firearm. (*Id.* at pp. 98–102.) Thereafter, in

People v. Parks (2004) 118 Cal.App.4th 1, 6 (*Parks*), a different panel of our Division, citing *Wolcott*, held that under the statutory elements and the accusatory pleading tests, assault with a firearm is not a lesser included offense of attempted murder even if it is alleged to have been accomplished with a firearm.

Appellant maintains that *Wolcott* was incorrectly decided and, in any event, was overruled *sub rosa* by *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and "cases applying *Apprendi*" such as *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*). We decline the invitation to reverse our Division's prior holding in *Parks* or to ignore *Wolcott,* Supreme Court precedent we are bound to follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In any event, in *People v. Alarcon* (2012) 210 Cal.App.4th 432, 436 (*Alarcon*), the defendant argued that the trial court erroneously refused to instruct on assault with a deadly weapon as a lesser included offense of attempted murder in light of the firearm use enhancement allegations accompanying an attempted murder allegation. The defendant, like appellant, "maintain[ed] that *Wolcott* was 'overruled sub rosa' by [*Apprendi*] and [*Seel*]." (*Alarcon*, at p. 436.) *Alarcon* rejected the claim. (*Ibid.*) *Alarcon* stated, "neither *Apprendi* nor *Seel* undermined *Wolcott* and its progeny, which are dispositive here." (*Alarcon*, at p. 438.) We agree with *Alarcon*. In sum, the trial court properly refused to instruct on a lesser charge of assault with a firearm and none of the cases cited by appellant or his arguments compel a contrary conclusion.

II. *APPELLANT FORFEITED HIS CLAIM THAT THE COURT ERRED BY GIVING CALJIC NO. 8.66.1; IN ANY EVENT, NO PREJUDICIAL ERROR OCCURRED.*

A. PERTINENT FACTS.

The court, using CALJIC No. 8.66, instructed on the elements of attempted murder. This included the element that "The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being."

The court, without objection, also gave CALJIC No. 8.66.1 on "attempted murder—concurrent intent." (Capitalization omitted.) That instruction stated, "A person who primarily intends to kill one person, may also *concurrently intend to kill other persons within a particular zone of risk. This intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity*.[6] [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a [zone of risk] is an issue to be decided by you." (Italics added.)

B. ANALYSIS.

1. Appellant Forfeited His Instructional Claim.

Appellant claims the trial court erred as to count 2 by giving CALJIC No. 8.66.1 to the jury without substantial evidence to support it and, as a result, he suffered prejudice

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6 The above italicized language was largely taken from *People v. Bland* (2002) 28 Cal.4th 313, 329 (*Bland*), which in turn was quoting the discussion of kill zone theory in *Ford v. State* (1992) 330 Md. 682 [625 A.2d 984].

because the instruction relieved the jury from making a finding on the issue of specific intent to kill. Respondent argues appellant forfeited his claim. We agree with respondent.

"It is of course true that a defendant need not object to preserve a challenge to an instruction that incorrectly states the law and affects his or her substantial rights. (§ 1259; [citations].) On the other hand, ' "Generally, 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." ' " (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.)

Appellant did not object, or request any clarifying or amplifying language as, to the now objectionable instruction. As such, he forfeited the instructional claim.

2. Counsel Was Not Constitutionally Ineffective For Failing To Object.

Appellant responds he received ineffective assistance of counsel because his trial counsel failed to object to the giving of CALJIC No. 8.66.1. He argues, "[b]ecause there was no *evidence* that appellant intended to kill a single person by killing everyone in the vicinity, or that he intended to kill multiple individuals, the zone of risk instruction not [*sic*] be given in this case. (See, above.)" (Italics added.)

During jury argument, appellant did not dispute he harbored intent to kill if he was the shooter; appellant argued he was not the shooter. Counsel reasonably could have refrained from objecting to the instruction as a tactical decision because he wanted to dispute the identity issue and not whether he, as the shooter, harbored intent to kill under *People v. McCloud* (2012)

211 Cal.App.4th 788 (*McCloud)* or otherwise. No constitutionally deficient representation occurred.

Finally, for the reasons discussed below, even if appellant did not forfeit his instructional claim, any constitutionally deficient representation was not prejudicial since it is not reasonably probable that, but for counsel's alleged failing, the result would have been more favorable to appellant. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

3. No Prejudicial Instructional Error Occurred.

a. ***Pertinent law.***

Attempted murder requires specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) Under the kill zone theory as articulated in *Bland,* and *People v. Stone* (2009) 46 Cal.4th 131 (*Stone*), when a defendant (1) commits an "attack" (*Bland*, *supra,* 28 Cal.4th at pp. 329–330) " 'directed at a primary [or targeted] victim' " (*id.* at p. 329) by " 'means [that] create a zone of harm around [the primary] victim' " (*id*. at p. 330) and " 'that inevitably would result in the death of other [nontargeted] victims within a zone of danger' " (*Stone*, at p. 138) and (2) " '*intentionally created* a "kill zone" ' " (*Bland*, at p. 330, italics added) " 'to ensure the death of [the] primary victim' " (*ibid.*), " '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.' " (*Ibid.*, at p. 330, italics added.) " '[T]he factfinder can *infer* that . . . the defendant concurrently *intended to kill everyone in [the primary victim's] immediate vicinity* to ensure [the primary victim's] death.' " (*Ibid.*, italics added.)

The theory permits an inference of intent to kill nontargeted victims, not directly from evidence of such an intent, but from evidence of the above described *intentional creation of a kill zone* (by means that inevitably would result in the death of nontargeted persons within the zone) with intent to kill the primary victim.

A defendant need not *know* a nontargeted victim is in the kill zone. (See *Bland*, *supra*, 28 Cal.4th at p. 330 [discussing *People v. Vang* (2001) 87 Cal.App.4th 554]; *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023 ["[w]hether . . . the defendant is *aware* that the attempted murder victims were within the zone of harm is not a defense"], italics added.) It follows that, although the defendant must commit an attack by means that inevitably would result in the death of nontargeted victims within a zone of danger, the defendant need not *know* that such death inevitably would result.

b. The *"kill zone" controversy.*

In *McCloud*, Division One of our District held that the trial court committed prejudicial error by instructing on the kill zone theory for 46 potential victims of attempted murder.[7] *McCloud* stated, "the kill zone theory *applies only* if the evidence shows that the defendant tried to kill the targeted individual *by killing everyone in the area in which the targeted individual was located*. The defendant in a kill zone case chooses to kill *everyone* in a particular area as a means of killing a targeted individual within

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[7] *McCloud* did not hold the version of CALJIC No. 8.66.1 given in that case was itself erroneous. Instead, perhaps because language in CALJIC No. 8.66.1 was largely taken from *Bland, McCloud* stated the instruction "should probably" be revised. (*McCloud*, *supra,* 211 Cal.App.4th at p. 802, fn. 7.)

that area. In effect, the defendant reasons that he cannot miss his intended target if he kills *everyone* in the area in which the target is located. [¶] . . . In a kill zone case, . . . the defendant *specifically intends* that *everyone* in the kill zone die." (*McCloud*, *supra*, 211 Cal.App.4th at p. 798, first italics added.) *McCloud* concluded the trial court erred by giving to the jury a version of CALJIC No. 8.66.1 absent substantial evidence the defendant intended to kill everyone, which in that case, 46 potential victims, in the alleged kill zone. (*McCloud*, at pp. 792, 799-800, 802, fn. 7.)[8]

There is no need to reach the issue of whether *McCloud* correctly states the law. As shown below, even if *McCloud's* articulation of kill zone theory is correct, there was no prejudicial instructional error in this case because there was substantial, indeed, overwhelming, evidence appellant intended to kill Curry even under *McCloud's* articulation of kill zone theory.[9]

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[8] The issue of whether a court properly instructed a jury on the kill zone theory of attempted murder is pending before our Supreme Court in *People v. Canizales* (2014) 229 Cal.App.4th 820 (*Canizales*), review granted November 19, 2014, S221958, and numerous other companion cases including one from our Division, *People v. Escobar* (Mar. 1, 2017, B259309) [nonpub. opn.], review granted June 14, 2017, S241137.

[9] Appellant also argues there was no substantial evidence supporting the kill zone instruction because "[Curry] was accidentally injured" and "[t]he injury to Curry was nothing more than a stray bullet fired with no intent to hurt anyone but Duvea." We reject the argument as there is no substantial evidence to support it, and there was overwhelming evidence appellant intended to kill Curry, whether under kill zone theory (including *McCloud's* articulation of the theory) or absent any kill zone theory.

c. *Application of the law to this case.*

In the present case, the prosecutor did follow the narrow proscriptions of *McCloud*. First, he named a primary target — Duvea. In fact, appellant concedes Duvea was appellant's primary target. Second, he identified the zone of danger — the area around the stairwell where Curry and Duvea were seated. Third, he argued that appellant attempted to kill everyone in that discrete area.

Substantial evidence supports the prosecutor's theory and rendition of the facts. Appellant approached Duvea and Curry, who were part of a group of people that were, as the prosecutor argued, in a "tight little area" on the stairwell. Appellant yelled out a gang challenge, then, from a distance of less than 10 feet, opened fire with a .40-caliber semiautomatic handgun, firing a flurry of bullets at the group and continuing to fire as the group fled. Not only were Duvea and Curry hit with projectiles, there were several bullet strike marks under the staircase where the group had been gathered.

In discussing the kill zone in *Bland,* our Supreme Court said, "given the strength of the evidence, a jury could not 'rationally conclude that defendant did not intend to kill everyone in the car. He was at point-blank range firing at and hitting helpless people. He could not, while using such lethal force, have

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Appellant's related third claim, that insufficient evidence supports his conviction on count 2, essentially restates the analysis underlying his present instructional claim. The standards for determining the sufficiency of evidence supporting an instruction and a conviction are the same. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 528–529.) Our rejection of appellant's present claim compels rejection of his claim that insufficient evidence supports his conviction on count 2.

intended to merely "wing" them or otherwise inflict some sort of nonfatal injury.' " (*Bland*, *supra,* 28 Cal.4th at p. 332.)

Similar reasoning applies here. Appellant " 'was at point-blank range firing at and hitting helpless people.' " (*Bland*, *supra,* 28 Cal.4th at p. 332.) The jury reasonably could conclude that appellant intended to kill his primary target, Duvea, and concurrently intended to kill Curry who was in close proximity to Duvea. In sum, overwhelming evidence established that appellant's shooting met *McCloud's* prerequisites for giving the kill zone instruction. Thus, the trial court did not err as to count 2, under the kill zone theory articulated in *Bland*, *Stone* and/or *McCloud,* by giving CALJIC No. 8.66.1 to the jury.

Moreover, there was overwhelming evidence appellant committed the premeditated attempted murder of Curry absent any kill zone theory. We initially note in this regard the prosecutor did not strongly argue kill zone theory to the jury. Rather, the prosecutor separately argued, without relying on kill zone theory, that appellant attempted to murder Curry. The court properly instructed the jury on the elements of attempted murder, including the element of express malice, apart from the kill zone theory. We presume the jury correlated and followed the instructions. (Cf. *People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

It "is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime." (*Smith, supra,* 37 Cal.4th at p. 741.) " '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 . . . .' " (*Ibid.*) "[T]hat the bullet misses its mark or fails to prove lethal [is not] dispositive." (*Id.* at p. 742.) "[T]he shooter's purposeful 'use of a lethal weapon with lethal force' against the victim, if otherwise legally unexcused, will itself give rise to an inference of intent to kill." (*Ibid.*)

Appellant fired towards helpless Curry at a close range, and in a manner that could have inflicted mortal wounds had the bullet(s) been on target. That the bullet(s) missed its mark or failed to prove lethal is not dispositive. Appellant used a lethal weapon with lethal force against Curry. It is undisputed appellant committed a *premeditated* attempted murder of Duvea.

Finally, in light of the overwhelming evidence appellant harbored *premeditated* intent to kill as to Curry absent any kill zone theory, and the jury's finding appellant committed the *premeditated* attempted murder of Curry, no prejudicial instructional error occurred under any conceivable standard. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

III. *SECTION 654 DID NOT BAR PUNISHMENT ON COUNT THREE.*

As to counts 1 and 2, the trial court, inter alia, imposed indeterminate terms of 25 years to life for gun use enhancements pursuant to section 12022.53, subdivision (d). The trial court also imposed, as to count 3, a lower term of 16 months for possession of a firearm by a felon, plus a lower term of two years for the gang enhancement. Appellant claims section 654 bars punishment on count 3. He argues there was no evidence he possessed the subject firearm other than when he committed the attempted murders. We reject the claim.

Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. The trial court determines a defendant's intent and objective under section 654 by a preponderance of the evidence. (Cf. *People v. Cleveland* (2001) 87 Cal.App.4th 263, 266, 268–270; see *People v. Lewis* (1991) 229 Cal.App.3d 259, 264.) The trial court's findings will not be reversed on appeal if there is any substantial evidence to support them. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).) This includes implied findings. (*Id.* at p. 1147.)

Jones is instructive.[10] The defendant was charged with shooting at an inhabited dwelling and being a felon in possession of a firearm. On appeal, he argued that section 654 prohibited punishment on both offenses. Initially, *Jones* stated: " ' "[W]here the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper . . . ." ' " (*Jones*, *supra*, 103 Cal.App.4th at p. 1143.)

Later, *Jones* announced the following rule. "[S]ection 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*Id.* at p. 1145.) On the other hand, "section 654 operates to bar multiple punishment where the

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[10] Our Supreme Court, in *People v. Jones* (2012) 54 Cal.4th 350, 358, fn. 3, approvingly cited the holding in *Jones*, *supra*, 103 Cal.App.4th 1139. The Supreme Court decision was an unrelated case involving another defendant whose last name was Jones.

evidence shows that the firearm came into the defendant's possession fortuitously 'at the instant of committing another offense.' " (*Ibid*.) Ultimately, *Jones* found that the trial court made an implied finding that the defendant arrived at the shooting armed with the weapon with an independent intent and, therefore, section 654 did not prohibit multiple punishments

Similarly here, there was substantial evidence appellant arrived at the scene already in possession of the firearm. Appellant approached the group, smiled at Haynes, then removed the gun from his waistband and, thereafter, began firing. Appellant obviously possessed the gun at least from the time he first began approaching the group to the time just before he began firing. He had an intent and objective to unlawfully possess the firearm and a later, additional intent and objective to unlawfully use the weapon. The firearm possession was thus distinctly antecedent to and separate from the attempted murders accomplished when appellant began firing.

As in *Jones*, substantial evidence supported the trial court's implied finding that appellant's intent and objective in possessing the subject firearm of count 3 before committing the attempted murders were not the same as his intents and objectives in possessing the firearm while committing the attempted murders. Accordingly, section 654 did not bar punishment on count 3. (Cf. *Jones, supra,* 103 Cal.App.4th at pp. 1142–1148; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1407–1410, 1412–1414.)

IV. *IMPOSITION OF A SECTION 667.5, SUBDIVISION (B) ENHANCEMENT ON EACH OF COUNTS 1 AND 2 WAS PROPER.*

As mentioned, appellant's prison sentences on each of counts 1 and 2 included a one-year section 667.5, subdivision (b) enhancement. Appellant, citing *People v. Edwards* (2011) 195 Cal.App.4th 1051 (*Edwards*), claims the trial court properly could impose only one such enhancement on appellant's aggregate sentence. We reject the claim.

Edwards, which concluded an aggregate sentence could include only one such enhancement, involved imposition of section 667.5, subdivision (b) enhancements on determinate sentences imposed pursuant to the Determinate Sentencing Law (DSL). (*Edwards*, *supra,* 195 Cal.App.4th at pp. 1054–1055, 1060.) Appellant's sentences on counts 1 and 2 were indeterminate sentences and thus were not imposed pursuant to the DSL. Appellant's reliance upon *Edwards* is misplaced.

"Section 667.5, subdivisions (a) and (b) contain mandatory language, which requires the additional terms be imposed on every count. The enhancement language in section 667.5 is mandatory unless the additional term is stricken [pursuant to section 1385, subdivision (a)]." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561, fn. omitted.) The purpose of section 667.5 is to "increas[e] the duration of prison terms for recidivists" (*Garcia*, at p. 1561) and section 667.5 is subject to our state constitutional mandate that prior convictions are to be used to enhance sentences without limitation. (*Garcia*, at p. 1562.) Further, "neither section 1170.1 nor any other statute requires a section 667.5, subdivision (b) prior prison term enhancement be applied only once when a defendant receives multiple

indeterminate terms." (*Garcia*, at p. 1562; see *People v. Williams* (2004) 34 Cal.4th 397, 402 [section 1170.1 applies only to determinate sentences].) The trial court therefore properly imposed a section 667.5, subdivision (b) enhancement on both counts 1 and 2. (Cf. *People v. Thomas* (2013) 214 Cal.App.4th 636, 639–640; *Garcia,* at pp. 1553, 1559-1562.)

V. *REMAND IS APPROPRIATE UNDER SENATE BILL No. 620.*

In an unopposed supplemental letter brief, appellant claims that, as a result of Senate Bill No. 620, signed by the Governor on October 11, 2017, this matter must be remanded for the trial court to exercise its discretion as to whether to strike appellant's section 12022.53 enhancements. As relevant here, Senate Bill No. 620 provides that section 12022.53 is amended to permit the trial court to strike or dismiss a sentencing enhancement under that section. The new provision, section 12022.53, subdivision (h), states as follows: "[t]he 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), as amended by Stats. 2017, ch. 682, § 2.)

Senate Bill No. 620 went into effect January 1, 2018. Because appellant's convictions are not yet final, he is eligible to have the matter remanded for resentencing because the amended statute granting discretion to the trial court has the potential to lead to a reduced sentence. (Cf. *People v. Vela* (2018) 21 Cal.App.5th 1099, 1113–1114; see *People v. Francis* (1969) 71 Cal.2d 66, 75–78; *In re Estrada* (1965) 63 Cal.2d 740, 742-745.)[11] We will vacate appellant's sentence and remand the matter to the trial court with directions to exercise its discretion as to whether to strike one or more of the section 12022.53 enhancements.[12] We express no opinion as to how the trial court should exercise that discretion.

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[11] Although appellant has a criminal record, the trial court's imposition of lower terms on components of his prison sentence indicates our remand is not an idle gesture. (See *People v. Chavez* (2018) 22 Cal.App.5th 663, 713–714.)

[12] Appellant claims the abstract of judgment must be corrected to reflect the trial court imposed two section 667.5, subdivision (b) enhancements, not (as the abstract currently reflects) two enhancements pursuant to section "667.53," a nonexistent section. Our vacating of appellant's sentence renders the issue moot.

DISPOSITION

The judgment is affirmed, except appellant's sentence is vacated and the matter is remanded for resentencing with directions to the trial court to exercise its discretion as to whether to strike, pursuant to Penal Code section 12022.53, subdivision (h), one or more of the section 12022.53 enhancements.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KALRA, J.*

We concur:

EDMON, P. J.

EGERTON, 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.