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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM RAMOS et al., Defendants and Appellants.	B243693 (Los Angeles County Super. Ct. No. MA056108)

APPEALS from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant William Ramos.

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and Appellant Justin Sumnicht.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Deputy Attorney General, for Plaintiff and Respondent.

Defendants William Ramos and Justin Sumnicht were charged with assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4), count 1)[1] and making criminal threats (§ 422, subd. (a), count 2).[2] The jury found Sumnicht guilty of both counts, but found Ramos guilty only of count 2. After denying Ramos's motion to strike a prior strike conviction,[3] the trial court imposed prison terms of 11 years as to Ramos,[4] and six years eight months as to Sumnicht.[5]

Both defendants appealed from the judgment. Ramos contends: (1) his conviction on count 2 must be reversed for insufficient evidence that he made a criminal threat; and (2) the trial court abused its discretion in refusing to strike his prior strike conviction. Sumnicht filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, which raised no issues. Finding no error as to either defendant, we affirm.

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1 All further statutory references are to the Penal Code.

2 Count 1 also alleged that defendants personally inflicted great bodily injury upon the victim, Paul Regan, who was over the age of 60 when the alleged assault occurred. (§§ 12022.7, subd. (a), 1203.09, subd. (f).)

Counts 1 and 2 also alleged that Ramos had suffered a prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had suffered a prior serious felony conviction (§ 667, subd. (a)(1)).

3 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 504.

4 Ramos's 11-year sentence on count 2 consisted of the high term of three years, which was doubled to six years as a result of the prior strike conviction, plus five years for the prior serious felony conviction. (§ 667, subd. (a)(1).)

5 Sumnicht's sentence of six years eight months consisted of: (1) the midterm of three years on count 1, plus a consecutive three-year enhancement for the great bodily injury allegation under section 12022.7; and (2) a consecutive eight-month term on count 2 (1/3 the midterm of two years).

I. The Prosecution's Evidence

The prosecution's evidence consisted primarily of the eyewitness testimony of Regan and his neighbors, Angela and George Acosta.

A. Regan's Testimony

According to Regan, he heard barking and loud voices in his front yard at about 4:30 p.m. on April 28, 2012. He went to investigate and saw two men he did not know: Ramos, who was inside the fenced front yard, and Sumnicht, who was just outside the gate to the yard.[6]

When Regan asked what Ramos was doing, Ramos stated that "somebody needed to discipline [Regan's] dogs." Regan told Ramos the dogs were on his "property, and nobody was going to discipline them but me." Regan told Ramos to leave, but Ramos refused to go, saying, "I live here." Regan asked "what he was talking about. I said I've lived there since '74, and I have never seen him before in my life." Regan "poked [Ramos] in the chest" and "told him to get off my property." Regan opened the gate and, as Ramos "went out, [Regan] went out behind him. I told him to get off my property."

Ramos and Sumnicht stood outside the gate and argued with Regan. Sumnicht told Regan that "if [Regan] didn't get out of there, he was going to whip [his] ass." Regan replied, "You are not big enough to do that." Sumnicht hit Regan "in the head" and Regan fell down on Sumnicht's bicycle, which was lying on the ground. Regan testified: "[Sumnicht] hit me and I went down. I don't know if I tripped or he knocked me down, but I fell on the handle bar of the bicycle." "I just remember hitting the handle bar. It knocked the wind out of me. I couldn't get up. And then I saw people's feet coming and kicking me, and I put my hands up." "[I]t had to be more than one person kicking me. The feet were coming in too fast." "I heard my neighbors hollering at them, and they backed off." "I was able to stand up then."

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6 Regan's property line extends to the center of West Avenue, which is an unimproved private road, but there are no signs marking it as such.

After Regan's neighbors arrived, Ramos and Sumnicht "were both hollering." Ramos and Sumnicht were yelling "a lot of expletives," but Regan was not "sure which one was saying which." Regan thought Sumnicht was "the one that was hollering 'white power,' and that they would be back tonight to take care of it or finish it." The threat to come "back tonight to take care of it or finish it" made Regan fearful because "I can't defend myself. I and my wife [are] disabled, [and she is] more disabled than I am. And we have no protection against somebody coming back on us like that."

One of the neighbors called 911. Regan was taken to the hospital, where he was treated for injuries to his side and arm and was released. Several days later, Regan was readmitted to the hospital for extreme pain in his side. Regan underwent surgery and was hospitalized for nine days. He continues to have pain and requires further surgery.

B. The Neighbors' Testimony

Angela Acosta,[7] who lives next door to Regan, testified that she was outside her home when Regan and Sumnicht began "arguing with each other, yelling, cussing." She saw Sumnicht punch Regan, who fell onto a bicycle that was lying on the ground.

Angela and her husband George ran over to Regan's property. When she got there, Ramos "had his hands on" Regan and was "[p]reventing him from getting up." After George yelled, "Hey, what are you guys doing? Get off of him," George "grabbed Mr. Ramos and moved him out of the way."

Angela heard Ramos say "that Mr. Regan needed to teach his dogs some respect." She also heard both men "threaten[] to come back to our home later that night." "Each of them threatened to come back. Mr. Ramos said first that we better watch out, that he was going to come back tonight. And then Mr. Sumnicht said, 'Yeah, we'll come back tonight.'"

George corroborated his wife's testimony. George testified that he saw "these two young guys . . . beating on Paul [Regan], the old guy." George identified Sumnicht as the

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[7] Because Angela Acosta and George Acosta have the same last name, we will refer to them by their first names with no disrespect intended.

person who "caused Paul to fall down," and Ramos as the person who was "[h]olding [Regan] down."

George also heard both men yelling threats such as: "We're going to come back and kick your ass," "Don't sleep tonight," "Don't call the cops," and "If you do, we'll be back." George stated that Ramos, who had a "squeakier higher voice," made "more" of the threats than Sumnicht. George also stated that as Ramos was "walking away, . . . we thought it was humorous because he said 'white power' after he left."

George called 911 as Sumnicht and Ramos were leaving. George told the 911 operator that "the guy in the white shirt" (Sumnicht) was hitting Regan and "the guy in the purple shirt" (Ramos) was holding Regan down.[8]

II. The Defense Evidence

Both defendants testified at trial. According to their version of the incident, they argued with Regan but did not commit an assault or make a criminal threat.

A. Sumnicht's Testimony

According to Sumnicht, he was waiting outside the gate for Ramos, who had jumped the fence and entered Regan's yard. Sumnicht stated that Ramos "was just intoxicated, acting stupid, and the dogs were barking, and he yelled at them and told the dogs to shut up."

Sumnicht claimed that Regan was the aggressor during the incident. Sumnicht stated that while Ramos was "running towards the dogs," Regan was coming across the yard to open the gate and confront Sumnicht. Sumnicht testified that after Regan walked past Ramos, Regan exited the yard, "ran towards me, and then [Regan] punched me, and then I grabbed his arm, and then he pushed me, and then I dropped the bike, and I shoved over the bike and fell down and tried to — he tried to punch me again. And I grabbed his arm, and I punched him in the back of the head like this, and then he tried punching me

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[8] After the 911 call was made, defendants were arrested nearby.

again, and I grabbed his arm, and I pushed him to the side, and I was trying to get him off me."

Sumnicht denied making any criminal threats. He testified that as they were walking away, Ramos was yelling "at the people there." "I don't remember exactly what he was saying, but he was just yelling at him [and] calling him names, too."

B. Ramos's Testimony

On April 28, 2012, Ramos consumed a 40-ounce bottle of malt liquor before walking with Sumnicht to his house. As they were walking, they stopped in front of Regan's house "because the dogs were barking, and I was drunk. I was not myself. I was actually stupid. I hopped the wall." Regan came out and said, "What are you doing to my dogs?" "I said[] somebody needs to train your dogs better."

Ramos corroborated Sumnicht's testimony that Regan was the aggressor during the incident. After Regan told Ramos, "Get the fuck off my yard," Regan went out the gate and punched Sumnicht in the face. Sumnicht fell on the bike and Regan fell on top of Sumnicht. While Sumnicht and Regan were "on the ground . . . punching each other," Ramos "asked them to stop fighting." After they stopped fighting, Ramos went over "to see if the old man was okay."

Once the neighbors arrived, there was a lot of yelling and "everybody wanted to beat up on [Sumnicht]." Ramos defended Sumnicht by telling the neighbors, "You are not going to lay a hand on my friend. Just back up. You don't know what happened." When one of the neighbors said, "Get out of here. I will call the cops," Ramos said, "Go ahead, call the cops."

Sumnicht yelled, "Go ahead and call the fucking cops." Sumnicht also yelled "a lot of bitches and fuck yous basically. He was mad at me for the fact that I jumped the fence and he was yelling at me. He was yelling at everyone."

DISCUSSION

I. Ramos's Appeal

Ramos contends that: (1) his conviction on count 2 must be reversed for insufficient evidence that he made a criminal threat; and (2) the trial court abused its discretion in refusing to strike his prior strike conviction.

A. Substantial Evidence Supports Ramos's Conviction for Making a Criminal Threat

Ramos contends the evidence was insufficient to show that his "angry words amounted to or [were] intended as a criminal threat against Mr. Regan or that [they] would cause a reasonable person to be in . . . sustained fear of his safety." He argues that "no rational trier-of-fact could determine that Mr. Ramos's emotional outburst amounted to a criminal threat within the meaning of section 422. The words themselves—'don't call the cops,' 'we're coming back,[']or 'we're coming to kick your asses'—do not unequivocally assert a threat of bodily injury or harm." He asserts that his language, when viewed in light of his acquittal on the assault charge, failed to support a reasonable inference that his words were intended as a criminal threat. We disagree.

1. Standard of Review

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. '"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]"' (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

"'"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)' (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.)" (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.)

2. Section 422

The offense of making a criminal threat is a specific intent crime. Section 422, subdivision (a) provides: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

3. *In re Ricky T.*

Ramos cites *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*) in support of his contention that his angry words did not amount to a criminal threat in violation of section 422.

In that case, Ricky, a 16-year-old high school student, left teacher Roger Heathcote's classroom to use the restroom. When he returned to the classroom, he "pounded" on the door, which was locked. "Heathcote opened the door, which opened

outwardly, hitting [Ricky] with it. [¶] [Ricky] became angry, cursed Heathcote and threatened him, saying, 'I'm going to get you.' Heathcote felt threatened and sent [Ricky] to the school office. Heathcote said he felt physically threatened by [Ricky]; however, he said [Ricky] did not make a specific threat or further the act of aggression. [Ricky] was suspended for five days for the threat." (*Ricky T., supra*, 87 Cal.App.4th at p. 1135.)

When Ricky was interviewed by Officer Steaveson the day after the incident, he "admitted speaking angrily, but denied threatening Heathcote. [Ricky] also admitted 'getting in [Heathcote's] face,' but did not mean to sound threatening. He said that his actions were not appropriate and he apologized for the incident." (*Ricky T., supra*, 87 Cal.App.4th at p. 1135.)

When Ricky spoke with Officer Steaveson a week later, he "waived his rights and said that on the day of the incident, he told Heathcote 'I'm going to kick your ass.' He added, however, that he never made any physical movements or gestures toward Heathcote to further the threat." (*Ricky T., supra*, 87 Cal.App.4th at p. 1136.)

At the jurisdictional wardship hearing, the juvenile court found Ricky had committed a violation of section 422 (making a misdemeanor terrorist threat), but not section 71 (threatening a teacher with the intent of preventing him from performing his duties). (*Ricky T., supra*, 87 Cal.App.4th at pp. 1134-1135.) In his appeal from the judgment, Ricky contended the evidence was insufficient to support the section 422 violation. The appellate court agreed and the judgment was reversed.

The appellate court noted that section 422 is comprised of four elements: "[T]he People were required to show: (1) [Ricky] willfully threatened to commit a crime that would result in death or great bodily injury; (2) he made the threat with the specific intent that it be taken as a threat; (3) the threat, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat; and (4) the threat caused the person threatened reasonably to be in sustained fear for his own safety. (§ 422; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536.)"

(*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1136, fn. omitted.) Of these four elements, only the third and fourth elements were at issue on appeal.

As to the third element of section 422, Ricky argued his threat that "he would 'kick [his] ass'" was not "so unequivocal, unconditional, immediate and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat." (*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1136.) The appellate court agreed. After pointing out that "threats are judged in their context," the court found nothing in the "surrounding circumstances" that indicated an "immediacy to the threat. Sending [Ricky] to the school office did not establish that the threat was 'so' immediate." (*Id.* at p. 1137, fn. omitted.) "[T]he police were not called until the following day. [Ricky] was then interviewed in the school principal's office. That execution of the threat was not so immediate is further evidenced by the fact that the police did not again interview [Ricky] until one week later. [¶] Having no circumstances to corroborate a true threat, respondent claims the record contains the legal minimum required to sustain the finding. But the remark 'I'm going to get you' is ambiguous on its face and no more than a vague threat of retaliation without prospect of execution. (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218 (*Martinez*).) [Ricky]'s 'kick your ass' and cursing statements were made in response to his accident with the door." (*Ricky T.*, *supra*, at p. 1138.)

The court found significant the lack of any prior disagreements between Ricky and Heathcote. It stated: "In contrast to other cases upholding section 422 findings, there was no evidence in this case to suggest that [Ricky] and Heathcote had any prior history of disagreements, or that either had previously quarreled, or addressed contentious, hostile, or offensive remarks to the other. (See, e.g., *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1341-1342 . . . [the use of surrounding circumstances—defendant and the victim had been associated with a gang and defendant knew the victim had testified at a trial regarding a gang member—changed seemingly nonspecific words into a threat]; *Martinez*, *supra*, 53 Cal.App.4th at pp. 1214-1216 [defendant and one of the victims were involved in a stormy relationship]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1151-

1154 (*Allen*) [same]; *People v. McCray* (1997) 58 Cal.App.4th 159, 172 [defendant's past violence toward the victim was relevant to the determination of whether defendant made a terrorist threat]; [*People v.*] *Stanfield* [(1995)] 32 Cal.App.4th [1152,] 1154-1157 [attorney's emotionally disturbed ex-client was properly convicted for terrorist threats, even though the threat was grammatically conditional, because circumstances revealed other threats and defendant's possession of the means of accomplishing the threat].) Nor was there evidence that a physical confrontation was actually imminent. (See *People v. Lepolo* (1997) 55 Cal.App.4th 85, 88-90 [defendant raised a machete over his head, pointed to a police officer, and said '"I want that officer"'].)" (*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1138.)

As to the fourth element of section 422, Ricky argued the threat did not reasonably cause Heathcote to be in sustained fear for his personal safety. The appellate court again agreed. (*Ricky T.*, *supra*, 87 Cal.App.4th at pp. 1139-1140.) The court stated: "Unlike the crime of robbery where the word 'fear' does not necessarily connote intimidation or fear as it means apprehension, the term 'sustained fear' is defined by *Allen*, *supra*, 33 Cal.App.4th at page 1156 as a period of time 'that extends beyond what is momentary, fleeting, or transitory.' In concluding that the statutory element of sustained fear was met, the *Allen* court relied on evidence indicating that the victim had knowledge of the defendant's prior threatening conduct and had reported this conduct to the police on several occasions. No such evidence exists in this case. Whatever emotion—fear, intimidation, or apprehension—Heathcote felt during the moment of the verbal encounter, there was nothing to indicate that the fear was more than fleeting or transitory. Indeed, Heathcote admitted the threat was not specific. This court rejects respondent's suggestion that even momentary fear can support a finding of sustained fear within the meaning of section 422. Clearly, if any experience of fear constitutes a 'sustained' experience, then the term is superfluous. Heathcote told Officer Steaveson that he 'felt threatened,' and that he ordered [Ricky] to report to the school office. The record, however, indicates that the police were not notified until the day after the incident. Apparently, fear did not exist beyond the moments of the encounter. Rather than taking

advantage of Heathcote's fear, [Ricky] followed his directive and placed himself in the school office, where he returned the next day for Officer Steaveson's interview." (*Ricky T., supra*, 87 Cal.App.4th at p. 1140, fn. omitted.)

4. Analysis

Ramos contends that, as in *Ricky T.*, the elements of section 422 were not proven in this case. He states that "as in *Ricky T.*, no rational trier-of-fact could determine that Mr. Ramos's emotional outburst amounted to a criminal threat within the meaning of section 422. The words themselves—'don't call the cops,' 'we're coming back,[']or 'we're coming to kick your asses'—do not unequivocally assert a threat of bodily injury or harm." We are not persuaded. We conclude the threats in this case, when viewed in the context of the physical injuries inflicted on Regan, constituted unequivocal threats of bodily injury or harm that were made in violation of section 422.

Ramos's reliance on *Ricky T.* is misplaced. Unlike the teacher in *Ricky T.*, who was not physically assaulted and was not threatened with further harm if he called the police, Regan suffered serious injuries that required surgery and a nine-day hospital stay. Unlike *Ricky T.*, where the police did not become involved in the matter until the day after the incident, the police in this case were called immediately after the attack and both Ramos and Sumnicht were apprehended while they were walking away from Regan's home. These distinguishing facts render *Ricky T.* inapplicable to this case.

Ramos contends the surrounding circumstances failed to establish that his angry statements constituted criminal threats, because he made the "remarks from a distance as he walked away from the scene." Ramos claims that, "[a]s reflected by the acquittal on the assault charge, there was no credible evidence that Mr. Ramos behaved in an aggressive manner towards Mr. Regan or his neighbors. Indeed, Mr. Ramos had complied with Mr. Regan's request to leave his front yard, and did not respond in kind when Mr. Regan poked his chest. [¶] And as the jury evidently found, Mr. Ramos did not participate in the subsequent altercation or encourage or facilitate Mr. Sumnicht's conduct. In short, Mr. Ramos's 'intemperate, rude, and insolent remarks hardly suggest

any gravity of purpose; there was no evidence offered that [his] angry words were accompanied by any show of physical violence—nothing indicating any pushing or shoving or other close-up physical confrontation.'" (Internal record reference omitted.) The contention lacks merit.

Ramos's acquittal on count 1, assault with intent to inflict great bodily injury, did not preclude his conviction on count 2, making criminal threats. There was credible testimony that Ramos made the majority of the threats that were uttered after the beating. By his own testimony, Ramos was angry that the neighbors wanted to beat up Sumnicht and he had defended Sumnicht by telling them, "You are not going to lay a hand on my friend. Just back up." "I yelled out fuck you[] and[] go ahead, call the cops. That's what I said." Based on the violent threats that he made, a jury could reasonably conclude that notwithstanding Ramos's apparent unwillingness to inflict great bodily injury on Regan earlier that day, he was now willing to do so if the neighbors failed to back away or called the police.

Ramos contends the record failed to establish that Regan's fear of Ramos was objectively reasonable given the lack of any prior history between the two men. Again, we are not persuaded. Given the surrounding circumstances—Regan had just been punched, held to the ground, and kicked by Ramos's companion, who was sufficiently threatened by the neighbors to require Ramos's intervention—Regan's fear of Ramos was objectively reasonable. This is especially so given Regan's and his wife's inability, due to his and his wife's disabilities, to defend themselves. In our view, the angry manner in which Ramos's threats were made in defense of Sumnicht and himself after the attack provides substantial evidence that Ramos's threats were serious and intended to be taken as such.

B. The Trial Court Did Not Abuse Its Discretion in Refusing to Strike Ramos's Prior Strike Conviction

The information alleged that Ramos had suffered a prior conviction for arson in 2007. (§ 451, subd. (c).) The prior arson conviction was alleged as both a prior strike

conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and a prior serious felony conviction (§ 667, subd. (a)(1)).[9]

At the sentencing hearing, defendant waived his constitutional rights and admitted the prior arson conviction. The trial court then reviewed Ramos's criminal record, stating: "In listening to the trial, having heard the testimony, he is not as young as [Sumnicht]. I note that he is young, about 23 years old. He has a juvenile history, unlawful driving of a vehicle . . . , and it looks like 4153, offensive words in a public place, disrupting class where the petition was sustained. This is a case where the current conviction is clearly one of escalating seriousness. He has two separate probationary matters where he was given E.S.S. [execution of sentence suspended].[10] What I find aggravating about the two cases has more to do with unsatisfactory fulfillment of the probationary conditions. I've looked at each of them, MA037042, which was the subject of a strike prior, vandalism of Hart High School; and MA050639, which is the receiving stolen property. He's had probation. His probationary matter's revoked. He's been given the benefit of an E.S.S. At one point, on the case ending in -639, I notice also on March 16, there was a *Romero* motion that was argued and it was granted by that judge. So he has been given the benefit of that, and it has not deterred him from his violent conduct."

Following these comments, Ramos's attorney asked the court to give him "another opportunity" by striking the prior strike conviction under *Romero*. The trial court denied the motion, stating: "I have considered it. I have listened to the trial. I have looked at the entirety of his record. I believe he's had a chance. I believe he was the aggressor and

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9 The information alleged that Ramos was convicted in case number MA037042 of both "PC 415(C)" and "PC 451(C)." In light of Ramos's admission of the prior conviction for arson under section 451, subdivision (c), the reference to section 415 was undoubtedly a typographical error. The reporter's transcript indicates the trial court corrected the information at the sentencing hearing to reflect a prior strike conviction allegation under section 451, subdivision (c).

10 During his testimony, defendant admitted he was on probation for two offenses: (1) arson, and (2) receiving stolen property.

initiated this situation, and I don't find that he is an appropriate candidate. So I would decline to exercise my discretion."

Ramos contends on appeal that the trial court abused its discretion in refusing to strike his prior strike conviction. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 [trial court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard].) He raises four arguments, all of which we conclude lack merit.

First, Ramos argues the evidence failed to show he "was the type of unredeemable violent offender deserving of a substantial second strike sentence." The record fails to support this contention. As noted above, the trial court found that Ramos's performance on probation was unsatisfactory, that his current conviction was of escalating seriousness, and that probation had failed to deter him from committing further violent crimes. The record therefore supported the finding that Ramos fell within the scope of the Three Strikes law.

Second, Ramos argues that although he "may have shouted expletives while walking away from the area, the victim was unsure that he uttered threats, and believed that the hostile remarks came more from the co-defendant. Furthermore, although other bystanders testified they heard more such words uttered by Mr. Ramos, one witness claimed that he and others actually found some of Mr. Ramos's remarks 'humorous.'" (Internal record references omitted.) Again, the record fails to support his contention. As previously discussed, Regan heard the threats but was simply unsure which threats were uttered by which defendant. However, George testified that Ramos made a majority of the threats and Ramos's own testimony indicated that he was willing to resort to violence if the neighbors failed to back away or called the police. Although George found it humorous that Ramos, who presumably is Hispanic, yelled "white power," his ability to find humor in an otherwise serious situation does not negate the substantial evidence of Ramos's hostile and threatening remarks in violation of section 422.

Third, Ramos contends the trial court's finding that he acted as the "aggressor" was wholly unsupported by the record. We disagree. Viewed in its proper context, the

term "aggressor" did not refer to the person who struck the first blow, but to the one who, by jumping the fence and trespassing into Regan's yard, instigated the conflict that led to the first blow.

Finally, Ramos argues the trial court failed to consider that he "would still face a lengthy sentence—8 years imprisonment on count 2—if it exercised its discretion to dismiss the strike conviction." The contention lacks merit. The trial court was clearly aware that, in light of the five-year enhancement that applied to the prior serious felony allegation, striking the prior strike conviction would result in an eight-year sentence on count 2 (the high term of three years plus a five-year enhancement). There is no basis to conclude the trial court was unaware of this fact.

II. Sumnicht's Appeal

After reviewing the record on appeal, Sumnicht's appointed counsel filed a brief raising no issues and asked this court to independently review the record pursuant to *People v. Wende*, *supra*, 25 Cal.3d 436. On April 9, 2013, we sent a letter to Sumnicht advising him of the nature of the brief that had been filed and informing him that he had 30 days within which to submit any issues that he wished us to consider. We have received no response.

We have reviewed the record and are satisfied that no arguable issues exist. Sumnicht has received effective appellate review of the judgment entered against him. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-279; *People v. Kelly* (2006) 40 Cal.4th 106, 123-124.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.