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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.

JAIME MENDEZ CASTANEDA
et al.,

Defendants and Appellants.

B278764

Los Angeles County
Super. Ct. No. YA092302

APPEAL from judgments of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Affirmed in part, reversed in part, and remanded with instructions.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant Jaime Mendez Castaneda.

Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant Walter Maradiaga.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant Byron Zamora.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

After a three-defendant trial, a jury convicted Jaime Mendez Castaneda of second degree robbery (Pen. Code, § 211),¹ convicted Castaneda, Walter Maradiaga, and Byron Zamora of assault with a deadly weapon (§ 245, subd. (a)(1)), and found true that Zamora personally inflicted great bodily injury (§ 12022.7, subd. (a)). All three defendants appeal. We strike the protective orders naming the defendants, vacate Maradiaga's sentence and remand for resentencing, and otherwise affirm the judgments.

BACKGROUND

An information charged that on or about April 14, 2015, Castaneda, Maradiaga, and Zamora robbed Michael W., in violation of section 211 (count 1), and assaulted Michael W. with a deadly weapon, in violation of section 245, subdivision (a)(1) (count 2); and alleged all three defendants personally inflicted great bodily injury on Michael W., under section 12022.7, subdivision (a). The information alleged all three defendants had prior felony convictions.

Castaneda, Zamora, and Maradiaga all pleaded not guilty. Before trial, the court granted Castaneda's motion to strike the allegation that he had a prior serious felony conviction.

At trial, 51-year-old Michael W. (described by the prosecutor as developmentally disabled) testified that on

¹ All subsequent statutory references are to the Penal Code.

April 14, 2015, he was riding his bike near the El Zorro market when he saw a small dog. He chased the dog “by accident” (and without meaning to hurt it), because dogs used to chase him when he was younger, and one had bitten him. Castaneda, Maradiaga, and Zamora (whom Michael W. had never seen before) were outside the market. Castaneda said, “Don’t chase my dog,” and ordered Michael W. not to run off. Michael W. testified that Castaneda told him, “I had to get beer for them, or he’s going to beat me, you know, crap out of me.” The prosecution played a surveillance video for the jury.

Afraid all three men would beat him up if he did not buy beer, and hoping to make Castaneda less angry, Michael W. went inside the market, followed by Castaneda and Zamora, who stood in line behind him. Michael W. bought three beers. The store’s back doors were locked so he could not leave, and when he asked to use the phone to call the police, the cashier said, “No.” Maradiaga entered the market and asked Michael W. to buy him a soda, but Michael W. responded he did not have enough money.

Michael W. went back to the cooler to get more beer for himself, paid for two beers, and went outside. The defendants were waiting, and sneaked up on Michael W. from behind. Maradiaga said, “I want your money.” Michael W. pulled his wallet out halfway and put it back in his pocket. Michael W. testified, “Then he stabbed me.” Asked who stabbed him, Michael W. first said either Zamora or Maradiaga stabbed him, although maybe one held him down, or one or both stabbed him and held him down. He then said Maradiaga stabbed him while he said: “Don’t put the knife too far in . . . [b]ecause I don’t want to die too fast. I don’t want to die.” The three men ran off.

Michael W. went back inside the market and told the cashier, "This guy stabbed me." The cashier would not let him use the phone to call 911. He rode his bike to a nearby auto parts store, where someone called 911 for him. Police and paramedics arrived and took Michael W. to the hospital. They tried to interview him, but he could hardly talk.

Michael W. was in the hospital for about eight days. He had 40 stitches in his stomach. Michael W. had a long surgical scar from his chest to his belt line, and two knife marks on the left side of his belly. Michael W. identified a prosecution exhibit as the folding knife used to stab him. He had not seen the knife handle at the time of the stabbing, but had seen the blade, which was about three inches long.

On cross-examination, Michael W. testified Castaneda said "[h]e was going to beat the living shit out of me." Michael W. volunteered to buy Castaneda a beer because he was afraid, and Castaneda then asked him to buy a beer for his friends. After he bought three beers for Castaneda, Maradiaga, and Zamora, he went back into the store and bought two more beers for himself. Michael W. testified that he saw the knife in Zamora's hand, and Zamora held him during the stabbing. He then said all three were holding him.

Michael W. agreed the surveillance video did not show him asking the cashier to call 911 when he bought beer for the men. Outside, the three men had circled him like hawks or hyenas and then he went down. Looking at the video, Michael W. said Zamora stabbed him, and Castaneda stood apart during the attack. When Michael W. went back into the store after the stabbing, he asked for a bag for his beer and then told the cashier, "This guy stabbed me." Castaneda came up to him and

asked, “Why did that guy grab you like that?” Michael W. responded, “I don’t know.”

Michael W. agreed that new situations scared him and he was a little afraid whenever he met new people, including the first time he met the prosecutor. He said, “You want to ask me a million questions, okay.”

An Inglewood Police Department officer testified she responded to the 911 call and found Michael W. sitting outside the auto parts store. Michael W. showed her the injuries on the left side of his abdomen, and told her three male Hispanics were involved (without saying who stabbed him). He described two of the men by their clothing, and the third had a tattoo on his chin. The officer detained Maradiaga and Castaneda. When she searched Castaneda, she found the folding knife; the blade was bent.

A detective testified he arrested Zamora in the course of the investigation. Castaneda, Maradiaga, and Zamora all told the detective they were at the El Zorro market, but gave no more information.

The defendants rested without presenting any evidence. The trial court granted Maradiaga’s and Zamora’s motions for a judgment of acquittal under section 1118.1 on the robbery count, finding there was insufficient evidence that Michael W. was afraid of anyone other than Castaneda when he bought the beer, or that the other defendants knew Castaneda had threatened Michael W. The trial court also granted Maradiaga’s section 1118.1 motion on the great bodily injury enhancement (§ 120227, subd. (a)), because the enhancement applied only to the defendant who stabbed Michael W.

The jury found Castaneda guilty of robbery and assault with a deadly weapon, Maradiaga guilty of assault with a deadly weapon, and Zamora guilty of assault with a deadly weapon, also finding true that Zamora inflicted great bodily injury.

The trial court sentenced Castaneda to two years in state prison (the low term) for robbery, with a concurrent term of two years for assault with a deadly weapon.

In a bifurcated proceeding, Maradiaga admitted to a prior felony conviction for assault with a deadly weapon, within the meaning of section 667, subdivision (a)(1), and section 1170.12, subdivision (b). The trial court sentenced Maradiaga to a total of nine years in state prison, including enhancements.

In a bifurcated proceeding, Zamora admitted a prior felony conviction for voluntary manslaughter (§ 192, subd. (a)), within the meaning of section 667, subdivision (a)(1), and section 1170.12, subdivision (b). The trial court sentenced Zamora to a total of 16 years in state prison, including enhancements.

All three defendants filed notices of appeal.

DISCUSSION

1. *Castaneda*

Castaneda argues insufficient evidence supports his convictions for robbery and for assault with a deadly weapon.

On a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Young* (2005) 34 Cal.4th 1149, 1175 (*Young*).) We “ ‘ ‘presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ ’ ” (*Ibid.*)

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) The defendant’s use of force or fear must be motivated by an intent to steal. (*People v. Anderson* (2011) 51 Cal.4th 989, 994.)

Castaneda argues the evidence does not establish that he took Michael W.’s personal property (the money to buy beer) against his will. He admits he struck fear in Michael W. by threatening to “beat the living crap” out of him, but denies he demanded that Michael W. hand over any property, arguing it was Michael W.’s idea to buy beer for Castaneda and the other defendants. Substantial evidence thwarts this argument. Michael W. testified he “had to get beer for them, or he’s going to beat me.” Although on cross-examination he testified he volunteered to buy the beer because he was afraid of Castaneda, he added that Castaneda had asked him to buy the beer. Viewing this testimony in the light most favorable to the jury’s finding that Castaneda was guilty of robbery, sufficient evidence supported the jury’s conclusion that Michael W. bought the beer against his will.

Castaneda also argues he was motivated by anger at Michael W. for chasing his dog, not by a desire to take Michael W.’s property. While that is one possible interpretation of the evidence, a rational jury also could have concluded that Castaneda was motivated by a desire to take Michael W.’s money to buy the beer.

As to his conviction for assault with a deadly weapon, Castaneda argues the jury concluded that Zamora was the stabber (by finding true that Zamora personally inflicted great

bodily injury), and no substantial evidence shows he aided and abetted Zamora. Here too we conclude the evidence supported Castaneda's conviction.

An aider and abettor is guilty as a principal. (§ 31.) A defendant aids and abets when he acts “ ‘with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’ ” (*People v. Chiu* (2014) 59 Cal.4th 155, 161.) Intent is rarely shown by direct proof and usually must be inferred from the circumstances surrounding the offense. (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.) While mere presence at the scene or failure to prevent a crime alone is not sufficient, the jury may consider “ ‘presence at the scene of the crime, companionship, and conduct before and after the offense.’ ” (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409 (*Campbell*).) Here, Castaneda did not “independently happen by the scene of the crime.” (*Ibid.*) Before the stabbing, he threatened Michael W. with a beating, instructed him to get beer, and accompanied him into the market with Zamora. He then waited outside the market with Zamora and Maradiaga, circling Michael W. when he exited (although not holding Michael W. down during the stabbing).

After the stabbing, Michael W. testified Castaneda asked him why “that guy grab[bed] you like that,” and Castaneda argues the jury could infer Castaneda was surprised by the knife attack. Yet the folding knife was in Castaneda's possession when he was arrested, which supports an inference that the knife may have been his to begin with and that he gave it to Zamora to use. Even when the circumstances shown by the evidence might also reasonably be reconciled with a contrary finding, we nevertheless

will not reverse a judgment for insufficient evidence. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

The evidence “reasonably indicates that [Castaneda] played an affirmative supportive role in the [stabbing] and was not simply an innocent, passive, and unwitting bystander.” (*Campbell, supra*, 25 Cal.App.4th at p. 410.)

Sufficient evidence supports Castaneda’s convictions for robbery and assault with a deadly weapon.

2. *Maradiaga*

a. Sufficient evidence supports Maradiaga’s conviction

Like Castaneda, Maradiaga argues insufficient evidence supports his conviction for aiding and abetting assault with a deadly weapon.

Michael W. testified that after he bought the beers for Castaneda and Zamora, Maradiaga came into the market and asked Michael W. to buy him a soda; Michael W. refused. Maradiaga, like Castaneda, was outside the market with Zamora when Michael W. exited, and Maradiaga said, “I want your money.” At first Michael W. testified Maradiaga stabbed him, but then said it was Zamora, and Zamora and/or Maradiaga held him down. The video shows Maradiaga very close to Michael W. during the stabbing. The jury could reasonably conclude that Maradiaga engaged in concerted action with Castaneda and Zamora before the stabbing, implying a common purpose, and that, like Castaneda, Maradiaga intimidated and blocked Michael W. from leaving after he exited the market. A jury could also conclude that Maradiaga played an affirmative supportive role in restraining Michael W. during the stabbing and was not an unwitting bystander. “ “Liability attaches to anyone

‘concerned,’ however slight such concern may be.” ’ ” (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743.)

- b. *The record does not affirmatively show Maradiaga voluntarily and intelligently waived his constitutional rights when he admitted his prior conviction*

Maradiaga also argues he did not voluntarily and intelligently waive his constitutional right to trial before he admitted his prior conviction.

The information alleged Maradiaga had a prior conviction in April 2012 for assault with a deadly weapon (§ 245, subd. (a)(1)). Maradiaga agreed to bifurcate trial on the allegation. After excusing the jury to deliberate, the trial court noted that both Maradiaga and Zamora had strike priors charged against them, and asked counsel to “have a discussion, if [you] haven’t already, with your clients about whether they want a jury—this jury to decide that should the jury come back with a verdict that could make these priors relevant. Or whether they would allow me to determine whether these priors—the convictions themselves occurred.” The court added: “Because, gentlemen, you have the right to have a jury trial on that issue. Priors were charged against the two of you as sentence enhancements.” Zamora’s counsel stated Zamora would waive jury trial, and Zamora agreed he was willing to have the court, rather than a jury, decide whether the prior occurred. Maradiaga’s counsel then stated Maradiaga agreed “to waive a jury and let the court decide.” The court asked Maradiaga if he agreed; he answered yes, and waived his right to trial by jury on the prior.

At sentencing six weeks later, the court advised Maradiaga:

“You have a right to a trial on whether or not the prior that was charged against you . . . to enhance your sentence occurred. It’s not the underlying facts, but it’s the fact that either a plea or verdict had occurred that’s in issue. And if you’re willing to acknowledge that indeed the prior that was charged against you [under] Penal Code 245(a)(1) in case YA081756. If you’re not contesting that you were convicted of this and want to admit that, then you are waiving your right to have a trial on the issue. I’d hear the trial because you’ve already waived a jury. And all I would determine is whether or not there are documents in existence that reflected that this conviction occurred. Do you understand that?”

After counsel and Maradiaga conferred, counsel stated, “Your honor, his issue is he’s on probation for the prior.”² The court responded: “Doesn’t matter. The only issue legally is whether that prior [conviction] occurred on or about April 2nd, 2012, and that the prior conviction alleged is a violation of Penal Code section 245(a)(1), assault.” Again, counsel and Maradiaga conferred. The court continued:

“If you admit the prior, then I would not ask to look into the documents that the People would

² There was some confusion about Maradiaga’s probation status. Later, the prosecutor stated that Maradiaga had been off probation for the prior strike only 12 days before he committed the current offense in 2015.

give me to determine whether this occurred.
You'd be waiving your right to a trial. And the trial would simply be me essentially looking at the documents. Are you willing to waive your right to a trial and admit the prior conviction?"

After conferring again with Maradiaga, counsel asked the court to repeat the question, and the court stated:

"You are now here on the issue of whether or not you have a prior felony conviction on your record. That's the only thing we're discussing right now. And it's alleged that on April 2nd, 2012, you either entered a plea or were found guilty of violating Penal Code section 245(a)(1), which is a felony assault charge.³ So I'm simply asking whether you admit this prior conviction or not?"

Maradiaga answered, "[y]es," and the court found the prior allegation true. The court imposed the low term of two years, doubled the sentence to four years for the strike prior, and imposed an additional consecutive five year enhancement under section 667(a)(1) for a total sentence of nine years.

Before a defendant admits the truth of an allegation of a prior conviction, the trial court must advise the defendant that by admitting the conviction, he waives his constitutional rights to a jury trial, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. (*People v. Mosby* (2004)

³ Three days before the sentencing hearing, Maradiaga filed a motion to strike his prior strike conviction which he described as a "plea to Penal Code, section 245 (A)(1) [*sic*]." There is no other record evidence of a guilty plea.

33 Cal.4th 353, 359-360 (*Mosby*).) The trial court must also advise the defendant of the penal consequences of the admission, but where “the only error is a failure to advise of the penal consequences, the error is waived if not raised at or before sentencing.” (*People v. Wrice* (1995) 38 Cal.App.4th 767, 770-771; *In re Yurko* (1974) 10 Cal.3d 857, 864-865.)

Here, on the day the jury began deliberations, the court advised Maradiaga of his right to a jury trial, and he waived that right. Nevertheless, at Maradiaga’s sentencing six weeks later, the court did not advise Maradiaga of his right against self-incrimination and his right to confront adverse witnesses before Maradiaga admitted the prior conviction, nor did the court advise him of the penal consequences. His admission resulted in a doubling of his two-year sentence to four years and an additional five year enhancement.⁴ As the court advised Maradiaga of his right to a jury trial, but not his right to remain silent and his right to confront adverse witnesses, this is an “incomplete advisement” case. (*Mosby, supra*, 33 Cal.4th at p. 363.) *Mosby* held that when “*immediately* after a jury verdict of guilty, a defendant admits a prior conviction after being advised of and waiving only the right to trial . . . that admission [can] be voluntary and intelligent even though the defendant was not told of, and thus did not expressly waive, the concomitant rights to remain silent and confront adverse witnesses . . . if the totality of the circumstances surrounding the admission supports such a conclusion.” (*Id.* at p. 356, italics added.) *Mosby* “had *just*

⁴ At Zamora’s sentencing hearing earlier the same morning (at which Maradiaga was not present), the court did advise Zamora of his right to confront witnesses and to testify in his own behalf before Zamora admitted his prior conviction.

undergone a jury trial at which he did not testify,” so “he not only would have known of, but had just exercised, his right to remain silent at trial,” and “had, through counsel, confronted witnesses at that immediately concluded trial, [so] he would have understood that at a trial he had the right of confrontation.” (*Id.* at p. 364.) The defendant’s previous experience in the criminal justice system also was relevant to whether he knowingly waived his constitutional rights, and as Mosby’s prior conviction had followed his plea of guilty, he would have been advised of his rights in the earlier case and had experience in waiving his trial rights. (*Id.* at p. 365.)

In *People v. Lloyd* (2015) 236 Cal.App.4th 49, 59 (*Lloyd*), as here, when the jury began deliberations, the defendant waived his right to a jury trial on his prior conviction and the court advised him of his right to a court trial. His admission of his five separate prior terms in state prison “was not made until more than seven months later In the interim, defendant’s trial counsel declared a conflict of interest and was relieved as counsel of record, new counsel was appointed to represent defendant, and the matter was continued a number of times for trial on the state prison priors and sentencing.” (*Ibid.*) Sentencing did not occur until seven months after trial, defeating an inference that the defendant was aware of the rights he had exercised at trial. (*Ibid.*) There was no information whether any of his prior convictions were guilty pleas in which he would have received advisements of his trial rights. (*Id.* at p. 60.) Under those circumstances, the court of appeal held the totality of the circumstances did not demonstrate a knowing and intelligent waiver of the defendant’s rights. (*Id.* at pp. 59-60.)

In *People v. Christian* (2005) 125 Cal.App.4th 688, 691-692 (*Christian*), the defendant (who had five previous convictions of serious felonies) pleaded no contest to robbery and admitted one prior strike conviction and two prior serious felony convictions, for a total prison term of 20 years. Before the defendant accepted the plea and admission, the trial court stated the district attorney would apprise the defendant of his constitutional rights, which applied not only to the robbery charge but also to the allegations of a prior strike and two five-year priors. “All of the rights in a jury trial apply to those also.” (*Id.* at p. 692.) The prosecutor advised the defendant of his right to jury trial on both the robbery and the priors, and explained that admitting to the priors would mean in the future he would be treated as a third-strike offender, with a minimum sentence of 25 years to life. (*Id.* at pp. 692-693.) The trial court found he had expressly and intelligently waived his rights and the plea and admission were “freely and voluntarily made,” accepted the guilty plea and admission, and imposed the 20-year sentence. (*Id.* at p. 693.)

On appeal, the defendant argued that because the court did not advise him of his rights to confront witnesses and self-incrimination, his plea to the substantive offense and the priors was invalid. This division found the argument “persuasive.” (*Christian, supra*, 125 Cal.App.4th at p. 693.) We pointed out that the defendant had not just participated in a trial where he might exercise his rights to confrontation and to remain silent; instead, “he was forgoing a trial on the substantive charges as well as on the prior allegations.” (*Id.* at p. 697.) The record showed defendant had five prior convictions, but not whether those convictions were reached by plea or trial, so “we cannot infer that he would have received advisements in his prior cases.”

(*Ibid.*) His most recent prior conviction was nine years before the present charges. (*Ibid.*) We therefore could not infer that his prior experience in the justice system “demonstrated his present knowledge and understanding of his rights.” (*Id.* at p. 698.) Although the defendant consulted with counsel about the plea offer, the substance of that conversation was not in the record. (*Ibid.*) While nothing mandates that the trial judge be the one to advise a defendant of his constitutional rights (*Lloyd, supra*, 236 Cal.App.4th at p. 57, fn. 6), without a record of any conversations with counsel “we will not presume appellant was informed of his . . . rights in appellant’s conversation with his counsel.” (*Christian, supra*, 125 Cal.App.4th at p. 698.)

Similarly, this record does not affirmatively show that Maradiaga’s waiver of his trial rights to confrontation and to remain silent was voluntary and intelligent. Maradiaga waived his right to jury trial while the jury was deliberating, but did not waive his right to a court trial until six weeks later. We thus do not have the assurance that he had just exercised his rights to remain silent and to confront witnesses as in *Mosby, supra*, nor that he would understand that those rights adhered in a court trial as well as in a jury trial. Maradiaga’s criminal history in the probation report showed a felony conviction for possession of a controlled substance in 2008, a misdemeanor conviction for possession of a dangerous weapon in 2010, a misdemeanor conviction for marijuana possession in 2011, and the prior alleged in this case, the felony conviction for assault with a deadly weapon in 2012. Maradiaga’s criminal history is not so extensive or so recent that we may presume he understood his constitutional rights at the time of sentencing in this case. Although Maradiaga repeatedly consulted with trial counsel

before admitting his prior conviction, we lack any information about the substance of those consultations and have no assurance that counsel informed Maradiaga of the rights he was about to waive.

We cannot conclude the record “*affirmatively shows* that defendant’s admission of the prior conviction constituted a knowing and voluntary waiver of his constitutional rights.” (*People v. Howard* (1992) 1 Cal.4th 1132, 1179, italics added.) Maradiaga thus is entitled to reversal of the portion of his sentence based on the prior conviction allegation. On remand, the trial court may proceed to try the prior conviction allegation or accept an admission to the allegation, after securing an adequate waiver of Maradiaga’s right to a court trial and his other constitutional rights.

3. *Zamora*

Zamora argues insufficient evidence establishes that he stabbed Michael M., or aided and abetted in the stabbing. He also argues CALCRIM No. 331, an instruction on evaluating the testimony of a person with a developmental disability, is unconstitutional, and insufficient evidence supported giving the instruction in this case. Finally, he argues the court abused its discretion when it failed to strike his prior strike conviction.

a. *Sufficient evidence supports Zamora’s conviction*

Zamora argues no forensic evidence connected him to the actual stabbing, the video made it difficult to see who wielded the knife, Michael W.’s trial identification of him as the stabber was unreliable, and Castaneda, not Zamora, had the knife when the defendants were arrested. Again, to determine whether the evidence is sufficient we view the evidence in the light most favorable to the judgment, presuming the existence of every fact

the jury could reasonably infer from the evidence. (*Young, supra*, 34 Cal.4th at p. 1175.) We resolve neither witness credibility issues nor evidentiary conflicts: “Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact,” and unless it is “physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.” (*Id.* at p. 1181.)

Taking into account the testimony and the video evidence, the evidence is sufficient to establish that Zamora stabbed Michael W. Michael W. testified that Zamora was with Castaneda and Maradiaga outside the market, and Zamora and Castaneda went into the market with him after Castaneda threatened to beat Michael W. unless he bought them beer. Zamora was outside with Castaneda and Maradiaga when Michael W. exited the market. The men surrounded Michael W., who testified that either Maradiaga or Zamora stabbed him and that he saw the knife in Zamora’s hand. After viewing the video, Michael W. testified that Zamora stabbed him. Zamora calls Michael W.’s credibility “suspect” and points to inconsistencies in his testimony, but we resolve credibility issues and conflicts in testimony in favor of the judgment. Viewing the surveillance video in the light most favorable to the judgment, we conclude it is consistent with the jury’s conclusion that Zamora stabbed Michael W.

- b. *CALCRIM No. 331 is not unconstitutional, and substantial evidence supported the instruction*

The trial court gave CALCRIM No. 331 to the jury:

“In evaluating the testimony of a person with a developmental disability, consider all of the factors surrounding that person’s

testimony, including his level of cognitive development.

“Even though a person with a developmental disability may perform differently as a witness because of his level of cognitive development, that does not mean he is any more or less credible than another witness.

“You should not discount or distrust the testimony of a person with a developmental disability solely because he has such a disability.”

None of the three defendants objected to the instruction.

Section 1127g requires: “In any criminal trial or proceeding in which a person with a developmental disability, or cognitive, mental, or communication impairment testifies as a witness, upon the request of a party, the court shall instruct the jury” with language substantially identical to CALCRIM No. 331 as given to the jury in this case. In *People v. Catley* (2007) 148 Cal.App.4th 500, 508 (*Catley*), the court of appeal noted that CALCRIM No. 331 “tracks the language of section 1127g,” and, like the instruction advising a jury on the testimony of a child, “‘provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom “‘traditional assumptions’” may previously have biased the factfinding process.’” (*Catley*, at p. 508.) The statutory history describes the legislative intent of section 1127g as “‘protecting the rights of developmentally disabled persons and other dependent persons who are witnesses in criminal cases and ensuring that they are given equal access to the criminal justice system,’” and the use of

the instruction does not violate a defendant's right to due process. (*Catley*, at p. 508; *People v. Keeper* (2011) 192 Cal.App.4th 511, 520.) The use of the instruction does not “ ‘unduly inflate’ ” the testimony of the witness. (*Catley*, at p. 507.) Instead, the instruction corrects a bias: “ ‘Obviously a criminal defendant is entitled to fairness, but just as obviously he or she cannot complain of an instruction the necessary effect of which is to increase the likelihood of a fair result. There was no denial of due process.’ ” (*Ibid.*) We agree the instruction is not unconstitutional.

Zamora also argues the evidence was insufficient to show that Michael W. met the legislative description of “dependent person.” (*Catley, supra*, 148 Cal.App.4th at p. 508.) We disagree. “The Legislature defined a dependent person as ‘any person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age.’ ” (*Ibid.*) The prosecutor and all three defendants argued at trial that Michael W. was developmentally disabled. The prosecutor's opening statement began: “. . . Michael [W.], the victim in this case—he's developmentally disabled. . . .” In closing, the prosecutor asked the jury to take into account Michael W.'s developmental disability when considering how he described the events surrounding his stabbing. Zamora's own counsel described Michael W. as “gifted,” a “fragile witness-victim” speaking with childlike innocence and not knowing how to lie or manipulate. Maradiaga's counsel stated Michael W. was “developmentally delayed,” and Castaneda's counsel stated

Michael W. was “disabled.” At Maradiaga’s sentencing, the trial court stated: “[W]hat the three defendants did to [Michael W.], given his disability, was the equivalent . . . of what we might otherwise call a hate crime,” and took advantage of Michael W.

The definition of “dependent person” includes anyone with “‘a physical or mental impairment’ ” which “ ‘substantially restricts his or her ability to carry out normal activities *or* to protect his or her rights, *including* . . . persons who have . . . developmental disabilities.’ ” (*Catley, supra*, 148 Cal.App.4th at p. 508, italics added.) As a developmentally disabled person whose disability restricted his ability to protect his rights, Michael W. was included in the legislature’s definition.

c. *The trial court did not abuse its discretion in declining to strike Zamora’s prior strike conviction*

The information alleged that in 1988, Zamora was convicted of voluntary manslaughter (§ 192, subd. (a)), within the meaning of the Three Strikes law (§§ 667, subds. (b)-(j), 1170.12). Before trial, Zamora filed a motion to dismiss the prior strike conviction under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Zamora argued the 1988 conviction for manslaughter was “remote,” and he was remorseful after the current crimes. At a hearing on the motion, the court noted that Zamora had a racketeering and firearm case in Texas 10 years after his 1988 manslaughter conviction, a probation violation in 2007 for which he was ordered to drug rehabilitation, and a possession of drug paraphernalia case in 2015. Zamora continued to engage in criminal activity, and at age 48 was a risk to public safety. Nothing in Zamora’s “background, character, and prospects” favored granting the motion. Counsel argued Zamora had not had an opportunity to address his substance

abuse. The court denied the motion: “[T]his is all on video. . . . I do remember seeing evidence where the victim was ordered or asked to go in and buy beer for these guys, and what he got for it was basically a knife in the belly. So it’s—it’s a serious case, and the three of them are lucky this person didn’t die.”

Zamora has the burden to show clearly that the ruling was “irrational or arbitrary,” and if he does not make that showing, we presume the trial court acted to achieve legitimate sentencing objectives. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) We see no irrationality or arbitrariness in the court’s denial of the motion. The court considered the nature and circumstance of Zamora’s current offense, felony assault with a deadly weapon; his prior violent felony and his continued involvement in criminal activity; and the particulars of his prospects (his remorse and his need for substance abuse treatment), all of which had support in the record. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Zamora did not present to the trial court, and does not identify on appeal, any reason why the denial of his motion to strike his prior strike conviction was outside the bounds of reason. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

4. *The criminal protective orders must be reversed*

Castaneda, Maradiaga, and Zamora all challenge the criminal protective orders, and respondent agrees the orders are improper.

At the sentencing hearings, the trial court granted the prosecution’s request for criminal protective orders restraining Castaneda, Maradiaga, and Zamora from contact with Michael W. for 10 years, without defense objection. The protective orders were on a Judicial Council form stating the orders were under section 136.2, subdivision (i)(1), which provides for restraining

orders prohibiting contact with the victim “[i]n all cases in which a criminal defendant has been convicted of a crime involving domestic violence” or any crime requiring registration as a sex offender. None of the appellants was convicted of a crime of domestic violence or a crime requiring registration. The orders thus are unauthorized sentences in excess of the court’s jurisdiction, which may be challenged even without objection in the trial court. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 381-382.) The protective orders must be stricken.

DISPOSITION

The criminal protective orders are stricken. Walter Maradiaga’s sentence is vacated, and the matter is remanded for a new court trial and resentencing on the prior conviction allegation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.