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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

BIRL MCKINNIE, JR.,

Defendant and Appellant.

E060309

(Super.Ct.No. RIF139217)

OPINION

APPEAL from the Superior Court of Riverside County. Dale R. Wells, Judge.

Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury found defendant and appellant Birl McKinnie, Jr., guilty of assault with a firearm (Pen. Code,<sup>1</sup> § 245, subd. (a)(2), count 1), negligent discharge of a firearm (§ 246.3, count 2), being a felon in possession of a firearm (former § 12021, subd. (a)(1), count 3), and being a felon in possession of ammunition (former § 12316, subd. (b)(1), count 4).<sup>2</sup> Defendant admitted that he had one prior serious felony conviction (§ 667, subd. (a)) and one prior strike conviction (§§ 667, subds. (c) & (e)(1) & 1170.12, subd. (c)(1)). In 2009, the trial court sentenced him to a total term of 15 years in state prison.

On October 25, 2013, the Legal Processing Unit, Division of Adult Institutions, of the Department of Corrections and Rehabilitation, sent a letter to the sentencing judge indicating a potential error. The letter noted that, on count 2 (§ 246.3) and count 3 (former § 12021, subd. (a)(1)), the court imposed a term of one-third the middle term, or eight months, and ordered the terms to run concurrent. The letter requested clarification, pointing out that “imposition of one-third the middle base term is only applicable when sentencing *consecutively*.” On November 22, 2013, the court held a hearing on the matter, conferred with counsel, and vacated its previous sentences on counts 2 and 3. Then, on both of those counts, the court imposed the midterm of two years, doubled

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

<sup>2</sup> On March 27, 2013, this court granted defendant’s request to take judicial notice of the appellate record in case no. E048212. The procedural background is taken from this court’s opinion in that case. (See *People v. McKinnie* (June 23, 2010, E048212) [nonpub. opn].)

pursuant to the prior strike, and ordered them to run concurrent. The 15-year total term remained as originally imposed.

Defendant filed a timely appeal. We affirm.

### PROCEDURAL BACKGROUND

On March 5, 2009, defendant was convicted of assault with a firearm (§ 245, subd. (a)(2)), negligent discharge of a firearm (§ 246.3), being a felon in possession of a firearm (former § 12021, subd. (a)(1)), and being a felon in possession of ammunition (former § 12316, subd. (b)(1)).

### DISCUSSION

Defendant appealed and, upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and a few potential arguable issues: 1) whether the trial court properly imposed sentence on counts 2 and 3 following the request by the Department of Corrections and Rehabilitation; 2) whether defendant had a right to be present at the resentencing hearing; and 3) whether his absence was prejudicial error. Counsel has also requested this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, which he has not done.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

RICHLI  
J.

KING  
J.