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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

NORBERTO ARREDONDO, JR.,

Defendant and Appellant.

B263217

(Los Angeles County  
Super. Ct. No. KA102751,  
consol. with Nos. KA103443  
and KA106717)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed as modified with directions.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael R. Johnsen and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant Norberto Arredondo, Jr. appeals from a judgment of conviction entered after a jury trial. The jury found defendant guilty of arson of the property of another (Pen. Code,<sup>1</sup> § 451, subd. (d); count 1), making a criminal threat (§ 422, subd. (a); counts 2, 7, 11), misdemeanor assault (§ 240; count 4), assault by means likely to produce great bodily injury (§ 245, subd. (a)(4); count 5), intimidating a witness (§ 136.1, subd. (b)(1); count 6), intimidating a witness (§§ 136.1, subd. (a)(2); count 8), intimidating a witness by force (§ 136.1, subd. (c)(1); count 9), stalking (§ 646.9, subd. (b); count 10<sup>2</sup>), and misdemeanor violation of a court order (§ 166, subd. (a)(4); count 12).

Following conviction, defendant admitted the truth of the allegations he suffered two prior convictions—willful infliction of corporal injury on a spouse or cohabitant (§ 273.5, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a)(1))—for which he served prison terms (§ 667.5, subd. (b)), one of which was a serious felony (§ 667, subd. (a)(1)) within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12).

The trial court selected count 9 as the base term and imposed the upper term of four years, doubled as a second strike to eight years, plus five years for the serious felony and two years for the two prior prison terms, for a total of 15 years. The trial court imposed consecutive one-third of the middle term sentences

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> The abstract of judgment omits the stalking conviction on count 10 and reflects two convictions of making criminal threats on count 11. We will order that this error be corrected.

on the remaining felony counts, doubled as second strikes, as follows: one year and four months on each of counts 1, 2, 6, 7, 8 and 11, and two years on each of counts 5 and 10, for a total of 12 years. The trial court also imposed consecutive terms of six months in county jail on count 4 and one year in county jail on count 12. The total sentence imposed was 28 years six months.

On appeal, defendant challenges only his sentence. He contends the trial court improperly imposed a one-year enhancement under section 667.5, subdivision (b), based on the same prior conviction used to impose a five-year enhancement under section 667, subdivision (a)(1). He further contends sentence on counts 11 and 12, making a criminal threat and disobeying a court order, should have been stayed pursuant to section 654, because they arose from the same course of conduct as count 10, stalking. Finally, he contends the trial court abused its discretion in refusing to strike his prior strike conviction. We agree in part and modify the judgment accordingly.

## **FACTS**

### **A. *Prosecution***

Defendant began dating Elia Doe in February 2013. They experienced problems with their relationship, particularly when they were drinking.

On July 6, 2013, while Elia and defendant were at his mother's house, defendant accused Elia of sleeping with someone else. When Elia tried to leave, defendant pushed her to the ground. She kicked at him; he pulled her hair, dragged her, threw a stool at her, and hit her. She sustained bruises on her

leg, arms and head. (These acts formed the basis of count 4, misdemeanor assault.)

Defendant told Elia that if she contacted the authorities, something bad would happen to her or her family. Neighbors called the police, but when they arrived, defendant would not let Elia go outside to talk to them. Before defendant opened the door for the police to enter the home, defendant told Elia that if she told them anything, something bad would happen to her. The police came in, and Elia told them everything was fine. (Intimidating a witness by force—count 9.)

Elia was driven to her aunt's house, where Elia lived with her daughter, Elise. Defendant followed her to the house that night, called her multiple times, and attempted to see her. On July 8, he sent her a text message, saying he was sorry and warning her not to tell the police about the incident with the stool, or he would kill her and her whole family. (Intimidating a witness—count 6.)

On July 19, while Elia was with defendant at his mother's house, he hit her, pulled her hair, pushed her to the ground and choked her. He threatened to chop her up into little pieces and bury her in the desert. When she ran out of the house, defendant chased her with a knife. (Assault by means likely to produce great bodily injury—count 5.) The police arrived and took Elia from the house, but she never made a police report regarding the incident because defendant told her he was in the mafia and he and his "homies" would get her whole family.

Defendant began calling Elise in June, calling her names and threatening her. In mid-July, he sent her a text message, stating that he was going to burn her. On July 25, defendant sent a text message to Elia, telling her she would see firefighters

all over the place. On July 26, he sent threatening text messages to Elise, telling her to tell her mother to call him, and that he was not playing games. On July 27, Elise awoke to find her car on fire. Defendant later texted Elia, threatening to kill her and her family. Police determined gasoline had been poured on the car and the car set on fire. A subsequent search of defendant's car turned up a plastic fuel container nozzle with gasoline on it, and defendant had a lighter on his person. (Arson of the property of another—count 1; making criminal threats against Elia and Elise—counts 2 and 7.)

Defendant was arrested on July 31, 2013. He called Elia from jail multiple times. On August 8, 2013, the court issued a protective order, prohibiting defendant from contacting Elia or Elise. On September 20, 2013, prior to the preliminary hearing, defendant called Elia from jail. He told her she was going to be sorry for coming to court and threatened to kill her and her family. (Intimidating a witness—count 8.)

After the preliminary hearing, defendant nonetheless continued to call Elia and threaten her. On October 1, 2013, he called her and told her that her house was a target and she was going to get burnt. He stopped calling her in December, but the calls started again in January 2014. He called her as many as 50 times a day. On July 10, 2014, he called her and told her that her whole family was going down and “this will never end.” He called her again on July 12 and July 13. (Stalking—count 10; making a criminal threat—count 11; violation of a court order—count 12.)<sup>3</sup>

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<sup>3</sup> Counts 10, 11 and 12 were initially filed as a separate case, then later consolidated with this case.

B. *Defense*

Defendant testified he did not assault Elia at any time in July 2013. On July 26, he was at his mother's house all night. He did not burn Elise's car early the following morning. He texted Elia about firefighters because Elise's boyfriend had threatened to burn her car. The gasoline nozzle the police found in his car belonged to his mother, and he carried a lighter because he smoked marijuana.

Defendant apologized for texts he sent. He did not mean any harm by them. He did not try to threaten Elia for going to court. He admitted sending angry and threatening texts to Elia and Elise, including that he would kill Elia and her entire family, and that his calls to Elise from jail sounded threatening. He also acknowledged he was aware of the protective order but continued calling Elia.

Defendant acknowledged a 1996 conviction for stalking and a 2005 conviction for assault with a deadly weapon but claimed the latter was self-defense.

## DISCUSSION

A. *Prior Prison Term Enhancement*

Defendant contends, and the People agree, one of the prior prison term enhancements under section 667.5, subdivision (b), must be stricken, because enhancements may not be imposed under both sections 667.5, subdivision (b), and 667, subdivision (a)(1), based on the same prior conviction. (*People v. Jones* (1993) 5 Cal.4th 1142, 1152-1153; *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) We agree and will therefore strike the enhancement. (*Perez, supra*, at p. 805.)

B. *Section 654*

Defendant's convictions on counts 10 and 11, stalking and making a criminal threat, were based on events occurring between October 1, 2013 and July 13, 2014. His conviction on count 12, disobeying a court order, was based on events occurring between August 8, 2013 and July 13, 2014. He contends sentence on two of these convictions should have been stayed under section 654 because they arose out of the same indivisible course of conduct. We agree as to his sentence for disobeying a court order but disagree that section 654 prevented his sentence for both stalking and making a criminal threat.

Under section 654, subdivision (a), "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." The question whether section 654 applies is one of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1378.) We review the trial court's factual determinations for substantial evidence (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338), viewing the evidence in the light most favorable to those determinations (*Ortiz, supra*, at p. 1378; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143).

"The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any

one of such offenses but not for more than one.’ [Citation.]” (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) “If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335; accord, *People v. Vu* (2006) 143 Cal.App.4th 1009, 1033.) ““The principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple.” [Citation.] “A defendant’s criminal objective is ‘determined from all the circumstances . . . .’” [Citation.]” (*People v. Sok* (2010) 181 Cal.App.4th 88, 99; see *Britt*, *supra*, at p. 952.)

Although the courts have not addressed the application of section 654 in the context of stalking and related crimes, such as making a criminal threat, committed during a single time period (see *People v. Shelton* (2006) 37 Cal.4th 759, 772 (dis. opn. of Werdegarr, J.); *People v. Henson* (1997) 57 Cal.App.4th 1380, 1384), the courts have considered application of section 654 in similar contexts. In *People v. Harrison*, *supra*, 48 Cal.3d 321, the court declined to apply section 654 to a violent attack occurring over a seven- to 10-minute period, during which the defendant inserted his finger into the victim’s vagina three separate times. (*Id.* at pp. 325-326.) The court affirmed the imposition of consecutive terms for each crime of sexual penetration, holding that to apply section 654 on the basis that the sexual acts were all the same and done in sequence “would mean that ‘once a [defendant] has committed one particular sexual crime against a victim he may thereafter with impunity repeat his offense,’ so



long as he does not direct attention to another place on the victim's body, or significantly delay in between each offense. [Citation.]" (*Id.* at p. 337.)

In the context of making criminal threats, the court in *People v. Felix* (2001) 92 Cal.App.4th 905 held that section 654 did not bar punishment for two separate criminal threats made on the same day but at different times and places. The court explained that "[s]ection 654 prohibits multiple punishment for an indivisible course of conduct . . . ." [Citation.] But multiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm. [Citations.] 'Separate sentencing is permitted for offenses that are divisible in time . . . .' [Citation.]" (*Felix, supra*, at p. 915.)

Here, the acts that constituted making a criminal threat can be separated from defendant's course of conduct in stalking Elia from October 1, 2013 to July 13, 2014. Evidence was presented of specific threats made on October 1, 2013 and July 10, 2014, but there was additional evidence that defendant called Elia multiple times, sometimes as many as 50 times a day, during this time period. To hold that defendant cannot be sentenced for particular criminal threats merely because they occurred during a lengthy period of time in which he was stalking his victim would allow him to make such threats with impunity so long as he continued his stalking behavior. (*People v. Harrison, supra*, 48 Cal.3d at p. 337.)

Defendant's conviction of violating a court order is a different situation. Defendant's violation of the protective order necessarily was based on his stalking behavior and making criminal threats. There is no way of separating the violation of

the protective order from behavior constituting the other crimes. Although the information alleged that the crime of disobeying a court order occurred “[o]n or between July 13, 2014 and July 13, 2014,” the prosecutor told the jury “[t]hat [was] a typo on my part,” and it should have been August 8, 2013, the day the protective order was issued, through August 14, 2014. Defendant was aware of the protective order, and in order to find defendant violated it, all the jury had to do was “agree on at least one thing that the defendant did to violate the court order, or if you find that the 50-some odd calls he made, that he made every one of those and every one of those violated the court order, that’s okay, too. As long as there is one act that you all agree on that violates the order, that’s enough.”

The phone calls, however, also formed the basis of the stalking count. The prosecutor argued that defendant “was harassing [Elia], repeatedly and consistently. We know that through the numerous phone calls that are recorded, that are on the call logs . . . .” The jury verdict forms did not specify dates for stalking or violation of a court order counts, so there is no basis for separating a discrete violation of a court order from either the stalking behavior or the criminal threats. In addition, there is no basis for concluding defendant “harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other” when he engaged in the stalking and the violation of a court order. (*People v. Harrison, supra*, 48 Cal.3d at p. 335; accord, *People v. Vu, supra*, 143 Cal.App.4th at p. 1033.) Accordingly, we agree that defendant’s conviction of violating the protective order must be stayed pursuant to section 654. (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1527.)

C. *Motion To Strike a Prior Conviction*

At the sentencing hearing, defendant requested that the trial court exercise its discretion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to strike his prior serious felony conviction of assault with a deadly weapon (§ 245, subd. (a)(1)) in 2005, “[b]ased on the fact that it’s ten years old.”

The trial court, which had anticipated such a request, reviewed the factors it was required to consider, then explained: “I have to look at everything that I know of about the present offense and what transpired, not only when the incidents first surfaced between you and Elia but also what occurred while cases were pending and even while this trial was pending. That goes to the very heart of what *Romero* requires me to consider, your character and your prospects in light of the recidivism that may have occurred, and all that really goes against your interest for purposes of this type of consideration. Your prior offenses are very similar to the current offenses, which means that whatever efforts the court utilized in order to rehabilitate you and prevent the continued wrongdoing was unsuccessful. It continued and it continued while charges were pending in the present case, while trial was pending, and there were still routine violations, and the court cannot ignore that. And for those reasons, you fall well within the spirit of the strike law and should not receive the benefit of the court’s discretion to ignore that prior conviction. So the motion is respectfully denied.”

In reviewing a claim of abuse of discretion, “we are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to

achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citation.] Second, a “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377; accord, *People v. Blackwell* (2016) 3 Cal.App.5th 166, 199-200.) We will not find an abuse of discretion unless the trial court’s ruling “is so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, at p. 377; *People v. Brown* (2016) 245 Cal.App.4th 140, 156.)

In determining whether to strike or vacate a prior conviction “in furtherance of justice” under Penal Code section 1385, subdivision (a), the trial court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Leonard* (2014) 228 Cal.App.4th 465, 502, quoting *People v. Williams* (1998) 17 Cal.4th 148, 161.) Relief from the three strikes sentencing requirements is warranted only where “the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be

treated as though he actually fell outside the Three Strikes scheme.” [Citation.]” (*People v. Carmony*, *supra*, 33 Cal.4th at p. 377; see *Williams*, at p. 161.)

Defendant relies on three factors in arguing that the trial court abused its discretion in denying his *Romero* motion: the age of the strike, his age—52, and the fact that he would still be subject to a lengthy sentence if the trial court exercised its discretion. While these factors may have supported an exercise of discretion by the trial court in the first instance, they are insufficient to establish an abuse of discretion on appeal. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1434.)

The trial court here considered all of the relevant factors in ruling on defendant’s *Romero* motion. Under the circumstances of this case, the trial court acted well within its discretion in denying the motion. The purpose of the three strikes law is to provide greater punishment for recidivists who, by reason of their criminal history, have shown that they are neither rehabilitated nor deterred from further criminality. (*People v. Davis* (1997) 15 Cal.4th 1096, 1099.) The trial court did not abuse its discretion in finding defendant fell within the spirit of this law.

## DISPOSITION

The judgment is modified to strike one of the enhancements imposed under section 667.5, subdivision (b), and to stay the sentence imposed on count 12 pursuant to section 654. As so modified, the judgment is affirmed. The trial court is directed to prepare an abstract of judgment reflecting these changes and correcting the error as to counts 10 and 11, and to forward a copy to the Department of Corrections and Rehabilitation.

KEENY, J.\*

We concur:

PERLUSS, P. J.

ZELON, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.