

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL JOSEPH HERNANDEZ,

Defendant and Appellant.

B242869

(Los Angeles County
Super. Ct. No. VA123605)

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Affirmed.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Daniel Joseph Hernandez, appeals from the judgment entered following a jury trial which resulted in his conviction of attempted voluntary manslaughter (Pen. Code, §§ 664, 192)¹ during the commission of which he used a deadly and dangerous weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury (§ 12022.7, subd. (a)) and his admissions he previously had been convicted of a felony pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a serious felony within the meaning of section 667, subdivision (a)(1). The trial court sentenced Hernandez to 20 years in prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

a. The prosecution's case.

Jesse Hernandez (Jesse) is defendant Hernandez's brother. Jesse,² Hernandez and their mother, Angelita Hernandez (Angelita), lived in two houses on the same property. Hernandez and Angelita lived in the front house and Jesse lived in the house on the back of the lot. Since Jesse worked as a custodian at Parmalee Elementary School in Los Angeles, he was at work on most weekends and from 3:00 p.m. to 11:30 p.m. on weekdays. Accordingly, the two brothers rarely saw each other.

On the morning of February 8, 2012, Jesse had gone to the dentist where he had undergone a root canal. When he got home at approximately noon, he took some clothes from the house on the back of the lot and went into the garage where the washer and dryer were kept. As he started a load of laundry, Hernandez, who was in the garage, asked Jesse if the root canal had hurt. Jesse answered, indicating that it had not, then told Hernandez he would not be working that weekend and would help Hernandez clean the

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

² Although many are not related to appellant, a number of the witnesses in this case have the last name "Hernandez." We refer to these individuals by their first names, not out of any disrespect, but to avoid confusion.

garage. Jesse then went into his house to take a nap until it was time for him to report for work.

Later that day, at approximately 3:30 p.m., Jesse was working at the school when he received a telephone call from his mother. Angelita told Jesse that Hernandez “ ‘left the house real angry’ ” and Jesse should “ ‘just watch [his] back.’ ” Jesse, who believed his brother and mother had gotten into some kind of an argument, told Angelita, “ ‘Okay.’ ”

At approximately 4:00 p.m., as Jesse was walking down the steps toward the front of the school, he saw Hernandez ride by on his bicycle. After Hernandez had ridden around the school for approximately 10 minutes he stopped, got off his bike, put down the kickstand, took off his backpack and glasses and began to walk toward Jesse. As he got closer, Hernandez pointed his finger at Jesse and said, “ ‘I don’t care if I have to go to jail for the rest of my life, I’m going to kill you.’ ” Jesse looked Hernandez in the eye and told him, “ ‘You don’t have to do that.’ ” The next thing Jesse remembered was Hernandez stabbing him. Hernandez stabbed him in the upper left breast, his ribs, stomach and upper groin. Jesse, who was “in shock,” fell backward. He took a radio phone from the back of his belt and began yelling into it, “ ‘Help me. Help me. I’m getting stabbed in the front.’ ” Jesse began using his legs to “ward [Hernandez] off” and Hernandez began to stab him in the legs. In all, Hernandez stabbed Jesse 13 or 14 times.

As Jesse was calling for help, a teacher, Jose Hernandez (Jose), came outside and told Hernandez to stop. Hernandez looked up at Jose and said, “ ‘If you get any closer, I’ll use this [knife] on you.’ ” Jose went back into the building and came out again carrying a plastic chair. Jesse, who was still attempting to fight off Hernandez, yelled to Jose, “ ‘Throw it at him.’ ” Jose did so and the chair hit Hernandez in the head. When Jesse next looked at his brother’s face, Hernandez looked “shocked.” The school principal then came out and Jesse yelled out, “ ‘Go check up on my mom, go check up on my mom.’ ”

Jesse was not armed during the altercation. The only blunt object he could have used to hit Hernandez was his radio. Jesse, however, did not strike Hernandez. He did not hit Hernandez on the bridge of his nose. He only kicked Hernandez in the knee caps in order to get him to stop stabbing him.

Deputy sheriffs arrived at the scene and Jesse was transported to a hospital. There, he heard someone using a staple gun to close his wounds. In addition, a tube was placed inside his lung to drain blood which had collected there. The tube was removed after five days and Jesse was released from the hospital two days after that. Jesse still suffers from pain in his leg as a result of the stabbing.

Two days after the stabbing, Jesse spoke with Los Angeles County Sheriff's Detective Arevalo. Jesse told the detective that, when he and Hernandez spoke about it, Jesse would tell Hernandez, "Hey . . . , any time you have a job, you clean the work before and you clean when you finish" Jesse did not remember telling the detective he was "upset with [Hernandez] tremendously" or that, on the day of the stabbing, he and Hernandez had engaged in a "verbal dispute." Jesse would from time to time tell Hernandez he needed "to pick up after [him]self after [he did] something," but he did not "pick[] on [Hernandez] and tell[] him every day." Jesse and Hernandez did not have an argument on the day of the stabbing. As Jesse left for work, he told his mother he was leaving and she told him, " 'Good[b]ye, watch your back.' " ³ When he then walked past Hernandez, who was sitting on the porch, Jesse said, " 'I'll see you guys later.' " Hernandez did not respond and Jesse simply got into his car and drove to the school.

Jesse did not remember telling a Detective Rivas that when he saw Hernandez circling the school on his bicycle he was "scared but . . . continued to work anyway." Jesse did not remember being "scared." He did, however, remember that when Hernandez first spotted him, Hernandez gave Jesse "a smirk."

³ Jesse testified his mother always told him to "watch [his] back" or to "be careful" when he left for work.

Jesse had “no idea why [his] brother stabbed [him].” “[T]hat issue [has] puzzled [him] throughout the pendency of this case[.]” Jesse maintained there was “absolutely no provocation on [his] part toward [Hernandez] before [he was] stabbed.” Jesse did not remember telling a deputy sheriff that, earlier on the day of the stabbing, he and his mother had told Hernandez that Hernandez had to leave the house.

Angelita testified that on the morning of February 8, 2012, after Jesse left for the dentist, Hernandez got up and “went straight to the garage.” Angelita did not see Hernandez again until Jesse left for work. At that time, Hernandez was sitting on the front porch. After Jesse left, Hernandez stayed on the porch for approximately 15 minutes, then came into the house and told Angelita “that it was all [her] fault.” Hernandez was angry with Angelita, yelled at her and told her he was going to leave and go to Chino Hills. Angelita, who had not realized that anything was wrong, told Hernandez he had to do what he had to do. Angelita then told Hernandez that if he did not like living with her, he needed to go. Throughout the argument, Hernandez never mentioned Jesse. Hernandez did not tell Angelita that when he left, he was going to take Jesse with him.

After Jesse had left for work, Hernandez went to his room, put some things together as if he were going to leave, then started to leave the house. Angelita followed Hernandez and asked him if he needed money. At that point, Hernandez turned around, took all the money out of his wallet, threw it on the floor and told Angelita he did not need money. It was clear to Angelita that Hernandez was angry with her, but she still did not know why. When he left the house, he was “very, very angry.” Angelita had never seen Hernandez that angry before.

Arnold Hernandez (Arnold) is the principal of Parmalee Elementary School where Jesse works as a custodian. At approximately 4:00 p.m. on February 8, 2012, the school’s coach came by the outside of Arnold’s office, pounded on the window and screamed that Jesse was “getting stabbed.” Arnold, who was meeting with two parents of students at the time, got up and “pretty much yelled at them to call 9-1-1.” He then went

out the front exit of the building. On his way, he told one of the school secretaries to call 9-1-1. When he got outside, Arnold “observed two persons [lying] on the ground. . . . [A]t that point he [did not] know who it was or what was going on.” However, as he got closer, he heard Jesse’s voice. Jesse was on the ground and Hernandez was on top of him. After he heard Jesse yell for help, Arnold “observed some stab wounds on Jesse. The [first] one [he] saw . . . was on [Jesse’s left] side,” right below his rib cage. Arnold then saw Hernandez attempt to stab Jesse in the center of his chest. The blade on the knife bent as it hit the bone there. Throughout the incident, Jesse was “struggling with [Hernandez] and saying, ‘help me’ ” and “ ‘get him off of me.’ ”

When he first ran out to the front of the building, Arnold saw that one of the teachers, Jose, was already there. Jose was yelling at Hernandez, telling him to stop hurting Jesse. Jose had brought a chair with him in order to prop open the building door and, when Hernandez refused to stop stabbing Jesse, Jose retrieved the chair and hit Hernandez with it. Jose hit Hernandez hard enough to knock the knife from his hand. It slid across the ground until it was approximately six feet from Hernandez. Arnold told Jose to kick the knife farther away. He did so and the knife landed in the street.

Jose, a teacher at Parmalee Elementary School, was working in the school’s office when he heard a commotion going on outside. At first Jose thought it was high school students passing by but then he heard Jesse call out his name. Jesse was yelling, “ ‘Help me, Mr. Hernandez.’ ” Jesse “sounded desperate and frightened” so Jose stepped outside and saw Hernandez “attacking Jesse with a knife . . . and Jesse . . . attempting to fight him off.” Jose saw that Jesse had been cut on his legs as well as his arms and torso. At that point, the school principal, Arnold, came out of one of the buildings. As Arnold held the door open, Jose ran inside and grabbed a chair. When he went back outside, Jose approached Hernandez and told him to put the knife down. Hernandez looked at Jose, then continued to stab Jesse. When Arnold told Jose to hit Hernandez with the chair, Jose did so. After one of the chair legs struck Hernandez, knocking the knife from his

hand, Jose kicked the knife farther away from Hernandez then again struck Hernandez with the chair. This time Jose hit Hernandez in the back.

Hernandez appeared “shook . . . up” and began to get up. He then “quickly got up,” “got on his bike, regained his composure” and, as he rode off said, “ ‘You’re a dead man, Jesse.’ ”

Armando Arevalo is a detective for the Los Angeles County Sheriff’s Department. At approximately 4:00 pm. on February 8, 2012, Arevalo responded to a call from the Parmalee Elementary School. Arevalo and his partner had received a description of the man who had stabbed a school employee and, as they approached the school, they saw Hernandez, who matched that description, walking on a nearby street. The sheriffs stopped and contacted Hernandez. Arevalo noticed that Hernandez was “sweating profusely” and “had a little bump or little bit of blood on [the] bridge of his nose.” Arevalo’s partner asked Hernandez why he was bleeding and Hernandez stated he had been involved in a fight with his brother. When Arevalo’s partner asked Hernandez where the fight had taken place, Hernandez indicated it had been at a school and that he had stabbed his brother.

After taking Hernandez into custody, the deputy and detective proceeded on to the school. There, they saw Jesse being placed on a gurney and into an ambulance. “Paramedics were treating him for what appeared to be stab wounds to his upper torso area.” On the walkway where the stabbing occurred, Arevalo observed “pieces of gauze spread out, pieces of clothing spread out[,] [a] knife . . . lying on top of a planter” and “blood droppings and little . . . puddles of blood in different parts of the area”

Two days after the stabbing, on February 10, 2012, Arevalo interviewed Jesse at the hospital. Jesse told the detective he and Hernandez had “constant discussions” about Hernandez’s failure to pick up after himself and do chores around the house. Jesse indicated Hernandez was something of “the black sheep of the family.” The detective’s “overall impression” was that Jesse wanted Hernandez “out of the house.” In fact, Jesse told Arevalo that between 11:30 a.m. and noon on the day of the stabbing, he and

Hernandez had “talked about [Hernandez’s] attitude at the house and what [Jesse] perceived to be [a] lack of doing chores and things of that nature.” When Jesse left for work that afternoon, he saw Hernandez on the front porch and Hernandez appeared to be angry.

On the afternoon of February 8, 2012, Los Angeles County Deputy Sheriff Mike Rivas was on patrol and he responded to a call involving a stabbing at Parmalee Elementary School. When the deputy and his partner arrived at the school, he saw “a male [lying] on the ground, [with] blood all around him on the sidewalk, [and] on his clothing. [The deputy] could [also] see holes in [the victim’s] shirt and his pants.” Rivas requested paramedics to treat the victim, then spoke with the victim, Jesse, who told Rivas “that his brother had stabbed him and . . . left [going] eastbound.”

Rivas also interviewed Jesse’s and Hernandez’s mother, Angelita. Jesse had told the deputy that he “feared for her safety” and so Rivas and his partner “perform[ed] a welfare check on her” at her home. Angelita told Rivas that, before he had left the house, she and Hernandez had an “encounter” during which he became very angry and shouted at her. Before he left, Hernandez had told Angelita he was “going to take [Jesse] with [him].”

Later that evening, Rivas spoke with Jesse at the hospital. Jesse told the deputy “both he and his mother had gotten into an argument with [Hernandez] and basically kicked him out of the house.” Later that afternoon when he was at work at the school, Jesse received a telephone call from his mother during which she told Jesse “that [Hernandez] might be out to harm him.”

b. *Defense evidence.*

Fifty one-year-old appellant, Hernandez, testified that on February 8, 2012 he was living with his mother in a house on Woodale Avenue in Los Angeles. There are two houses on the property and his 58-year-old brother, Jesse, lived in the house at the back of the property. Hernandez had been living with his mother since August 2011. He had moved to Los Angeles from Chino Hills when he separated from his wife of 30 years.

Hernandez believed his brother Jesse did not want him staying at the house. Hernandez believed this because Jesse had “told [him] so.” Jesse was “constantly telling [Hernandez], reminding [him] sarcastically . . . that he just didn’t want [Hernandez] there.” Most of the time, Hernandez would avoid Jesse. He would stay in his room until Jesse left the house, then come out and do his “chores.” According to Hernandez, he was “maintaining the home.”

On the afternoon of February 8, 2012, Hernandez was in the garage when Jesse came in and “started a fight with [him].” Jesse told Hernandez “what [he] was failing to do [and] why [he] was taking too long.” Jesse was “very angry” and cursed at Hernandez, calling him names and belittling him. Hernandez decided to ignore Jesse and walk away rather than be confrontational. Hernandez went into his mother’s house and he believed Jesse went into his house. Hernandez later went out on the front porch of the front house and was drinking lemonade when Jesse left for work. Jesse “slammed the front door,” “got in his car and . . . drove off hastily.” He appeared to be “very angry.”

After Jesse left for work, Hernandez went back into the house where his mother “started an argument with [him].” After criticizing Hernandez for failing to adequately care for the house, Angelita told him to leave. Hernandez went into his room, grabbed a few personal items then “jumped on [his] bike and . . . took off.”

Hernandez rode his bicycle to Parmalee Elementary School to speak with his brother. He wanted to ask Jesse what he had said to their mother to make her so upset that she had told Hernandez to leave the house. Hernandez rode around the school twice, looking for an open entrance to the campus. On two occasions, he saw Jesse and the two men made eye contact. After a time, Jesse came out of a building and began walking toward the sidewalk in front of the school.

As Jesse got closer to him, Hernandez got off his bicycle. He did not, however, have time to put down the kickstand or take off his backpack and glasses. Hernandez could see that Jesse was carrying a “silvery object” in his hand which looked like a knife. Hernandez asked Jesse what he had told their mother to make her tell him to leave the

house. Hernandez did not want the encounter to be confrontational, he simply wanted an explanation. Jesse, however, who appeared to be extremely upset, responded by telling Hernandez to “[g]et the hell out of [there].” Jesse then hit Hernandez on the bridge of his nose. In addition, Jesse “aggressively made a move towards [him] in which [Hernandez] saw a shiny object in [Jesse’s] hand.”

Hernandez, was able to take the shiny object, which turned out to be a knife, from his brother and he began to fight. When he had gone to the school, Hernandez had not intended to hurt or kill his brother. He had not intended to stab his brother with a knife. However, after Jesse had punched him twice, Hernandez began to stab him. Jesse clenched his fists and raised both hands in a “flailing” motion away from his body. Although at that point Jesse was unarmed, Hernandez felt he was fighting “for [his] life.”

Hernandez could not remember that much about the scuffle, except that someone hit him with a chair and Jesse swung at him with his fist and kicked him with his feet. Hernandez did remember hearing Jesse say, “ ‘Help me, Mr. Hernandez.’ ” This confused Hernandez as he at first believed Jesse was speaking to him. Hernandez did not remember “any of the stabbing.” For most of the altercation, Jesse was holding Hernandez’s hands. Hernandez was “stunned” after Jesse struck him in the head several times, but he was able to get up and walk toward his bicycle. As he did so, he said to Jesse, “I could have killed you, you idiot.” When he was walking toward his bicycle, Hernandez saw the sheath to a knife. Although he did not know why, he picked it up and placed it in his backpack. When he then got to his bike, Hernandez saw blood on his hands, but he was not sure if it was from his nose, which was bleeding at the time. Hernandez picked up his bicycle and walked away from the school. However, he discarded his bicycle approximately two blocks from the school, at the corner of Compton Boulevard and 76th Place.

Hernandez loves his brother, but does not like him. He believes Jesse “hate[s] [him] for whatever reason.” On February 8, 2012, Hernandez did not get angry at Jesse when Jesse “kick[ed] [him] out of the house” and he was not “jealous” of his brother or

his brother's life. If anything, Hernandez felt "sorry for [his] brother" and he ignored Jesse when Jesse told Hernandez what to do. Hernandez believed, however, that his relationship with Jesse was "[v]ery bad." Jesse "spoke down to [Hernandez and] belittled [him]. [Jesse] felt that he was feeding [Hernandez] even though he had no idea what . . . type of financial position [Hernandez] was in. [Jesse] thought because [Hernandez] was unemployed[,] . . . [Hernandez] was broke." Hernandez also believed Jesse "had influence" over their mother. On February 8, 2012, Hernandez's mother yelled at him and he admitted he "[might] have raised [his] voice" when speaking with her. He did not, however, threaten her. Neither did he threaten to hurt or kill his brother, Jesse. When he told his mother he was leaving, Hernandez did not say he was going to take Jesse with him and when he gathered some personal items to take with him, Hernandez did not take a knife.

Shortly after his encounter with Jesse, Hernandez came into contact with Detective Arevalo and his partner. Hernandez told the detective he had been involved in a fight with his brother in front of a school and his brother had attempted to stab him. Hernandez was immediately taken into custody and transported to jail. There, he was given a wet rag to clean up, but received no medical attention.

Detective Arevalo and his partner were responding to the call from Parmalee School when they first contacted Hernandez as he was walking down Compton Boulevard, approximately two blocks from the school. Hernandez was walking normally and, at that time, had not been wearing "a sheath slip on his belt or waistband." He did, however, have a knife sheath in his backpack which fit the knife used in the altercation with Jesse. The knife and sheath appeared to be "a set."

When Arevalo first encountered Hernandez, Hernandez did not appear to be bleeding from his nostrils; he did not have any blood on his upper lip or mouth. The only area from which Hernandez appeared to be bleeding was the bridge of his nose.

Arevalo testified, when an individual is taken into custody, the booking and arresting officers will ask him or her "what kind of medical problems they . . . have" and

if they have suffered any injuries. If the individual appears to require medical attention, he or she will be taken to the local hospital and seen by a physician. The person will not be taken back to the jail until the physician gives the officers an “okay to book.” If a suspect “has injuries like bumps on [the] head or bruises or abrasions [that] don’t require medical attention,” they are simply booked and placed in a cell. Here, Hernandez had not indicated he had any serious injuries or that Jesse had tried to stab him.

c. Procedural history.

Following a preliminary hearing, on April 18, 2012 an information was filed in which Hernandez was charged in one count with attempted, willful, deliberate and premeditated murder (§§ 664, 187, subd. (a)), a felony. It was alleged the attempted murder was committed willfully, deliberately and with premeditation within the meaning of section 664, subdivision (a), making it a serious felony pursuant to section 1192.7, subdivision (c) and a serious, violent felony requiring registration pursuant to section 290, subdivision (c). In addition, it was alleged any time in custody imposed for the offense was to be served in state prison pursuant to section 1170, subdivision (h)(3). It was further alleged that, during the commission of the offense, Hernandez personally inflicted great bodily injury upon the victim, Jesse Hernandez, within the meaning of section 12022.7, subdivision (a), causing the offense to be a serious felony pursuant to section 1192.7, subdivision (c)(8), and that Hernandez personally used a deadly and dangerous weapon, a knife, within the meaning of section 12022, subdivision (b)(1), causing the offense to be a serious felony pursuant to section 1192.7, subdivision (c)(23). Finally, it was alleged Hernandez has suffered a 1979 conviction for forcible rape in violation of former section 261.3, that his conviction of former section 261.3 amounted to a prior strike pursuant to sections 1170.12, subdivisions (a) to (d) and 667, subdivisions (b) to (i) and a serious felony pursuant to section 667, subdivision (a)(1).

After waiving formal arraignment, Hernandez demanded the appointment of counsel, then pled not guilty to the offense alleged in count 1 and denied the additional allegations.

At proceedings held on June 7, 2012, Hernandez made a *Marsden*⁴ motion. He indicated, although he considered his case to be one involving self-defense, his counsel had failed to share with him “what [he was] going to use for [Hernandez’s] defense.” Hernandez stated, “I just want to be a part of this It’s my life.” In response, counsel indicated he was ready for trial and had spoken with Hernandez several times. Counsel continued, “We specifically talked about his defenses. His defense will be a self-defense type of issue [and] I’ve investigated potential witnesses in that regard” Counsel then stated that, unfortunately, “[a]ll the witnesses didn’t say what we needed them to say.” Counsel had informed Hernandez that for trial, he was the only witness they would have. If he wished to pursue a defense of self-defense, he would be required to testify. Counsel indicated Hernandez was “frustrated” and justifiably “worried” by that fact. Until counsel had given Hernandez this information, he “had not wanted any offers.” However that day he had asked counsel to “explore one.” Counsel had done so and although the People had offered Hernandez a term of 24 years in prison, they had indicated it was not a firm offer. Counsel further stated, when Hernandez had asked him for all of the police reports, counsel had read to Hernandez each report and the transcript of the preliminary hearing. Hernandez then indicated he did not believe his counsel had read to him the reports and his counsel had failed to be honest with him regarding the potential witnesses he had interviewed. Hernandez, however, admitted his counsel had read to him the investigator’s reports. When Hernandez stated he did not have any further complaints regarding his counsel’s representation, the trial court indicated it sounded as though counsel was “doing his job” and the court denied Hernandez’s *Marsden* motion.

After the trial court denied Hernandez’s *Marsden* motion, Hernandez indicated he wished to “invoke [his] right to go pro per.” The trial court responded, “You’re going to represent yourself on a life case?” When Hernandez indicated that was what he wished

⁴ *People v. Marsden* (1970) 2 Cal.3d 118.

to do, the trial court stated Hernandez should be given a form advising him of his *Faretta*⁵ rights and waivers and, when he had completed the form, the court would entertain the motion. Hernandez apparently never completed the form, or decided to proceed with his appointed counsel, as the record indicates the trial court never ruled on the *Faretta* motion.

Prior to trial, defense counsel moved to have excluded from the evidence several statements made by Hernandez because the deputy sheriffs who took him into custody failed to timely advise him of his *Miranda*⁶ rights. At proceedings held pursuant to Evidence Code section 402, Detective Arevalo testified that when he and his partner spotted Hernandez walking down the street, they stopped their car, got out and approached him. They asked Hernandez if they could talk with him and, when he turned in their direction, Arevalo saw that there was blood on the bridge of Hernandez's nose. At that point, Arevalo's partner "detained" Hernandez and performed a cursory pat-down search to be certain Hernandez was not carrying any weapons. As she was performing the search, Arevalo's partner asked Hernandez if he was carrying any weapons. He indicated he was not. When Arevalo's partner then asked Hernandez why he had blood on his nose, he stated he had been involved in a fight with his brother. The officers then asked Hernandez where the fight had occurred and Hernandez told them it had happened at a school and he had stabbed his brother. When the officers asked Hernandez if he had the knife because the officers did not wish to hurt themselves, Hernandez told them the knife was " 'at the school with [his] brother.' " Although he was asked to place his hands behind his back, Hernandez was not placed in handcuffs. After it was determined he was not carrying any weapons, Hernandez was seated in the back of the patrol car and transported to the school for a "field show-up."

⁵ *Faretta v. California* (1975) 422 U.S. 806.

⁶ *Miranda v. Arizona* (1966) 384 U.S. 436.

Following argument by the parties, the trial court stated: “I think he was being detained, there’s no doubt. [The officers] suspected he was the guy. They weren’t certain. They control him, start doing a *Terry*⁷ pat down. [Arevalo’s partner is] asking him further questions to determine if indeed he is the guy. He says I was in a fight. Where? At the school. What happened? I stabbed somebody. So I think that’s still in the investigatory stage. I will allow that statement up to the point where he says I stabbed him. Everything else, whatever else he said after that . . . I’m not going to allow.”

During trial, the prosecutor made “a reference” to the fact Hernandez was in jail. Defense counsel made a motion for a mistrial or, in the alternative, a curative instruction. The trial court denied the motion for the mistrial and, after some discussion between counsel and the trial court, counsel made the tactical decision to not have the court give an instruction. Counsel determined he did not wish to emphasize the fact his client was incarcerated.

Before Jose testified, defense counsel objected to his testimony, arguing it did not offer anything new or different and violated Evidence Code section 352 in that it was going to be entirely cumulative. The trial court denied the motion. Then, after all the evidence had been presented, defense counsel made a motion for entry of a judgment of acquittal pursuant to section 1118.1. The trial court denied that motion as well.

The jury began deliberating at approximately 9:00 a.m. on June 20, 2012. While deliberations were in progress, Hernandez waived his right to a jury trial on his prior convictions. At approximately 11:00 a.m., the jury indicated it had reached a verdict. However the forms had been incorrectly filled out and signed. After the trial court explained to the jurors how to properly fill out the forms, the jury was given a new set and returned to the jury room. After a short time, the jury again indicated it had reached a verdict. After they had been reviewed by the trial court, the court clerk read the verdict forms. The jury had found Hernandez not guilty of the crime of the attempted murder of

⁷ *Terry v. Ohio* (1968) 392 U.S. 1.

Jesse Hernandez as charged in count 1 of the information. The jury had found Hernandez guilty of the lesser offense of attempted voluntary manslaughter in violation of sections 664 and 192. Further, the jury found true the allegations Hernandez personally inflicted great bodily injury on Jesse within the meaning of section 12022.7, subdivision (a) and, in the commission or attempted commission of the offense, personally used a deadly and dangerous weapon, a knife, within the meaning of section 12022, subdivision (b)(1).

After Hernandez waived the time within which he was entitled to be sentenced, sentencing proceedings were set for July 17, 2012. On that date, Hernandez waived his right to present a defense, his right to cross-examine the witnesses against him, his right to use the subpoena power of the court and his right against self-incrimination and admitted that, on October 29, 1979 he had been convicted of forcible rape. Hernandez's counsel then made a *Romero*⁸ motion, arguing that, although he had suffered numerous drug-related offenses, Hernandez had not suffered a conviction for a violent crime since 1979. Commenting that, although remote, the prior strike was "an extremely violent crime" as was the present offense, the trial court denied Hernandez's motion to strike his prior rape conviction.

The trial court selected the upper term of five and one-half years, doubled to 11 years in prison, for Hernandez conviction of attempted voluntary manslaughter in violation of sections 664 and 192. For the finding Hernandez personally inflicted great bodily injury pursuant to section 12022.7, subdivision (a), the trial court imposed a consecutive term of three years and for the finding he personally used a deadly and dangerous weapon during the offense within the meaning of section 12022, subdivision (b)(1), the court sentenced Hernandez to an additional consecutive one year term. Finally, for his prior serious felony conviction (§ 667, subd. (a)), the trial court imposed an additional five-year term. In total, Hernandez was sentenced to 20 years in state prison.

⁸ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The trial court awarded Hernandez presentence custody credit for 162 days actually served and 24 days of conduct credit, for a total of 186 days. The court then ordered Hernandez to pay a \$240 restitution fine (§ 1202.4, subd. (b)), a suspended \$240 parole revocation restitution fine (§ 1202.45), a \$40 court security fee (§ 1465.8) and a \$30 criminal conviction assessment (Gov. Code, § 70373).

Hernandez filed a timely notice of appeal and request for the appointment of appellate counsel on July 17, 2012.

CONTENTIONS

After examination of the record, appointed appellate counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed April 30, 2013, the clerk of this court advised Hernandez to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. On June 5, 2013, Hernandez filed a supplemental brief in which he made several arguments.

Initially, Hernandez asserted the trial court erred when it determined his *Miranda* rights had not been violated by the deputy sheriffs who initially detained him. The contention is without merit. *Miranda* warnings are required “as soon as a suspect’s freedom of action is curtailed to a ‘degree associated with [a] formal arrest.’ ” (*Berkemer v. McCarty* (1984) 468 U.S. 420, 440.) This determination presents a mixed question of law and fact. (*People v. Ochoa* (1998) 19 Cal.4th 353, 402.) We apply a deferential substantial evidence standard to the trial court’s factual findings, but independently determine whether the interrogation was custodial. (*Ibid.*) Custody determinations are resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest? (*Berkemer v. McCarty, supra*, at p. 442.) In making that determination, a number of factors may be considered, including: “(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the

demeanor of the officer, including the nature of the questioning.” (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) Here, two law enforcement officers approached Hernandez as he was walking down the street and asked if they could speak with him. It was only after they observed blood on the bridge of his nose that the sheriffs “detained” Hernandez and performed a cursory pat-down search to be certain he was not carrying any weapons. The nature of the questions Detective Arevalo’s partner then asked Hernandez pertained primarily to officer safety; they were not accusatory. When the questioning became more pointed, the questions were still primarily investigatory. Moreover, Hernandez voluntarily told the officers he had been involved in a fight with his brother and had stabbed him. Finally, at no time during the encounter, even when he was being transported to the school, was Hernandez handcuffed. (See *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1405 [“[A] reasonable person would conclude defendant had been placed in custody when officers handcuffed him immediately after arriving on the scene”].) Under the circumstances presented in the present case, the trial court properly concluded it would allow Hernandez’s statements “up to the point where he [said he] stabbed [his brother].” It was not until then, when he was placed in the car to be transported to the school, that a reasonable person would have concluded he or she was in custody.

Hernandez next contended the trial court improperly denied his *Marsden* motion. “ ‘A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.’ [Citation.] When the defendant seeks to remove appointed counsel ‘the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of counsel’s inadequacy.’ [Citation.] The trial court’s ruling is reviewed for abuse of discretion. [Citation.]” (*People v. Panah* (2005) 35 Cal.4th 395, 431.)

In the present matter, the trial court held a *Marsden* hearing during which Hernandez complained that, although he considered his case to be one involving self-defense, his trial counsel had failed to inform him of “what [he was] going to use for [his] defense.” In response, counsel indicated he and Hernandez had spoken several times and specifically talked about his defenses. Further, counsel had read to Hernandez all of the police reports and the transcript of the preliminary hearing. Counsel had also investigated the matter and, unfortunately, found no witnesses who would testify in support of a self-defense theory. Counsel had then informed Hernandez that, if he wished to pursue a defense of self-defense, he would have to testify on his own behalf. Counsel indicated that, at that time, pursuant to Hernandez’s request, he had explored the possibility of an offer by the People. The People then made an offer of 24 years, but indicated it was not a firm offer. Although Hernandez then stated he did not believe his counsel had read to him the reports and that his counsel had failed to be honest with him regarding the potential witnesses he had interviewed, he later admitted his counsel had read to him the investigator’s reports. When Hernandez indicated he had no further complaints regarding his counsel’s representation, the trial court properly determined counsel was providing adequate representation and that counsel and defendant had not become embroiled in such an irreconcilable conflict that ineffective representation was likely.

Hernandez asserted the trial court improperly denied his *Romero* motion. The assertion is without merit. In *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pages 530 to 531, the court emphasized that “[a] court’s discretion to strike prior felony conviction allegations in furtherance of justice is limited. . . . [¶] . . . [¶] ‘From the case law, several general principles emerge. Paramount among them is the rule “that the language of [section 1385], ‘in furtherance of justice,’ requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]” [Citations.] At the very least, the reason for dismissal must be “that which would motivate a reasonable

judge.” [Citations.]’ [Citation.] ‘Courts have recognized that society, represented by the People, has a legitimate interest in “the fair prosecution of crimes properly alleged.” [Citation.] “ “[A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion.’ [Citations.]” ’ [Citation.]” (Italics in original.)

Here, the trial court properly determined Hernandez had committed, in addition to numerous drug-related offenses, two “extremely violent” crimes. Under these circumstances, the trial court properly exercised its discretion when it denied Hernandez’s motion to strike his prior strike conviction.

Hernandez asserted the jury found he committed acts no longer unlawful under the statutes cited. Again, the assertion is without merit. In 2012, when Hernandez committed the acts, was charged and tried, section 12022.7, subdivision (a) read: “Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.” In 2012, section 12022, subdivision (b)(1) provided: “Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment pursuant to subdivision (h) of Section 1170 for one year, unless use of a deadly or dangerous weapon is an element of that offense.” Based on the facts presented in this case, the jury properly found and the trial court properly imposed sentences for, the findings Hernandez had inflicted great bodily injury pursuant to section 12022.7, subdivision (a) and used a deadly or dangerous weapon pursuant to section 12022, subdivision (b)(1).

Hernandez next contended the trial court erred when it denied his motion for a mistrial, then failed to give a curative instruction after the prosecutor made “reference” to the fact he was incarcerated. Again, the contention is without merit. “A trial court should grant a mistrial only when a party’s chances of receiving a fair trial have been irreparably damaged[.]” Appellate courts “use the deferential abuse of discretion

standard to review a trial court[’s] ruling denying a mistrial.” (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) Here, it is clear Hernandez suffered no damage from the prosecutor’s comment. Although he had been charged with attempted willful, deliberate and premeditated murder, the jury found him guilty of the lesser offense of attempted voluntary manslaughter. Neither did the trial court err in failing to give a “curative instruction.” Hernandez’s counsel made the appropriate tactical decision that to give such an instruction would only emphasize the fact Hernandez was incarcerated and have a negative impact on the jury. That decision was reasonable “under prevailing professional norms” and, as we stated above, caused Hernandez no prejudice. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Hernandez then asserted the jury was not competent to decide his fate because the foreperson initially improperly filled out the verdict forms. We disagree. Providing the jury with new forms, both “guilty” and “not guilty,” and re-instructing the jury on how those forms should be filled out did not amount to error. (See *People v. Gray* (2005) 37 Cal.4th 168, 201.)

Finally, Hernandez appears to be arguing his appellate counsel was ineffective for filing a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. This contention, too, must fail. As review of the record reveals no arguable issues, the filing of the brief was appropriate.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel’s responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende, supra*, 25 Cal.3d at p. 443.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.