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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY NELSON, Defendant and Appellant.	A149139 (Contra Costa County Super. Ct. No. 5-151356-3)

Appellant Mark Anthony Nelson was convicted following a jury trial of first degree murder. On appeal, he initially contended substantial evidence did not support the verdict under either theory presented at trial: premeditation and deliberation or lying in wait. He further contended the trial court erred when it refused to give the jury a unanimity instruction. We affirmed the judgment, but the California Supreme Court subsequently granted review and transferred the matter back to this court with directions to vacate our decision and reconsider the cause in light of Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2), which amended Penal Code section 1385, subdivision (b),[1] effective January 1, 2019, to give trial courts new discretion to dismiss or strike prior serious felony convictions under section 667, subdivision (a). We shall again affirm the judgment, but shall remand the matter for resentencing so that the court can exercise its new discretion to determine whether to strike appellant's five-year enhancement, pursuant to section 667, subdivision (a)(1).

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

PROCEDURAL BACKGROUND

Appellant was charged by information with one count of murder (§ 187, subd. (a)), with an allegation that, in committing that offense, appellant used a deadly and dangerous weapon (§ 12022, subd. (b)(1)). The information also alleged a prior serious felony conviction (§ 667, subd. (a)(1)); a prior strike conviction (§ 667, subd. (b)-(i)); and two prior prison terms (§ 667.5, subd. (b)).

Following a jury trial, the jury found appellant guilty of first degree murder and found true the deadly weapon allegation. Following a court trial, the court found true the allegations of a prior serious felony conviction, a prior strike conviction, and the two prior prison terms.

On July 29, 2016, the court sentenced appellant to an aggregate prison term of 56 years to life.

On August 12, 2016, appellant filed a notice of appeal.

On September 18, 2018, a panel of this Division affirmed the judgment. (*People v. Nelson* (Sept. 18, 2018, A149139) [nonpub. opn.].)

On November 20, 2018, our Supreme Court granted appellant's petition for review and transferred the mater back to this court with directions to vacate our original decision and reconsider the cause in light of Senate Bill No. 1393.[2]

FACTUAL BACKGROUND

Prosecution Case

Evelyn White testified that she knew the victim, Lakota Brightman, as "Dakota." They panhandled together at the Central Avenue freeway off-ramp on the Richmond-El Cerrito border. Brightman lived at a camp in the area; White lived in a house. White also knew appellant. Appellant was always in a wheelchair or using a shopping cart as a crutch.

On July 3, 2015, White arrived at the Central Avenue off-ramp at 10:30 or 11:00 a.m. Appellant was there when she arrived; he was "raging like a mad man." She saw

[2] Both appellant and respondent have now filed letter briefs on this issue.

him “cussing” and “pacing up and down the freeway.” He kept talking about how his girlfriend had stolen his car. He kept saying he was “going to kill that bitch.” White also saw appellant sharpening a yellow-handled knife with a rock while they were sitting under the freeway. She calmed him down and told him to put the knife away, which he did. White did not like appellant because he had threatened her “too many times.”

White did not see any interaction between Brightman and appellant that day. Brightman stayed away from appellant, running errands and taking his turn panhandling on the off-ramp. Around 7:00 p.m., White and Brightman were leaving the area and heading toward a bus stop when appellant unexpectedly said he would go with them. He followed them while pushing his shopping cart. Appellant was still angry. When they got to the bus stop, appellant said he was missing his wallet. As Brightman left to put air in the tire of a bicycle he had found, White suggested he backtrack to see if appellant had dropped his wallet on the way to the bus stop. When Brightman left, he did not take his backpack and bags with him. Appellant said he wanted to search Brightman’s bags, but White said no.

Brightman returned after about five minutes. The bus never came, so they started walking toward Brightman’s camp and a nearby store. Appellant said he wanted to go to the store because his girlfriend would be there. Appellant went off on his own while White and Brightman went to Brightman’s camp to drop off the recycling items they had picked up on their walk. After they had been at Brightman’s camp for about 15 minutes, White’s stomach was upset and Brightman offered to go to the store to get her a soda before they left to go to a friend’s house. After Brightman left, White, who had gotten comfortable, called to let him know she was going to spend the night at his camp. She never saw or spoke to him again after that.

White passed out and at some point was awakened by appellant, who had “slithered” into the camp. Appellant started looking around the camp for something. He also gave White a reflective orange vest he had been wearing. White was not really surprised when she heard that appellant had been involved in Brightman’s killing because she “knew there was bad blood between the two of them.”

White, who described herself as "a functional addict," acknowledged that she had drunk alcohol, smoked marijuana, and taken "a little meth" on the day in question, but this did not affect her memory of what happened. White also acknowledged that she had suffered a number of felony and misdemeanor convictions for crimes involving dishonesty.

Miguel Gonzalez testified that in 2015, he worked as a brand ambassador for Uber, recruiting drivers at the Valero gas station near Central Avenue in Richmond. He periodically saw appellant, whom he identified at trial, at the gas station during the months he was stationed there. Around midday on July 3, Gonzalez saw appellant at the gas station talking to another panhandler. Appellant seemed upset and Gonzalez saw him make "stabbing hand motions" as he described something to the other person, although Gonzales could not recall what appellant was saying. When appellant was making the stabbing motions, he looked at Gonzalez and said, " 'Yeah, I've been in some fights.' " He then lifted up his shirt and showed Gonzalez a scar on his right side. When Gonzalez asked appellant where his car was, appellant said something like, " 'I know what happened to my car.' " At some point, Gonzalez also saw appellant with a fork with two prongs and a knife. When appellant left the fork and knife sitting on top of a trash bin, Gonzalez threw them away in a locked trash can.

Two days later, after Gonzalez heard there had been a homicide, he called the police. He met with an officer and told him whatever he had heard appellant say to the other person at the gas station. Gonzalez believed he told the officer that he heard appellant tell the other panhandler something like, " 'I'm going to get him.' " After refreshing his recollection by looking at a police report, Gonzalez believed he also told the officer that he saw appellant with a knife in his hand that day in the gas station.

Richmond Police Officer John Ellis testified that he interviewed Gonzalez on July 8, 2015, and Gonzalez described his observations at the gas station on July 3. Gonzalez saw a man with a shopping cart, whom he had previously seen at the gas station with a white car. The man was talking to another person about someone taking his car; he seemed angry. Gonzalez asked the man if he was mad at the person who took his car,

and the man said, “no.” Instead, Gonzales understood the man to be “pissed off about another male who was not there” at the gas station. The man also said he knew the woman who had taken his car, saying, “ ‘No, I know that bitch that took it. I’m going to get that mother fucker.’ ” Gonzalez also told Ellis that he saw the man with a serving fork and two knives and saw him making “knife cutting motions” while talking to the other person. Gonzalez did not identify appellant in a photo lineup as the man at the gas station. He identified someone else, saying he looked like a younger version of the man he saw at the gas station.

An employee at the Carlson Food Market in Richmond testified that on the evening of July 3, 2015, appellant came inside the market and spoke briefly to him at the checkout counter before leaving.

Video clips from surveillance footage taken inside and outside the market on the night of the killing were played for the jury at trial. The video showed the following relevant events: Brightman arrives at the market and starts shopping. Appellant, who is standing at the checkout counter notices his presence, and walks outside. Appellant walks to his cart, opens a bag, and walks away with a knife in his hand. Appellant then waits outside the door to the market for approximately two minutes, glancing periodically at the market entrance and crossing from one side of the door to the other.

Brightman exits the market and starts to walk away, but appellant gets his attention and Brightman walks back to where appellant is standing near the door. Appellant stands with his right shoulder back and keeps his right hand, which is still holding the knife, behind him during the ensuing one-minute conversation. While the two men talk, appellant gestures with his left hand. Brightman keeps his hands mostly at his sides, still holding his shopping bag, until near the end of the conversation, when he gestures a few times and raises his hand toward appellant’s face. Appellant uses his left hand to swat Brightman’s hand away. At that point, Brightman turns and begins to walk away. As soon as his back is turned, appellant lunges and stabs him in the upper left back.

Brightman turns and runs back into the market. Appellant initially follows him inside, but quickly leaves after Brightman runs further into the market, past the checkout counter where the clerk and some customers are standing. Brightman collapses onto the floor. Appellant walks away from the market, pushing his cart. Police arrive approximately three minutes later and attend to Brightman as he lies on the floor.

Richmond Homicide Detective Eric Haupt testified that he was the primary investigator in Brightman's killing. He arrived at the scene shortly before midnight on July 3, 2015, and reviewed the video footage from the surveillance cameras at the market. The cameras had captured an argument between appellant and Brightman outside the market during which appellant was standing in a "bladed stance," with his shoulder back and one side of his body facing away from Brightman.

Haupt went to Brightman's camp around 1:00 a.m. on July 4, 2015, to look for appellant. He spoke with White, who had been asleep in a tent at the camp. She said that appellant had been there earlier and described him as jittery and nervous. She also said that appellant came to the tent to try to find his wallet. White told Haupt that she had seen appellant the previous day with a yellow-handled knife. Haupt also met with White a few days later, and she told him that appellant had given her an orange reflective vest. The knife used in the stabbing was never recovered.

Forensic Pathologist Mark Super testified that he had performed the autopsy on Brightman's body. There was a single stab wound to the left upper back. The knife penetrated six inches, traveling horizontally between the third and fourth ribs and through the left lung before striking the aorta. The lung and aorta are vital structures and death from bleeding would occur very rapidly without surgery. The cause of death was the stab wound to the back and into the chest. An abrasion on Brightman's back could have been a hilt mark from the knife going into his body all the way up to the guard, which is the connection between the handle and the blade.

Defense Case

A defense witness testified that he was a friend of appellant's who also knew Brightman. Appellant was not a violent person, but Brightman was known to be a bully

on the streets. Brightman had physically pushed the witness, gotten in his face, and regularly been aggressive with him. Several other witnesses testified to appellant's reputation for nonviolence and/or Brightman's reputation for violence, although none of them testified that they had actually seen Brightman use physical violence. These witnesses had, however, seen Brightman being belligerent and threatening people, especially when he had been drinking. One witness had observed a heated verbal exchange between appellant and Brightman, which took place a week to 10 days before Brightman's death. Brightman was telling appellant "that if he didn't shut his mouth, he'd get a fucking ass whipping."

DISCUSSION

I. *Substantial Evidence of First Degree Murder*

Appellant contends substantial evidence does not support his first degree murder conviction under either of the two theories presented at trial: (1) premeditation and deliberation or (2) lying in wait.

"In reviewing a criminal conviction challenged as lacking evidentiary support, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. An appellate court must accept logical inferences the jury might have drawn from the evidence, even if the court would have concluded otherwise. [Citation.]" *(People v. Brady* (2010) 50 Cal.4th 547, 561 (*Brady*).)

A. *Premeditation and Deliberation*

"A murder that is willful, deliberate, and premeditated is murder in the first degree. (§ 189.) ' " 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation . . . does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]' " ' [Citation.]

" ' " 'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.' [Citation.] A reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing—but '[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.' " ' [Citation.]" (*Brady*, *supra*, 50 Cal.4th at pp. 561-562.) The factors "are merely a framework for appellate review; they need not be . . . afforded special weight, nor are they exhaustive. [Citations.]" (*Id.* at p. 562.)

In the present case, we conclude the totality of the evidence is sufficient to support the jury's first degree murder verdict based on the prosecution theory of premeditation and deliberation. (See *Brady*, *supra*, 50 Cal.4th at p. 561.)

First, there was evidence that appellant had a preexisting motive to kill Brightman. White testified that there was "bad blood" between the two men. A defense witness testified about an altercation he had witnessed between them about a week before the killing, during which Brightman threatened to give appellant a "fucking ass whipping." Gonzalez, the Uber recruiter, testified that he saw appellant with a knife and saw him making stabbing motions while talking to another man. He also heard appellant say something like, " 'I'm going to get him,' " and Officer Ellis testified that Gonzalez reported hearing him say he was "pissed off about another male." White also testified that on the day of the killing, appellant told her his wallet was missing and attempted to search for it in Brightman's bags when Brightman briefly left them alone at the bus stop. There was additional testimony from White and Haupt suggesting that appellant returned to Brightman's camp after the killing to search there for the wallet. This evidence is sufficient to demonstrate motive. (See *Brady*, *supra*, 50 Cal.4th at pp. 561-562; see also, e.g., *People v. Gunder* (2007) 151 Cal.App.4th 412, 423-424 [evidence of a recent dispute and "a reservoir of bad blood towards the victims" was sufficient to show defendant's motive in murders].)

Second, there was evidence that appellant engaged in planning activity. On the morning of the killing, White saw him sharpening a knife on a rock. Shortly before the killing, surveillance video footage showed that after appellant noticed Brightman inside the market, he walked outside to his cart, opened a bag, and walked away from the cart with a knife in his hand. Appellant then stood outside the entrance to the market for approximately two minutes until Brightman came outside. The video footage then showed appellant getting Brightman's attention and Brightman walking over to appellant. This evidence supports the reasonable inference that, regardless of whether appellant began planning to kill Brightman earlier in the day or only after first seeing him inside the market, appellant planned the attack beforehand and then waited for Brightman outside of the market with a knife in his hand. (See *Brady*, *supra*, 50 Cal.4th at pp. 561-562; see also, e.g., *People v. Poindexter* (2006) 144 Cal.App.4th 572, 588 (*Poindexter*) ["Planning activity could reasonably be found in the evidence of defendant's statement that he was going to show the victim 'what he meant,' followed by his retrieval of the shotgun" shortly before the killing].)

Third, the manner of killing also supports a jury finding of premeditation and deliberation. (See *People v. Anderson* (1968) 70 Cal.2d 15, 27 [manner of killing category of evidence involves "facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from" motive or planning evidence].) During the entire one-minute conversation between the two men, appellant remained in a "bladed stance," with one shoulder back and the knife in his right hand, concealed behind his back. Then, only when Brightman turned to walk away did appellant forcefully plunge the knife into Brightman's upper left back, puncturing his left lung and aorta, adjacent to his heart. (See *Brady*, *supra*, 50 Cal.4th at pp. 561-562; see also, e.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1287 [finding sufficient evidence of premeditated murder where "defendant was armed with a knife and stabbed [the victim] without provocation directly in the heart with enough force to penetrate part of a rib and

pierce entirely through the heart"]; *Anderson*, at p. 27 ["directly plunging a lethal weapon into the chest evidences a deliberate intention to kill"], citing *People v. Hillery* (1965) 62 Cal.2d 692, 704.)

Appellant nevertheless claims that various deficiencies in the evidence undermined the prosecution's theory of premeditated and deliberate murder, offering alternative conclusions a jury might have reached based on the evidence presented at trial. "On review, however, we do not reevaluate the credibility of witnesses or resolve factual conflicts; rather, we presume the existence of every fact in support of the verdict that reasonably could be inferred from the evidence. [Citation.]" (*Brady*, *supra*, 50 Cal.4th at p. 564.) For example, appellant ignores the evidence of planning and posits a completely different factual scenario, arguing that once Brightman "exited the store, appellant's actions were consistent only with his confronting him, not with any plan to kill him. Brightman had threatened appellant in the past and was much bigger than him. The fact that appellant was in a bladed stance when arguing with Brightman meant only that he was in a defensive posture. [Citation.] His having a knife on him, too, was consistent with his defending himself against the bully that Brightman had shown himself to be in the past. [Citations.]" (Fn. omitted.)

That appellant and Brightman may have been arguing just before the stabbing does not undermine the inference that appellant—who had waited for Brightman outside the market and kept a knife hidden behind his back throughout the conversation—engaged in planning before he stabbed Brightman. (See *People v. Romero* (2008) 44 Cal.4th 386, 401 ["Defendant brought a gun to the video store where, without any warning or apparent awareness of the impending attack, [victim] was shot in the back of the head"].) As in *Romero*, the evidence presented at trial supports the inference that, "without any warning or apparent awareness of the impending attack," Brightman turned away and was stabbed in the back by appellant, who had a knife at the ready even before the encounter began.

In an attempt to negate evidence of motive, appellant argues that even if appellant thought Brightman had taken his wallet, "[a]s far as appellant knew, Brightman might have found his wallet when he went off on his bicycle earlier and was planning to return

it to him." Again, given that substantial evidence supports the jury's verdict based on the theory of premeditation and deliberation, even assuming the jury could have made such an inference from the evidence presented, "[t]he mere *possibility* of a contrary finding as to [appellant's] mental state does not warrant a reversal of the guilt judgment. [Citation.]" (*Brady*, *supra*, 50 Cal.4th at p. 565.)

Finally, as to the manner of killing, appellant repeats his argument that the evidence shows that "the stabbing appeared to be a rash, impulsive act that followed a quarrel." In making this claim, appellant ignores the evidence showing that, after seeing Brightman, appellant retrieved a knife, waited for Brightman to exit the market, induced him to approach, and took a bladed stance while hiding the knife behind his back. Presuming, as we must, "the existence of every fact in support of the verdict that reasonably could be inferred from the evidence," appellant's presentation of possible alternative scenarios does not persuade us that a rational trier of fact could not have found the essential elements of premeditation and deliberation beyond a reasonable doubt based on the evidence presented at trial. (*Brady*, *supra*, 50 Cal.4th at p. 564; accord, *People v. Romero*, *supra*, 44 Cal.4th at pp. 400-401.)

In sum, a rational trier of fact could have been persuaded that appellant's "decision to retrieve the [knife] and to kill the victim was a 'cold and calculated judgment and decision,' even though it occurred over a short period of time." (*Poindexter*, *supra*, 144 Cal.App.4th at p. 588.) Substantial evidence supports the jury's conclusion that appellant's decision to kill Brightman was the result of premeditation and deliberation. (See *Brady*, *supra*, 50 Cal.4th at p. 561.)

B. *Lying in Wait*

"[M]urder which is perpetrated by lying in wait . . . is murder of the first degree." (§ 189.) " 'Lying-in-wait murder consists of three elements: ' " '(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . .' [Citations.]" ' [Citation.]" (*People v. Russell* (2010) 50

Cal.4th 1228, 1244 (*Russell*), fn. omitted.) Lying in wait is " ' "the functional equivalent of proof of premeditation, deliberation and intent to kill." ' [Citations.]" (*Id.* at p. 1257.)

As with the prosecution's theory of premeditation and deliberation, we conclude the totality of the evidence is sufficient to support the jury's first degree murder verdict based on the theory of lying in wait. (See *Brady*, *supra*, 50 Cal.4th at p. 561.)

First as to the concealment of purpose element, "[t]he concealment required for lying in wait 'is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise. [Citation.] It is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim. [Citations.]' [Citations.]" (*People v. Webster* (1991) 54 Cal.3d 411, 448 (*Webster*); accord, *People v. Cage* (2015) 62 Cal.4th 256, 278 (*Cage*); *People v. Ceja* (1993) 4 Cal.4th 1134, 1140.)

This case is similar to *Cage*, *supra*, 62 Cal.4th at page 279, in which the defendant hid a shotgun in a laundry basket full of clothes and took the basket with him to the victim's door. Our Supreme Court found that these facts provided "evidence that defendant concealed his true intent and purpose even though he did not conceal his presence at [the victim's] door." (*Ibid.*) Here, appellant retrieved a knife while Brightman was in the market and concealed it behind his back when he subsequently spoke with Brightman outside. The jury could reasonably infer that appellant thereby concealed his plan to attack with the knife, even as he drew Brightman over to where he stood waiting outside the door of the market. (See *ibid.*; see also *Russell*, *supra*, 50 Cal.4th at p. 1244.)

Second, as to the element requiring a substantial period of watching and waiting for an opportune time to act, the purpose of this element "is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse." (*People v. Stevens* (2007) 41 Cal.4th 182, 202.) "The lying in wait need not continue for any particular period of time provided that its duration is substantial in the sense that it shows a state of mind equivalent to premeditation and deliberation. [Citation.]" (*Cage*,

supra, 62 Cal.4th at p. 279; see also *Russell*, *supra*, 50 Cal.4th at p. 1245 [" '[t]he precise period of time is . . . not critical. As long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking his victim by surprise' "], quoting *People v. Ceja*, *supra*, 4 Cal.4th at p. 1145.)

In *Cage*, for example, the evidence supported an inference that "defendant conversed with [the victim] for a few minutes before removing the gun from the basket and shooting her. During such time defendant could have reflected on his intentions, such that his subsequent actions in taking the shotgun out of its hiding place and shooting [the victim] . . . were not the product of a rash impulse. [Citation.]" (*Cage*, *supra*, 62 Cal.4th at p. 279; see also *People v. Moon* (2005) 37 Cal.4th 1, 23 (*Moon*) [evidence that defendant watched and waited for 90 seconds was sufficient to show that he lay in wait for victim].)

In the present case, appellant waited for approximately two minutes outside the store before Brightman exited, and then conversed with him for another minute before stabbing him in the back as he turned away. This evidence is sufficient to satisfy the substantial period of watching and waiting element and to support the inference that appellant had the opportunity to reflect on his intentions and did not act "out of rash impulse." (*People v. Stevens*, *supra*, 41 Cal.4th at p. 202; accord, *Cage*, *supra*, 62 Cal.4th at p. 279; see also *Russell*, *supra*, 50 Cal.4th at p. 1244.)

Third, as to the element of a surprise attack on an unsuspecting victim from a position of advantage, there is no requirement that the victim be unaware of the defendant's presence before the attack, only that the victim be surprised by the unexpected attack. (See, e.g., *Cage*, *supra*, 62 Cal.4th at p. 279 [defendant's attack "followed in a continuous flow of events upon [his] successful use of his ruse to persuade [the victim] to open her front door," satisfying surprise attack element]; *Moon*, *supra*, 37 Cal.4th at pp. 22-23 [victim saw and spoke to defendant before he "suddenly pushed her down the stairs and then strangled her, satisfying the element of a sudden or surprise attack on an unsuspecting victim"]; *Webster*, *supra*, 54 Cal.3d at p. 449 [evidence

supported surprise attack element where victim was already aware of defendant's presence when defendant "maneuvered himself behind [the victim], then attacked without warning from that position of advantage"].)

Here too, the fact that Brightman was aware of appellant's presence and engaged him in conversation outside the market does not negate the surprise attack element. Throughout the conversation appellant kept the knife hidden from view and did not strike until Brightman had turned away, when he quickly plunged the knife into Brightman's back. From this evidence the jury could logically infer both that Brightman, an unsuspecting victim, was surprised by appellant's unexpected attack, as well as that appellant struck from a position of advantage when Brightman's back was turned. (See *Cage*, *supra*, 62 Cal.4th at p. 279; *Moon*, *supra*, 37 Cal.4th at pp. 22-23; *Webster*, *supra*, 54 Cal.3d at p. 449; see also *Russell*, *supra*, 50 Cal.4th at p. 1244.)[3]

In short, viewing the totality of the evidence in the light most favorable to the judgment, substantial evidence supports a finding that appellant committed first degree murder under the prosecution theory of lying in wait. (See *Brady*, *supra*, 50 Cal.4th at p. 561.)[4]

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[3] In light of this evidence supporting the surprise attack element, we find unpersuasive appellant's assertion that he "was not in an advantageous position when Brightman turned to walk away. He was simply standing next to him." Nor do we find factually pertinent *People v. Nelson* (2016) 1 Cal.5th 513, on which appellant relies to argue that there is insufficient evidence of watching and waiting and a surprise attack. In *Nelson*, our Supreme Court found insufficient evidence of lying in wait where the evidence showed only that the defendant arrived at the victims' location, came up behind them, and attacked "without any distinct period of watchful waiting." (*Id.* at pp. 549-551.) For the reasons discussed, the evidence in this case is quite different and *does* satisfy the elements of lying in wait murder.

[4] Because we have found that both prosecution theories of first degree murder are supported by substantial evidence, we need not address appellant's argument that the record affirmatively demonstrates that the jury found appellant guilty based upon the lying in wait theory, which requires reversal because that theory was not supported by substantial evidence. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 ["instruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and

II. *Jury Unanimity*

Appellant contends the court erred when it refused to give the jury a unanimity instruction.

During a discussion of jury instructions, the trial court denied the defense request to instruct the jury on the requirement of a unanimous verdict, pursuant to CALCRIM No. 3500, based on the fact that the prosecution was alleging two theories of first degree murder. The court did not believe the instruction applied in this case, where "we only have one act. We have two theories but one act." Instead, the court instructed the jury with CALCRIM No. 548, which told the jurors that appellant was being prosecuted for first degree murder under the two theories and that they did not need to agree on the same theory.

Appellant states in his opening brief that "[h]ad there been sufficient evidence on both theories" of murder—that is, both premeditation and deliberation *and* lying in wait—"the lack of a unanimity instruction would not require reversal. [Citation.] This is because where there is sufficient evidence on all theories, any potential disagreement amongst jurors about what appellant did would be *legally irrelevant*. In other words, the disagreement about the acts would not undermine the unanimous legal conclusion that based on either act, the defendant had committed a single charged offense." In support of this proposition, appellant cites *People v. Jennings* (2010) 50 Cal.4th 616, 639, in which the trial court instructed the jury on three alternative prosecution theories of first degree murder and the verdict did not specify the theory the jury relied on in convicting the defendant. Our Supreme Court explained: " 'A jury may convict a defendant of first degree murder . . . without making a unanimous choice of one or more of several theories proposed by the prosecution. [Citation.]' " (*Ibid.*) In *Jennings*, the court found that the record disclosed sufficient evidence to support the jury's verdict on each of the three

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the invalid ground, there would be no prejudice, for there would be a valid basis for the verdict"]; *Poindexter, supra*, 144 Cal.App.4th at pp. 586-587 [same].)

theories, though it did not, as appellant implies, state that a unanimity instruction would have been required had the evidence been insufficient as to any of the theories. (*Ibid*.)

Here, since substantial evidence supports both theories of first degree murder upon which the prosecution relied (see pt. I., *ante*), and appellant has conceded that no unanimity instruction was required in these circumstances, we need not address appellant's argument that a unanimity instruction would be required in the absence of substantial evidence as to one of the theories. (But see *Russell*, *supra*, 50 Cal.4th at p. 1257 ["Because lying in wait and deliberate and premeditated theories of murder are simply different means of committing the same crime, juror unanimity as to the theory underlying its guilty verdict is not required"]; *People v. Jennings*, *supra*, 50 Cal.4th at p. 639 [" '[a] jury may convict a defendant of first degree murder . . . without making a unanimous choice of one or more of several theories proposed by the prosecution' "].)

III. *Senate Bill No. 1393*

"On September 30, 2018, the Governor signed Senate Bill [No.] 1393 which, effective January 1, 2019, amends sections 667[, subdivision] (a) and 1385[, subdivision] (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the current versions of these statutes, the court is required to impose a five-year consecutive term for 'any person convicted of a serious felony who previously has been convicted of a serious felony' (§ 667[, subd.] (a)), and the court has no discretion 'to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.' (§ 1385[, subd.] (b).)" (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

In *Garcia*, Division Two of the Fourth District concluded that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019. [Citations.]" (*Garcia*, *supra*, 28 Cal.App.5th at p. 973, relying on *In re Estrada* (1965) 63 Cal.2d 740, 744-745 [if amendatory statute lessening punishment becomes effective prior to date judgment of conviction becomes final, amended statute applies], and *People v. Superior*

Court (*Lara*) (2018) 4 Cal.5th 299, 303-304 [Proposition, under which a district attorney can no longer directly file charges against juveniles in adult criminal court, is retroactive to all juveniles charged directly in adult court whose judgment was not final before new statute's enactment].)

Respondent acknowledges that "remand would be appropriate after January 1, 2019, to allow the trial court the opportunity to decide whether to strike" the section 667, subdivision (a)(1) enhancement.[5] Respondent also argues, however, that appellant's claim is not ripe because trial courts do not yet have the authority to strike such enhancements.

Because the amendment conferring discretion on the trial court to strike the enhancement will apply to all cases not final as of January 1, 2019, and because this case will not be final on that date,[6] we will remand the matter now to avoid needless additional proceedings. (See *Garcia*, *supra*, 28 Cal.App.5th at p. 973.)

DISPOSITION

The matter is remanded for resentencing after January 1, 2019, with directions to the trial court to exercise its new discretion to determine whether to strike appellant's five-year enhancement, imposed pursuant to sections 667, subdivision (a)(1). In all other respects, the judgment is affirmed.

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[5] Respondent also acknowledges that remand would not be futile in this case because the record does not indicate that the court would not in any event have dismissed or stricken the enhancement, had the court had such discretion when it originally sentenced appellant. (See *Garcia*, *supra*, 28 Cal.App.5th at p. 973, fn. 3, citing *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.)

[6] "A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired. [Citation.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 876, fn. 5.)

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Kline, P.J.

We concur:

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Richman, J.

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Miller, J.

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