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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. MIGUEL ANGEL MAGALLON, Defendant and Appellant.	E069524 (Super.Ct.No. RIF1602770) OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Conditionally Reversed.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Robin Urbanski and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Miguel Angel Magallon attacked his maternal uncle (the victim) with a knife. A jury convicted Magallon of attempted murder and assault with a

deadly weapon, found that the attempted murder was willful, deliberate and premeditated, and found that he had personally inflicted great bodily injury. The trial court found true recidivism-based enhancements relating to two prior convictions and sentenced Magallon to an indeterminate sentence of 14 years to life plus a determinate sentence of nine years.

Magallon contends on appeal that (1) there was no substantial evidence that the attempted murder was deliberate and premeditated[1]; (2) the trial court abused its discretion by admitting evidence of uncharged acts of violence against other family members; (3) the trial court should have stricken, rather than imposing and staying, a prison prior enhancement that could not be applied to Magallon's sentence because the underlying conviction was also the basis for a serious felony prior enhancement; (4) the case should be remanded for resentencing pursuant to the newly enacted Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Senate Bill 1393); and (5) the case should be remanded for a hearing to consider mental health diversion pursuant to the newly enacted Penal Code section 1001.36.[2]

We hold as follows: (1) substantial evidence supports the conclusion that the attempted murder was deliberate and premeditated; (2) the trial court did not commit prejudicial error with respect to admission of uncharged acts evidence; (3) the trial court should have stricken the prison prior enhancement that could not be applied to Magallon's sentence, rather than imposing and staying it; (4) the case should be

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[1] Magallon concedes that there was sufficient evidence that the attempted murder was willful, that is, that he intended to kill the victim.

[2] Further undesignated statutory references are to the Penal Code.

remanded for resentencing pursuant to Senate Bill 1393; and (5) the case should be remanded for a hearing to consider mental health diversion pursuant to section 1001.36. We therefore conditionally reverse the judgment and remand with instructions.

I. FACTUAL AND PROCEDURAL BACKGROUND

The victim testified that on May 9, 2016, he came to Magallon's mother's house to pick up Magallon's maternal grandmother, who lived with the victim. The grandmother was still eating a meal in the dining room. Magallon was there, and he appeared to be nervous or upset. The victim went out to the backyard to talk to Magallon's father while waiting for the grandmother.

About 20 minutes later, the victim received a phone call and walked around the side of the house toward the front yard to take the call. As he exited a side gate, he encountered Magallon. Magallon grabbed the victim by the neck and said, "You're not welcome here." The victim asked "why?" Magallon then stabbed the victim multiple times using a folding knife with a four- or five-inch blade. The victim yelled for Magallon's father to call an ambulance.

After Magallon stopped stabbing the victim, he went back into the house, retrieved his car keys, and left. The victim observed that Magallon was laughing as he got into his car, and after the car started, Magallon made a "thumbs up" gesture to the victim. Magallon's father, responding to the victim's call for help, witnessed Magallon getting into his car and leaving. He heard Magallon tell the victim in a normal speaking voice that "he had already told him not to show up at the house."

The victim received multiple stab wounds to the left chest, right shoulder, and left forearm. A chest tube was necessary to drain blood and reexpand a collapsed lung. The victim suffered nerve damage that limited mobility and reduced feeling in his left hand, and he also has had limited mobility in his right arm and difficulty using his right hand since the attack.

Magallon did not testify at trial or present any other form of affirmative defense. Defense counsel conceded that the jury should find defendant guilty of assault with a deadly weapon, but asked the jury to acquit on the attempted murder charge, arguing that there was reasonable doubt as to whether Magallon intended to kill the victim, and whether the attack was deliberate and premeditated.

The jury convicted Magallon of attempted murder (§§ 664, 187, subd. (a); count 1) and assault with a deadly weapon (§ 245, subd. (a)(1); count 2), found that the attempted murder was willful, deliberate and premeditated, and found true allegations as to both counts that Magallon had personally inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court found true allegations relating to two prior convictions, both of which were alleged to be prison priors (§ 667.5, subd. (b)), and one of which was also alleged to be a strike prior (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)) and a serious felony prior (§ 667, subd. (a)).

On count 1, the trial court sentenced Magallon to an indeterminate term of 14 years to life on count 1 (seven years to life, doubled by the strike prior), plus a determinate term totaling nine years, consisting of three years for the great bodily injury enhancement of count 1, five years for the serious felony prior, and one year for one of

the prison priors. On count 2, the trial court imposed, but stayed pursuant to section 654, a determinate sentence of nine years (the midterm of three years, doubled by the strike prior, plus three years for the great bodily injury enhancement). The trial court also imposed, but stayed, an additional one-year sentence for the prison prior allegation relating to the same conviction used as a serious felony prior on count 1.

II. DISCUSSION

A. *Premeditation and Deliberation*

Magallon argues that there is insufficient evidence that the attempted murder was premeditated and deliberate. We reject Magallon's argument.

1. *Additional Background*

At trial, the victim described an event from three months before the attack, when Magallon's mother had invited the victim to spend the night at her house. The victim then overheard Magallon tell his mother that he did not want to see the victim or her other family members. The victim testified that he heard Magallon "making comments in general about the family, that he wanted to kill us." The victim also heard Magallon say "that if I [the victim] stayed there, that he was going to stab me right there and then." The victim decided not to stay the night. He did return to Magallon's mother's house several times before the attack, and on one of those occasions Magallon was present, but they did not speak to each other.

Magallon's mother testified that she was aware Magallon did not get along with her brothers, including the victim. She believed that Magallon was angry at the victim

for engaging in "gossip." She confirmed that Magallon had told her that he did not want the victim to come over to her house, and had threatened violence if he did come over.

Magallon's biological daughter, who had been raised by Magallon's parents (her grandparents) and was 19 years old at the time of trial, also testified. The daughter stated that she knew Magallon did not like the victim because "none of us really like [the mother's] family," including the victim, because they engaged in "gossip." She testified that on about three occasions she had heard Magallon tell the mother to tell the victim not to ever come back to the house. She also testified that Magallon always carried a folding knife, which he would take out, "flick" open, and stare at when he "is mad or [there's] something that's going on." At trial, she denied that he did so "in a threatening manner." She testified that she had seen him use the knife for cooking and cutting fruit. In a previous interview with police, however, which was played for the jury, she said she thought Magallon would take the knife out "on purpose to scare me or my grandma or just to show off like, 'you know I have this.'"

At the close of the prosecution's case-in-chief, Magallon requested that the court dismiss count 1 pursuant to section 1118.1, arguing that there was no substantial evidence of premeditation or deliberation to support a guilty verdict. The trial court denied the motion.

2. *Applicable Law*

In the context of first degree murder or attempted murder, "'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the

proposed course of action.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled on other grounds as stated in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn.2.) "'The process of premeditation and deliberation 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 . . . .""" (*People v. Lee* (2011) 51 Cal.4th 620, 636.)

In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, our Supreme Court "identified three categories of evidence relevant to determining premeditation and deliberation; (1) events before the murder that indicate planning; (2) a motive to kill; and (3) a manner of killing that reflects a preconceived design to kill." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 663 [discussing *People v. Anderson*].) These factors "are not all required [citation], nor are they exclusive in describing the evidence that will support a finding of premeditation and deliberation." (*Ibid*.) "It also is not necessary that any of these categories of evidence be accorded a particular weight [citation], and it is not essential that there be evidence of each category to sustain a conviction." (*People v. Gonzalez* (2012) 210 Cal.App.4th 875, 887.) Rather, these factors are intended "to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing [or attempted killing] was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

We review an appellant's challenge to the denial of a section 1118.1 motion under the same standard as a challenge to the sufficiency of the evidence to support a

conviction, looking at the "state of the evidence as it stood" at the time of the motion. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) Here, all the evidence presented at trial had already been introduced when Magallon made his motion for acquittal.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) "We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*Ibid.*) "In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*Ibid.*) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

3. *Analysis*

Applying the factors of *People v. Anderson*, *supra*, 70 Cal.2d 15, and reviewing the evidence in the light most favorable to the judgment, sufficient evidence supports the conclusion that the murders were the result of preexisting reflection and weighing of considerations rather than a rash impulse. Magallon was not angry at the victim only on the day of the stabbing; he had nursed a grudge for months. Three months before the

stabbing, Magallon had demanded that the victim leave his mother's house and threatened to hurt him if he did not go, or if he showed up there again. Specifically, Magallon threatened to stab the victim. When the victim encountered Magallon at the side of the house, there was no new argument or other confrontation, he just grabbed the victim by the neck and began stabbing him. It is reasonably inferred from this evidence that the attack was not the product of a rash impulse, but rather the execution of a preexisting plan to stab the victim if he came to Magallon's mother's house again.

Magallon argues that he could not have known in advance the victim would be exiting the side gate to answer a phone call, so the attack could not have been the product of a "preconceived design to kill." (See *People v. Gonzalez*, *supra*, 54 Cal.4th at p. 663.) He also emphasizes that his daughter testified he regularly carries a knife with him, and there is no evidence that he specifically obtained the knife to carry out the stabbing. And he points out that the victim had returned to Magallon's mother's house without incident several times after the initial threats. We are not persuaded that this evidence demonstrates the attack could not have been premeditated and deliberate. Even assuming that the encounter at the side gate was a chance encounter, there is ample evidence from which it is reasonable to infer that this was a moment when a previously formed plan—to stab the victim if he came to Magallon's mother's house again—met opportunity.

We conclude the trial court did not err in denying Magallon's motion for acquittal, and the jury's finding that the attempted murder was deliberate and premeditated was supported by substantial evidence.

B. *Uncharged Acts*

Magallon contends that the trial court abused its discretion by admitting evidence of uncharged acts of violence by Magallon against his daughter and other family members. We find no abuse of discretion.

1. *Additional Background*

At trial, over defense objection, the prosecution elicited testimony from Magallon's daughter that Magallon had committed uncharged acts of violence against her and other family members. Specifically, at trial, Magallon's daughter testified reluctantly—only after being threatened with contempt of court—that Magallon had twice become violent with her. She conceded that on one occasion, Magallon had pushed her against a wall hard enough to dent the wall. On another occasion, she intervened in an argument between Magallon and her grandfather (Magallon's father) to prevent the grandfather from being injured. During that incident, Magallon spit on the daughter, and also pushed her.

The prosecution also played for the jury a recording of an earlier interview Magallon's daughter gave to police. In the recording, she described the two incidents in some additional detail. In one incident, when she was 17, she and Magallon were arguing; she did not recall about what, but commented that "[w]e don't get along at all." She stated that "he had pushed me against the wall and my grandma had to get in the middle . . . I made a dent in the wall because he's so strong." The other incident began as a dispute between Magallon and his father, about Magallon's lack of a job and failure to help around the house. The daughter stated that Magallon "got in my grandpa's face,"

and “I didn’t want them to fight so I got in the middle . . . .” After an exchange of words, Magallon spit at his daughter, and she responded by throwing a drink at him. He then grabbed her arm.

Also, as noted above, both during trial and in the recorded interview, Magallon’s daughter stated that Magallon always carried a knife. In the recorded interview, she stated that he would “flick” the knife open “on purpose to scare me or my grandma or just to show off like, ‘You know I have this.’”

During closing arguments, defense counsel contested the prosecution’s theory that the stabbing was premeditated and deliberate in part as follows: “So we heard that my client always carries a knife . . . So it’s not like he said, I’m going to kill him. I need to get an implement to go do it. . . . He always had it on him. His daughter said that he carried it clipped in his shorts. He uses it to cut oranges. He may pull it out and look at it when he’s in an argument—right?—that kind of thing. But he always had it on him . . . .”

In its rebuttal closing argument, the prosecution responded to defense counsel’s remarks in relevant part as follows: “This man wasn’t using that knife to cut oranges. He was using it to terrorize his own family, his own mother, father, daughter. They were—he was terrorizing them with his knife. Whenever he was angry, he would flip it out. That’s the kind of man he is. That’s what he was doing. It’s no different with [the victim].”

The trial court instructed the jury regarding the uncharged acts using CALCRIM No. 375, in relevant part as follows: “The People presented evidence of other behavior by the defendant that was not charged in this case that the defendant committed other acts

of aggression against other family members. . . . [¶] . . . [¶] If you decide that the defendant committed the uncharged acts, you may, but are not required to, consider that evidence for the limited purpose of deciding whether the defendant had a motive to commit the offenses alleged in this case. [¶] . . . [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

2. *Applicable Law*

"Evidence of defendant's commission of other crimes, civil wrongs or bad acts is not admissible to show bad character or predisposition to criminality, but may be admitted to prove some material fact at issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." (*People v. Cage* (2015) 62 Cal.4th 256, 273; see Evid. Code, § 1101.) "Under Evidence Code section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

"Other crimes evidence is admissible to establish two different types or categories of motive evidence." (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1381 (*Spector*).) The first category involves an uncharged act that "'supplies the motive for the charged crime; the uncharged act is cause, and the charged crime is effect.'" (*Ibid.*) The second category involves an uncharged act that "'evidences the existence of a motive, but the act does not supply the motive . . . . [T]he motive is the cause, and both the charged and

uncharged acts are effects. *Both crimes are explainable as a result of the same motive*.'" (*Ibid.*) "The probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15.)

On appeal, we review the trial court's admission of other crimes evidence for abuse of discretion. (*People v. Cole, supra*, 33 Cal.4th at p. 1195.) Even assuming an abuse of discretion, the judgment will not be reversed unless it is reasonably probable that a result more favorable to the defendant would have resulted absent the error. (*Ibid.*) "To determine what the 'jury is *likely* to have done in the absence of' [erroneously admitted] evidence, we consider the relative strength of 'the evidence supporting the existing judgment' as compared to 'the evidence supporting a different outcome.'" (*People v. Jandres* (2014) 226 Cal.App.4th 340, 360.)

3. *Analysis*

We find no abuse of discretion in the trial court's admission of evidence that Magallon always carried a knife, and sometimes pulled it out and "flicked" it in a threatening manner. Magallon's behavior, as described by his daughter, arguably amounted to uncharged prior assaults, but, as discussed above, the evidence was relevant to the prosecution's theory that Magallon planned to stab the victim if he returned to

Magallon's mother's house.[3] As such, it was admissible under Evidence Code section 1101, subdivision (b), subject to the trial court's discretion under to Evidence Code section 352. And Magallon has articulated no specific argument that the trial court abused its discretion in this respect.

Evidence of the two incidents when Magallon became physically violent with his daughter requires a different analysis. There is nothing in the record suggesting that either of these two incidents supplied the motive for the charged crime. (See *Spector, supra*, 194 Cal.App.4th at p. 1381.) There is also nothing in the record supporting the conclusion that the uncharged incidents involving Magallon's daughter and the stabbing of the victim were all caused by the same underlying motive. (*Ibid.*) Magallon was, according to both his mother and daughter, angry with the victim for engaging in unspecified "gossip." There is no indication that the two uncharged incidents involving the daughter had anything to do with "gossip."

The People, echoing the reasoning of the trial court, argue that the two incidents between Magallon and his daughter share the same motive as the attack on the victim in the sense that he "reacted in anger and aggression with family members when he did not like what they were saying or doing." At this level of abstraction, however, motive effectively collapses into propensity—Magallon's tendency to get violent when angry at

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[3] We do not consider here whether the prosecutor's remarks during rebuttal closing arguments, arguing that Magallon was the "kind of man" who used a knife to "terrorize" his family, were inappropriate. No objection was raised below, and on appeal Magallon has not separately raised a claim of prosecutorial misconduct based on the prosecutor's closing remarks, only mentioning the comments in support of his argument that the admission of the uncharged acts evidence was prejudicial error.

his family. That cannot be what "motive" means in the context of section 1101, subdivision (b), and the People have not presented, and we have not discovered, any case authority that reads the term so broadly. (Cf. *Spector, supra*, 194 Cal.App.4th at p. 1381 [collecting examples of prior acts showing shared motive with charged acts].)

We conclude that evidence of the two incidents when Magallon became physically violent with his daughter was not admissible as evidence of motive under section 1101, subdivision (b). Nevertheless, we conclude that the trial court's error was not prejudicial.

We find no reasonable probability that Magallon would have obtained a more favorable result at trial if evidence of the two incidents when he became violent with his daughter had been excluded from trial. Magallon did not dispute at trial that he stabbed the victim; defense counsel conceded that his actions were "[a]bsolutely assault with a deadly weapon," causing great bodily injury. The evidence that Magallon intended to kill the victim was circumstantial, but strong. It is at least challenging, under any circumstances, for a defendant to convince a jury that someone might stab someone multiple times in the chest without intending to kill. Here, in addition, Magallon had previously expressed that he wanted to kill his mother's family, including the victim. The evidence of premeditation and deliberation, which we reviewed above, was also circumstantial, but strong.

Moreover, neither the prosecution nor the defense made any express reference to the two incidents during argument. Although in rebuttal arguments, responding to a specific remark by defense counsel, the prosecution's comments touched on Magallon's

use of his knife to "terrorize" his family, the prosecutor made no mention of the two incidents when Magallon became physically violent with his daughter.[4]

Taking into account all the evidence presented at trial, we are not persuaded that there is any reasonable likelihood that the exclusion of the improperly admitted uncharged acts evidence would have resulted in a verdict more favorable to Magallon. We conclude that he has failed to demonstrate any prejudicial error with respect to the admission of uncharged acts evidence.

C. *Prison Prior Enhancement*

It is well established that a single prior conviction cannot support enhancement of a defendant's sentence under both section 667, subdivision (a) (serious prior felony) and section 667.5, subdivision (b) (prison prior). (*People v. Jones* (1993) 5 Cal.4th 1142, 1150-1153.) Where allegations under both enhancement provisions are found true based on a single underlying conviction, "the greatest enhancement, but only that one, will apply." (*Id.* at p. 1150.)

The parties dispute, however, what the trial court should do at sentencing where, as here, there is an enhancement finding that must go "unused." (*People v. Lopez* (2004) 119 Cal.App.4th 355, 364 (*Lopez*).) The People contend that the trial court properly imposed, but stayed, the prison prior enhancement based on the same underlying

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[4] Additionally, it is questionable whether exclusion of the evidence of Magallon's physically violent behavior toward his daughter would have benefitted the prosecution or the defense. Arguably, it shows a pattern of rash and impulsive violence towards his family, which might cut against the argument that Magallon's attack on the victim was premeditated and deliberate. The jury instructions, however, required the jury to consider the uncharged acts of aggression only in relation to motive, and not any other purpose.

conviction that the trial court had already used as the basis for the serious prior felony enhancement of count 1. Magallon contends the extraneous prison prior enhancement should have instead been stricken. We find Magallon has the better side of the dispute.

In *Jones, supra*, 5 Cal.4th 1142, the Supreme Court remanded with directions to strike a prior prison term enhancement that was based on the same underlying offense as a prior serious felony enhancement. (*Id.* at p. 1153.) Most appellate opinions have since relied on *Jones* to strike prior prison term enhancements that are based on the same underlying offense as a prior serious felony enhancement. (E.g., *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) Our Supreme Court recently reaffirmed this approach. (*People v. Anderson* (2018) 5 Cal.5th 372, 426 [citing *Jones*, striking unused enhancement]; see also *People v. Langston* (2004) 33 Cal.4th 1237, 1241 [noting that a "trial court may not stay the one-year enhancement, which is mandatory unless stricken"].)

At least one case has held that an unused prior prison term enhancement should be stayed, rather than stricken. (*People v. Brewer* (2014) 225 Cal.App.4th 98 (*Brewer*).) In so holding, *Brewer* relied primarily on *Lopez, supra*, 119 Cal.App.4th 355, and the Supreme Court's opinion in *People v. Gonzalez* (2008) 43 Cal.4th 1118. (*Brewer, supra*, at pp. 104-106.) *Lopez* held that the multiple victim special circumstance under the habitual sexual offender law (§ 667.71) should be stayed when the trial court sentences the defendant under the alternative sentencing scheme of the One Strike law (§ 667.61). (*Lopez, supra*, at pp. 364-366.) The One Strike law expressly prohibited striking the special circumstance finding. Accordingly, *Lopez* declined to follow *Jones* and instead

concluded that the correct procedure was to impose but stay the sentence under California Rules of Court, rule 4.447. (*Lopez*, *supra*, at pp. 364-366.) In *People v. Gonzalez*, *supra*, at page 1123, the Supreme Court held that a trial court must stay firearm enhancements imposed under section 12022.5 after imposing a section 12022.53 firearm enhancement. *Gonzalez* did not address *Jones* or California Rules of Court, rule 4.447, instead focusing on interpreting the specific statutory provisions governing the firearms enhancements at issue. (*People v. Gonzalez*, *supra*, at pp. 1125-1130.)

We find *Brewer's* reliance on *Lopez* and *People v. Gonzalez*, *supra*, 43 Cal.4th 1118, unpersuasive. Both *Lopez* and *Gonzalez* involved statutory situations different from *Brewer* and from this case. Striking the prior prison term enhancement has been the procedure used by the Supreme Court in analogous circumstances, in *Jones* and, more recently, *People v. Anderson*, *supra*, 5 Cal.5th 372. Although the Supreme Court did not discuss its instruction to strike the prior prison term enhancement in either *Jones* or *Anderson*, we do not assume that the instruction was given without consideration of the proper manner to handle the situation.

We hold that the trial court should have stricken, rather than imposed and stayed, the unused prior prison term enhancement.

D. *Resentencing*

Magallon contends that he is entitled to a remand so that he can be resentenced in light of Senate Bill 1393. The People agree, as do we.

Effective January 1, 2019, Senate Bill 1393 amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court in its discretion to strike or dismiss a prior

serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the versions of these statutes in effect when the trial court sentenced Magallon, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony" (former § 667, subd. (a)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (former § 1385, subd. (b)).

The People concede that the changes to the law enacted by Senate Bill 1393 apply to judgments, like the one in this case, which were not final on January 1, 2019, when Senate Bill 1393 went into effect. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) The matter therefore must be remanded to allow the trial court to resentence Magallon, including considering whether to exercise its newly authorized discretion under amended sections 667, subdivision (a), and 1385, subdivision (b), to dismiss the prior serious felony conviction enhancement.

E. *Mental Health Diversion*

Magallon requests that the case be remanded for the trial court to consider mental health diversion pursuant to section 1001.36. We agree that is the proper course of action.

Effective June 17, 2018, the Legislature passed Assembly Bill No. 1810 (2018 Reg. Sess.), which added sections 1001.35 and 1001.36 to the Penal Code. (Stats. 2018, ch. 34, § 24.) These statutes permit discretionary diversion of persons with qualifying mental disorders that contributed to the commission of the charged offense. (See *People v. Frahs* (2018) 27 Cal.App.5th 784, 789, review granted Dec. 27, 2018, S252220

(*Frahs*).) In this context, "diversion" means "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication . . . ." (§ 1001.36, subd. (c).) With exceptions not relevant here, the court may grant diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b).)

The criminal proceedings against the defendant may be diverted for up to two years while the defendant receives treatment at an approved treatment program. (§ 1001.36, subds. (c)(1)(B), (3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (*Id.*, subd. (e).)

Our colleagues in Division Three of the Court of Appeal, Fourth Appellate District, recently determined that the new mental health diversion statutes apply retroactively, finding that the Legislature must have intended "the potential 'ameliorating benefits' of mental health diversion to 'apply to every case to which it constitutionally could apply.'" (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, quoting *In re Estrada* (1965) 63

Cal.2d 740, 744-746; accord *People v. Aguayo* (2019) 31 Cal.App.5th 758, 845, 852 [following *Frahs* and conditionally remanding for consideration of mental health diversion].) The People contend that *Frahs* was wrongly decided. Pending further instruction from the California Supreme Court, which recently took review of *Frahs* on its own motion, we reject the People's contention.

"'[I]n the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.'" (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308 [discussing "*Estrada* rule" from *In re Estrada, supra*, 63 Cal.2d 740].) The People find such contrary indications of legislative intent in the limiting language of section 1001.36, subdivision (c), "at any point in the judicial process . . . until adjudication." (§ 1001.36, subd. (c).) We disagree. "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara, supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs, supra*, 27 Cal.App.5th at p. 791.)

Moreover, *Lara* was decided before the Legislature passed section 1001.36, and the Legislature is deemed to have been aware of the decision. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897.) If the Legislature intended for the courts to treat section

1001.36 as prospective, we would expect the Legislature to have expressed this intent unambiguously. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].) It did not.

The People also argue that the legislative history of section 1001.36 supports the conclusion that it was intended to act only prospectively.[5] We find nothing in the legislative history, however, that is any more elucidating about the Legislature's intent regarding retroactivity than the statutory language, or that contradicts the analysis in *Frahs*.

The People further argue that, even if section 1001.36 is retroactive, the case should not be remanded for the trial court to consider mental health diversion because the record indicates the trial court already implicitly found that Magallon does not suffer from a qualifying disorder. We disagree.

After the jury returned its verdict, but prior to the bench trial on the prior conviction allegations, defense counsel declared a doubt about Magallon's competency. Magallon was examined by three psychologists, two of whom opined that he was

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[5] The People have requested that we take judicial notice of the Assembly Floor Analysis of AB 1810, which includes some discussion of the new mental health diversion program. The People's request for judicial notice is defective in that only the first page of the document was included as an attachment, an excerpt that does not include the portions cited by the People in briefing. The request for judicial notice is therefore denied. Nevertheless, "[a] request for judicial notice of published material is unnecessary. Citation to the material is sufficient." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45, fn. 9.) We have therefore considered the People's arguments regarding legislative history raised in their briefing.

competent. On the basis of the psychologists' opinions, the trial court made a finding that Magallon was competent, and the trial proceeded.

The trial court had no opportunity, however, to consider whether Magallon suffered from a mental disorder that would qualify him for diversion pursuant to section 1001.36 when he attacked the victim. Indeed, the trial court's comments on the record regarding competency do not include any express finding as to whether Magallon suffered from a mental disorder at any time. It is possible for a defendant to suffer from a qualifying mental disorder and nevertheless be competent to stand trial. (Compare § 1001.36, subds. (b)(1)(A), (B) [requiring finding that the defendant "suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders" that was "a significant factor in the commission of the charged offense"] with *People v. Buenrostro* (2018) 6 Cal.5th 367, 389 ["incompetence to stand trial 'must arise from a mental disorder or developmental disability that limits [the defendant's] ability to understand the nature of the proceedings and to assist counsel'"]; see § 1369, subd. (a).) We do not find it appropriate to equate the trial court's competency ruling with a finding that Magallon does not qualify for mental health diversion, particularly given the divided expert opinion regarding his competency to stand trial. Remand is appropriate to allow the trial court to consider the mental health diversion issue in the first instance.

III. DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the superior court with direction to conduct a hearing to consider mental health diversion under section 1001.36.

If the court determines Magallon qualifies for diversion under section 1001.36, the court may grant diversion. If Magallon successfully completes diversion, the trial court shall dismiss the charges.

However, if the court determines that Magallon is ineligible for diversion, or Magallon does not successfully complete diversion, the court shall reinstate his convictions. If the convictions are reinstated, the trial court is directed to resentence Magallon in accordance with this opinion, including by considering whether to exercise its newly authorized discretion under amended sections 667, subdivision (a), and 1385, subdivision (b), to dismiss the punishment for the prior serious felony convictions, and striking, rather than staying, any prison prior enhancement that cannot be applied to Magallon's new sentence.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.