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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME MONTGOMERY,

Defendant and Appellant.

A130627

(Mendocino County
Super. Ct. No. 1012356)

Jerome Montgomery appeals from a conviction of intimidating a witness. He contends there was insufficient evidence to support the conviction; the trial court erroneously failed to instruct the jury on a required element of special intent; the trial court erred in failing to strike a prior prison term allegation; and defense counsel rendered ineffective assistance by arguing an incorrect specific intent requirement. We shall affirm the judgment.

STATEMENT OF THE CASE

Appellant was charged by information filed on June 8, 2010, with one count of intimidating a victim (Pen. Code, § 136.1, subd. (b)(2))¹ and one count of preventing or dissuading a victim or witness by force or threat (§ 136.1, subd. (c)(1)). It was alleged that appellant had served five prior prison terms within the meaning of section 667.5,

¹ All further statutory references will be to the Penal Code unless otherwise specified.

subdivision (b), and that one of these prior convictions was a strike within the meaning of sections 1170.12 and 667.

Jury trial was held on August 16 and 17, 2010. The jury was instructed that appellant was charged with “intimidating a witness in violation of Penal Code section 136.1” and that if it found appellant guilty of this offense, it had to decide whether the prosecution had proven the “additional allegation” that appellant “used force or threatened . . . to use force.” The verdict form reflects that the jury found appellant guilty of count 1, intimidation of a victim in violation of section 136.1, subdivision (b)(2), and found true the special allegation that appellant used or threatened to use force. On separate verdict forms, the jury also found true each of the six special allegations of prior convictions and prison terms. The court found the sixth special allegation was a serious and violent felony under sections 1170.12 and 667.

At sentencing on October 13, the court denied appellant’s motion to strike the prior strike and imposed a total prison term of eight years, consisting of the mitigated term of two years on what the court referred to as the “felony violation of 136.1(B)(2)/136.1(C)(1),” doubled to four years, and consecutive one-year terms for each of the first four prior prison allegations. The one-year term for the fifth prior prison allegation was stayed under section 654. The abstract of judgment describes the conviction as a violation of section 136.1, subdivision (b)(2).

Appellant filed a timely notice of appeal on October 20, 2010.

STATEMENT OF FACTS

On April 26, 2010, the police responded to a report of domestic violence at appellant’s residence. Appellant’s wife, Malinda Montgomery, told the police that appellant had pushed her; she testified that she did not tell them “the complete, whole story,” which was that appellant pushed her out of his way because she was blocking the door to keep him from leaving, and she did not say she slapped him. She asked the police not to arrest appellant and declined a restraining order. The police took photographs of a small bruise and a small “bump” on her lip and arrested appellant.

Later that day, appellant made nine phone calls from the jail to his wife. Recordings of three of these calls were played for the jury. The first of these began with appellant accusing Malinda of lying and Malinda responding that she did not lie but told the police he pushed her. Insisting he had not touched her, appellant told her, “You call my parole officer. You better tell him the fucking truth. That I pushed you out of my mother fucking face after you hit me in my mother fucking face. You tell him.” Malinda told him he had thrown her down in the kitchen and into the crib and appellant said she should have “got out of my fucking face like I told you to.” Repeatedly calling her a liar, appellant told her again to call his parole officer and “tell him the mother fucking truth,” stating “I’m telling you now. I’m about to fuck you up. You, you , you said I put hands on you, I want to show you what putting hands on your ass is. I’m telling you now. You shouldn’t have fucking lied on me. I got two fucking strikes. I could do a lot, a lot of mother fucking time. . . .”

In the second phone call, a few hours later, appellant asked if Malinda had called his parole officer and she said she had been at school. She said she had warned him that if she had to call the police, “it wasn’t going to end good.” Appellant told her not to lie; she said he pushed her and acknowledged that she hit him in the face after he pushed her; he insisted he did not push her. Appellant told her to get him out of jail and when she said she could not release him, he told her to call his parole officer and tell the truth. Appellant said, “I want to get you back for this shit. I’m telling you now. I’m getting you back for this shit. Whatever I have to do, I’m going to get you back. I swear to God.” Malinda told appellant he had pushed her in the kitchen, the bedroom and their son’s room and he asked if he had pushed her out of the way because she was “blocking my fucking way as usual.” She answered affirmatively and he said, “Okay. Why you didn’t tell them that? Look, tomorrow you get on that mother fucking phone. You call my fucking parole officer. You better tell him the fucking truth or that’s your ass. I’m telling you now.”

The third phone call began with appellant asking, "So you calling in the morning?" Malinda said she would do what she could but did not think it was going to do any good and asked, "You think I want you to go to jail?" Appellant continued to tell her he wanted her to tell the truth and she said it was the truth that he touched and shoved her. Arguing about incidents in the past, appellant insisted, "I never, I never touch you. I push you out of the mother fucking way." Malinda called this a "bold faced lie" and said appellant shoved her and pinned her down. When Malinda said appellant had anger problems, he said, "Because you don't get out of my fucking way." After continued arguing, appellant told Malinda he hated her for lying; she said, "You really going to start this shit with me when I'm the one that fucking holds your fate in my hands, dumb ass?" Appellant told her "I'm not asking you for nothing but to tell the fucking truth." Malinda said she was going to explain to the court that appellant pushed her because she was in his way and preventing him from leaving, and appellant told her, "You ain't telling the mother fucking court. You're telling my parole officer tomorrow." She told him it was the county, not her, pressing charges. Appellant told her, "You call, tell my parole officer that you overexaggerated bad. That's not how it fucking went. You tell him the mother fucking truth. You tell him the fucking truth. And get my ass the fuck out of here because I ain't, I ain't going, I, I could see if I did something wrong. . . . You tell him you overexaggerated. I, I did not do that. Tell him that was false, false pretense. He can't keep me. And you make sure you tell him he can't keep me." Eventually, Malinda said, "I did tell the truth but I'll go lie for you, okay?" Appellant said she did not have to lie for him, "just tell the fucking truth," and she said, "if you want me to go do something, it'll, it'll be, end up being a lie." They argued about their conflicting versions of the incident and appellant told her he would take the baby away from her, "if I have to lie like you lie." Toward the end of the conversation, appellant said things were never going to work between them and then, "Man you better do that shit tomorrow. I'm telling you now. . . . You better do that shit tomorrow."

Malinda testified that she and appellant were angry at each other during these phone calls, which were a continuation of the argument they had been having at home. She testified that, throughout the first and second call the jury heard, appellant was asking her to tell the truth. Questioned about the third call, Malinda testified that appellant never told her to lie and repeatedly told her to tell the truth, and that she never perceived that this was “a cover for getting [her] to lie.” When she asked appellant, in this call, what kind of lie he wanted her to tell, she was being sarcastic. About the incident that led to appellant’s arrest, Malinda testified that appellant pushed her because she was blocking his way out the door, not in order to hurt her.

When appellant was arraigned, Malinda told the judge she wanted appellant out of custody so he could help care for their child. She testified that she loved appellant but would not lie for him. Three days after the incident and phone calls, Malinda wrote in a “supplementary statement” that, after reflection, she realized appellant had not pushed her but accidentally “fell in to” her when he tripped while trying to get around her and out the door. She testified that she wrote this statement because she wanted “the truth to be there” and “nobody should be punished for something they didn’t do.”

DISCUSSION

As indicated above, appellant was charged with two offenses, violations of section 136.1, subdivision (b)(2), and of section 136.1, subdivision (c)(1). He was convicted of a single offense, violation of section 136.1, subdivision (b)(2), with a special finding that he used or threatened to use force.

Section 136.1, subdivision (b)(2), provides that, except as provided in subdivision (c), “every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from . . . [c]ausing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof” is guilty of a public offense, punishable by imprisonment in jail or state prison.

Subdivision (c)(1) of section 136.1 provides that “[e]very person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously . . . [w]here the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person,” is guilty of a felony, punishable by imprisonment in the state prison for two, three or four years.²

² Section 136.1 provides in full:

“(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

“(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

“(2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

“(3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

“(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

“(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

“(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

“(3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

“(c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances:

I.

Appellant contends there was insufficient evidence he violated section 136.1 because this statute does not apply to attempts to influence the contents of statements to law enforcement. Appellant does not appear to challenge the sufficiency of the evidence to demonstrate that he intended to influence the contents of his wife's statements to his parole officer; rather, he argues that this attempt to influence his wife's statements does not come within the purview of section 136.1. According to appellant, section 136.1 applies only to attempts to prevent a victim or witness from notifying the authorities that a crime has been committed or from initiating the arrest, prosecution or issuance of a parole violation for that crime. After a report has been made and criminal investigation begun, appellant urges, attempts to influence the content of information provided to law

“(1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person.

“(2) Where the act is in furtherance of a conspiracy.

“(3) Where the act is committed by any person who has been convicted of any violation of this section, any predecessor law hereto or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation of this section.

“(4) Where the act is committed by any person for pecuniary gain or for any other consideration acting upon the request of any other person. All parties to such a transaction are guilty of a felony.

“(d) Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure of the attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section.

“(e) Nothing in this section precludes the imposition of an enhancement for great bodily injury where the injury inflicted is significant or substantial.

“(f) The use of force during the commission of any offense described in subdivision (c) shall be considered a circumstance in aggravation of the crime in imposing a term of imprisonment under subdivision (b) of Section 1170.

enforcement officials are proscribed under section 137, which addresses attempts to induce a person to “give false testimony or withhold true testimony or to give false material information pertaining to a crime to, or withhold such information from, a law enforcement official.”³ Respondent urges that section 136.1, subdivision (b)(2), applies to attempts to persuade a witness not to participate in a prosecution regardless of when the threat was made.

Section 136.1 is one of a number of statutes in part I, title 7, chapter 6 of the Penal Code, “which establishes a detailed and comprehensive statutory scheme for penalizing the falsification of evidence and efforts to bribe, influence, intimidate or threaten witnesses.” (*People v. Fernandez* (2003) 106 Cal.App.4th 943, 948.) Cases interpreting these statutes have limited them according to their specific language, to avoid overlap in their application. (*Id.* at p. 950; *People v. Womack* (1995) 40 Cal.App.4th 926, 931; *People v. Hallock* (1989) 208 Cal.App.3d 595, 607.) In particular, appellant points to cases that have limited the reach of section 136.1 to pre-arrest attempts to report a crime (106 Cal.App.4th at p. 950; 208 Cal.App.3d at p. 607), as distinct from section 137’s

³ Section 137 provides in pertinent part:

“(a) Every person who gives or offers, or promises to give, to any witness, person about to be called as a witness, or person about to give material information pertaining to a crime to a law enforcement official, any bribe, upon any understanding or agreement that the testimony of such witness or information given by such person shall be thereby influenced is guilty of a felony.

“(b) Every person who attempts by force or threat of force or by the use of fraud to induce any person to give false testimony or withhold true testimony or to give false material information pertaining to a crime to, or withhold true material information pertaining to a crime from, a law enforcement official is guilty of a felony, punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years. . . .

“(c) Every person who knowingly induces another person to give false testimony or withhold true testimony not privileged by law or to give false material information pertaining to a crime to, or to withhold true material information pertaining to a crime from, a law enforcement official is guilty of a misdemeanor. . . .”

application to attempts to influence the contents of testimony (106 Cal.App.4th at pp. 948-949; 40 Cal.App.4th at pp. 930-931).

In *People v. Womack*, *supra*, 40 Cal.App.4th 926, the defendant was convicted of attempted murder and attempting to induce a witness to give false or withhold true testimony under section 137, subdivision (b). The court held that the intent to kill reflected in the attempted murder conviction was inconsistent with the intent required under section 137, to induce the witness to give false testimony or withhold true testimony. (*Id.* at pp. 931-932.) “The entire sense of Penal Code section 137 is that testimony will be given, but the perpetrator will attempt to influence the testimony given” whereas other statutes, sections 136.1 and 138,⁴ “contemplate that the perpetrator will prevent or dissuade a prospective witness from *giving* testimony, or will attempt to do so. Preventing or dissuading a witness from testifying altogether is incompatible with influencing or shaping the testimony the witness gives.” (*Id.* at pp. 930-931.) Moreover, the *Womack* court concluded, interpreting “inducing a witness to withhold true testimony” (§ 137) as including “preventing or dissuading a witness from testifying” (§§ 136.1, 138), would render sections 136.1 and 138 surplusage. (40 Cal.App.4th at p. 931.)

People v. Fernandez, *supra*, 106 Cal.App.4th 943, 945, held that section 136.1, subdivision (b)(1), which penalizes attempts to prevent or dissuade a victim or witness from “ “[m]aking any report of that victimization to any peace officer or state or local law

⁴ Section 138 provides:

“(a) Every person who gives or offers or promises to give to any witness or person about to be called as a witness, any bribe upon any understanding or agreement that the person shall not attend upon any trial or other judicial proceeding, or every person who attempts by means of any offer of a bribe to dissuade any person from attending upon any trial or other judicial proceeding, is guilty of a felony.

“(b) Every person who is a witness, or is about to be called as such, who receives, or offers to receive, any bribe, upon any understanding that his or her testimony shall be influenced thereby, or that he or she will absent himself or herself from the trial or proceeding upon which his or her testimony is required, is guilty of a felony.”

enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge,’ ” does not include an attempt to influence a victim’s testimony at a preliminary hearing. Noting that the statutes in chapter 6 each target particular kinds of conduct—threats of violence by a defendant after conviction or in retaliation for cooperation with law enforcement (§§ 139, 140), efforts to prevent a victim or witness from appearing in court (§§ 136.1, subds. (a)(1), (2), & (c), 138, subd. (a)), attempts to influence the content of testimony (§ 137, subds. (a)-(c))—*Fernandez* concluded that “when the Legislature intends to penalize an effort to influence or prevent *testimony*, or an effort to prevent the defendant from appearing in court, it does so explicitly. Section 136.1, subdivision (b)(1) makes no reference to testimony or courtroom appearances. . . . Section 136.1, subdivision (b)(1) should not be construed to punish efforts to prevent or influence testimony when it does not do so expressly, and there are other statutes within the same scheme that cover such conduct.” (106 Cal.App.4th at p. 949-950.)

The defendant in *People v. Hallock*, *supra*, 208 Cal.App.3d 595 was charged under section 136.1, subdivision (b)(1), with dissuading a victim from reporting the victimization, but the jury was instructed on the terms of section 136.1, subdivision (a), which penalizes dissuading or attempting to dissuade a victim from attending or testifying at trial. The resulting conviction was reversed because the evidence supported only a finding that the defendant’s threat, made at the time of the offense, was aimed at preventing the victim from reporting the offense, not at dissuading the victim from testifying at a future trial. (*Id.* at pp. 607, 610.)

None of these cases construed the statute at issue here, section 136.1, subdivision (b)(2). *Womack* distinguished the reach of section 137 from that of section 136.1, subdivision (a), concerning efforts to prevent a witness from attending or testifying at a trial or other proceeding. In *Hallock* and *Fernandez*, which specifically viewed subdivision (b) as applying to pre-arrest attempts to influence, the subdivision at issue was (b)(1), the subject of which is “[m]aking any report.” Subdivision (b)(2), by

contrast, covers “[c]ausing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, *and assisting in the prosecution thereof.*” (Emphasis added.)

This latter portion of subdivision (b)(2) has no logical limitation to a pre-arrest timeframe; “assisting in the prosecution” necessarily follows arrest. Nor can it be said, as *Fernandez* said of section 136.1, subdivision (b)(1), that section 136.1, subdivision (b)(2), should not be construed to punish conduct covered by another statute within the scheme of which it is part. *Fernandez* declined to interpret subdivision (b)(1) of section 136.1 as punishing “efforts to prevent or influence *testimony*” when it did not “do so expressly” and other statutes covered such conduct. (*People v. Fernandez, supra*, 106 Cal.App.4th at p. 950.) There may be some overlap in the reach of section 136.1, subdivision (b), as it applies to attempts to influence a victim’s “assisting in the prosecution” of a crime and that of section 137, subdivisions (b) and (c), regarding attempts to induce a victim to “give false material information pertaining to a crime to, or withhold true material information pertaining to a crime from, a law enforcement official.” But the purview of these statutes is not identical,⁵ and, more importantly, unlike the case in *Fernandez*, section 136.1, subdivision (b)(1), *does* expressly address the conduct at issue in the present case—an attempt to dissuade a victim from “[c]ausing a . . . parole violation to be sought and prosecuted, and assisting in the prosecution thereof.” The evidence in the present case, as appellant recognizes, showed an attempt to influence the content of the victim’s description of the offense immediately after it occurred—after appellant was arrested, at the very earliest stages of investigation.

⁵ For example, the application of section 136.1 is limited to attempts to influence victims and witnesses to crime, while section 137 addresses attempts to influence “any person.” Section 136.1, subdivision (b)(2), applies specifically to assisting in a prosecution in conjunction with “[c]ausing a complaint, indictment, information, probation or parole violation to be sought and prosecuted” while section 137 applies broadly to influencing the content of testimony or “material information” given to law enforcement.

Appellant's objective was to have his wife convince his parole officer that he should be released from jail and not prosecuted.

Although Malinda asserted in the phone calls that she was not pressing charges, appellant's efforts were in the nature of an attempt to influence a victim to drop charges. *People v. Velazquez* (2011) 201 Cal.App.4th 219 found such an effort to come within section 136.1, subdivision (b)(2). *Velazquez* specifically disagreed with *Fernandez's* suggestion that subdivision (b) was limited to pre-arrest efforts to influence, noting that *Fernandez* was dealing with subdivision (b)(1) and "[t]o the extent the court in *Fernandez* intended to include subdivision (b)(2) in its statement that subdivision (b) applies only to prearrest attempts to dissuade the reporting of a crime, the statement is dictum, with which we respectfully disagree. . . . Subdivision (b)(2) clearly encompasses more than prearrest efforts to dissuade, inasmuch as it includes attempts to dissuade a victim from causing a complaint or information to be prosecuted or assisting in that prosecution. The evidence in this case shows that defendant threatened Porter in an attempt to persuade her to drop the charges against his fellow gang members. This is sufficient evidence to support a conviction under section 136.1, subdivision (b)(2)." (201 Cal.App.4th at pp. 232-233.)

We agree with the *Velazquez* court that subdivision (b)(2) of section 136.1, by its own terms, is not limited to pre-arrest reports. Here, the recorded telephone calls reflect appellant arguing with Malinda about the incident and demanding that she talk to his parole officer in order to get him out of jail. Although appellant called Malinda a liar and demanded that she tell the parole officer the truth, the tenor of the conversation was clearly susceptible of the interpretation urged by the prosecution and accepted by the jury, that appellant was in fact telling Malinda to lie about the incident in order to avoid the consequences of a parole violation. As indicated above, appellant does not dispute that the evidence showed he attempted to influence the content of Malinda's statements. The evidence supported a conclusion that appellant attempted to dissuade Malinda from "[c]ausing a . . . parole violation to be sought and prosecuted and assisting in the

prosecution thereof” by trying to influence her statements to his parole officer about the incident that led to his arrest.

Appellant’s assertion that he should have been prosecuted under section 137 is not persuasive. *Womack* refused to view section 137 as including an attempt to kill a witness because the language of section 137—inducing a witness to give false testimony or withhold true testimony—contemplated that the witness would testify, not be altogether prevented from testifying. (*People v. Womack, supra*, 40 Cal.App.4th at pp. 929-932.) *Fernandez* agreed with the *Womack* court’s refusal to “stretch the language of the statute at issue to cover the defendant’s conduct when another statute within the same chapter of the Penal Code clearly applied.” (*People v. Fernandez, supra*, 106 Cal.App.4th at p. 949 [emphasis added].) Here, no stretch is required to bring appellant’s conduct within the reach of the language of section 136.1, subdivision (b)(2).

II.

Appellant further contends his conviction must be reversed because the trial court failed to instruct the jury on the specific intent required under section 136.1, subdivision (c)(1).⁶ As explained above, section 136.1, subdivision (c)(1), provides that a person who commits an act proscribed by subdivisions (a) or (b) of the section “by force or by an express or implied threat of force or violence” is guilty of a felony punishable by a prison term of two, three or four years. As applied to the present case, section 136.1, subdivision (b)(2), described the prohibited conduct—attempting to dissuade a victim

⁶ Respondent urges that appellant forfeited this claim by failing to object to the instructions given, relying upon the principle that “a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) However, “[a] defendant need not assert an objection to preserve a contention of instructional error when the error affects the defendant’s “substantial rights.” (§ 1259.)” (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11.) Appellant’s claim is not merely that the instructions were incomplete but that by failing to instruct on the required specific intent, they were “not ‘correct in law.’” (*Id.* at p. 554.)

from causing a parole violation to be sought and prosecuted and assisting in the prosecution—and subdivision (c)(1) made that conduct a felony if accomplished by force or threat of force.

In discussing proposed jury instructions with counsel, the court stated its understanding that “although in the information, Count 2 is separately charged, the intent of the parties and the understanding was that that’s a special circumstance. So I used 2623. . . . [T]he issue is whether or not, if they find him guilty of intimidation, then they’ll be asked the question whether it was use of—or threatened use of force. So it’s the special allegation that we’ll ask the jury to specifically find.”

CALCRIM No. 2623, to which the court referred, is the jury instruction designed to apply to section 136.1, subdivision (c).⁷ Entitled “Intimidating a Witness: Sentencing Factors (Pen. Code, § 136.1(c)),” it directs, as applicable here, that if the jury finds the defendant guilty of intimidating a witness, it must then decide “whether the People have proved the additional allegation[s]” that the defendant used or threatened to use force.⁸ CALCRIM No. 2622, entitled “Intimidating a Witness (Pen. Code, § 136.1(a) & (b)),” defines the elements of a violation of section 136.1, subdivisions (a) and (b).⁹ In

⁷ CALCRIM No. 2623, as given in the present case, provides:

“If you find the defendant guilty of intimidating a witness, you must then decide whether the People have proved the additional allegations that the defendant used or threatened to use force. [¶] To prove this allegation, the People must prove that: [¶] 1. The defendant used force or threatened either directly or indirectly to use force or violence on the person or property of a victim or witness.”

⁸ Section 136.1, subdivision (c), requires that the prohibited acts be undertaken “knowingly and maliciously.” The Bench Notes to CALCRIM No. 2622, concerning section 136.1, subdivisions (a) and (b), explain that although subdivision (b) does not use the words “knowingly and maliciously,” the “knowing” requirement is included in CALJIC No. 2622 because the offense always requires a specific intent, and that where appropriate for the case, “maliciously” should also be added. The Bench Notes to CALCRIM No. 2623 direct that if the malice element is given in CALJIC No. 2622, it need not be repeated in CALCRIM No. 2623.

⁹ CALCRIM No. 2622, as given here, provides:

accordance with these standard instructions, the court explained to the jury that although it had originally been told appellant was charged with two counts, in fact there was only one count and then a special allegation. The court instructed that appellant was charged with a violation of section 136.1, detailed the elements of a violation of section 136.1, subdivision (b)(2), based on appellant having “maliciously tried to prevent or discourage Malinda M. from cooperating or providing information so that a parole violation could be sought and prosecuted, and from helping to prosecute that action,” and then directed the jury, if it found appellant guilty of intimidating a witness, to decide whether the additional allegation of use or threat of force had been established.

“The defendant is charged with intimidating a witness in violation of Penal Code Section 136.1.

“To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant maliciously tried to prevent or discourage Malinda M. from cooperating or providing information so that a parole violation could be sought and prosecuted, and from helping to prosecute that action;

“2. Malinda M. was a witness or crime victim; and,

“3. The defendant knew he was trying to prevent or discourage Malinda M. from cooperating or providing information so that a parole violation could be sought and prosecuted, and from helping to prosecute that action and intended to do so.

“A person acts maliciously when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.

“As used here, ‘witness’ means someone or a person the defendant reasonably believed to be someone: [¶] Who knows about the existence or nonexistence of facts relating to a crime;

“A person is a victim if there is reason to believe that a federal or state crime is being or has been committed or attempted against him or her.

“It is not a defense that the defendant was not successful in preventing or discouraging the victim or witness.

“It is not a defense that no one was actually physically injured or otherwise intimidated.”

Relying upon *People v. Upsher* (2007) 155 Cal.App.4th 1311, appellant argues that section 136.1, subdivision (b)(2), and section 136.1, subdivision (c)(1), are separate offenses, the former a lesser included offense of the latter, requiring jury instructions that completely describe the elements of each offense. “The crime of intimidating a witness requires proof that the defendant specifically intended to dissuade a witness from testifying.” (*People v. Young* (2005) 34 Cal.4th 1149, 1210.) Under section 136.1, subdivision (c)(1), the threat of violence must be “meant to achieve the consequence of affecting a potential witness’ testimony.” (*People v. Ford* (1983) 145 Cal.App.3d 985, 989.) Appellant’s complaint is that the instructions did not specifically inform the jury that it must find his use or threat of force was intended to influence Malinda’s statements to law enforcement.

In *People v. Upsher, supra*, the defendant was convicted of dissuading a witness with a prior conviction for the same offense (§ 136.1, subd. (c)(3)) and attempting to dissuade a witness (§ 136.1, subd. (b)(1)). Finding that the subdivision (b)(1) offense was necessarily included in the subdivision (c)(3) one—the latter could not be committed without also committing the former—the court reversed the section 136.1, subdivision (b)(1), conviction. (155 Cal.App.4th at p. 1321.) Multiple convictions based on necessarily included offenses are prohibited. (*Id.* at p. 1319.)

People v. Torres (2011) 198 Cal.App.4th 1131, explained that section 136.1, subdivision (c)(1), describes a discrete crime rather than a sentencing factor or enhancement. “In *Apprendi*’s [*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490] terms, subdivision (c)(1) does not describe a ‘sentencing factor’ of a subdivision (b)(1) violation, as a finding of the subdivision (c)(1) circumstances invokes a higher range of punishment than authorized for a subdivision (b)(1) conviction, with a maximum sentence of four years. Neither does subdivision (c)(1) describe an enhancement. An enhancement is ‘an additional term of imprisonment added to the base term.’ (Cal. Rules of Court, rule 4.405(3); cf. *People v. Dennis* (1998) 17 Cal.4th 468, 500.) Subdivision (c)(1) must be recognized as describing a greater offense with its own

alternative and separate sentencing scheme. (Cf. *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1835.)” (*People v. Torres, supra*, 198 Cal.App.4th at p. 1147, fn. omitted.)

The *Torres* court suggested that the trial court in that case might have been misled by the title to CALCRIM No. 2623, “Intimidating a Witness: Sentencing Factors,” and suggested that the instruction “would be improved by eliminating from its title the phrase ‘Sentencing Factors’ and by eliminating this characterization of the instruction from its bench notes. A greater improvement would be for the instruction to identify the multiple offenses described in section 136.1, subdivision (c)(1) as separate offenses with some overlapping and some different elements than the lesser offenses described in subdivisions (a) and (b).” (*People v. Torres, supra*, 198 Cal.App.4th at p. 1147, fn. 11.)

In *Torres*, the jury was not instructed on the additional elements required under section 136.1, subdivision (c), but the defendant was sentenced pursuant to that statute. Because it was impermissible to impose that sentence in the absence of jury findings under subdivision (c), the conviction was deemed to have been under section 136.1, subdivision (b), and the matter remanded for resentencing. In *Upsher*, the defendant was improperly convicted of two separate violations of section 136.1, under both subdivisions (b) and (c). Here, by contrast, appellant was convicted of only one offense. The only question is whether the jury was properly instructed that it could find appellant guilty only if, in committing the conduct charged under subdivision (b)(2) *and* the additional conduct charged under subdivision (c)(1), he acted with the intent to influence Malinda’s statements to law enforcement.

As we understand appellant’s argument, the only thing missing from the instructions given was the specific intent required to accompany the threat of force charged under subdivision (c)(1). But appellant misconstrues the nature of that specific intent. His complaint is that the jury was not told that his threats had to be made with the intent to prevent her from *initiating* the prosecution, which had already occurred by the time of the post-arrest threats. As explained in the prior section of this opinion,

appellant’s construction is incorrect: The application of subdivision (b)(2) is not necessarily limited to pre-arrest conduct. The specific intent required, in the circumstances of this case, was the intent to prevent or dissuade Malinda from “[c]ausing a . . . parole violation to be sought and prosecuted and assisting in the prosecution thereof.” (§ 136.1, subd. (b)(2).)

We see no way the jury could have misunderstood this requirement. The jury was fully instructed on the elements of the offense of intimidating a witness defined by section 136.1, subdivision (b)(2). It was instructed that if it found appellant guilty of witness intimidation, it had to determine whether the prosecution had proved that appellant used or threatened to use force. The instructions and verdict form clearly connected the allegation of force to the offense of witness intimidation. The jury could not have misunderstood that the threat of force had to be made with the purpose defined as an element of witness intimidation. Appellant’s argument is based on his assumption that the jury could have misunderstood the required purpose and believed his threats to have been directed at influencing Malinda’s statements rather than at trying to prevent her from initiating the prosecution—but, as we have said, the former possibility was sufficient to satisfy the requirements of section 136.1, subdivisions (b)(2) and (c)(1). Accordingly, any error in the instructions or verdict form resulting from treatment of section 136.1, subdivision (c)(1), as a sentencing factor rather than a separate offense was harmless.¹⁰

¹⁰ Appellant additionally contends he received ineffective assistance of counsel in that his attorney failed to research the specific intent required for a violation of section 136.1 and argued an incorrect requirement in closing arguments. This contention depends on appellant’s assumption that section 136.1 applies only to efforts to prevent someone from testifying altogether, not efforts to influence their testimony. Having determined that appellant’s conduct fell within the purview of section 136.1, subdivisions (b)(2) and (c)(1), and that the required specific intent was adequately conveyed to the jury, we necessarily reject the claim of ineffective assistance of counsel.

III.

Appellant next urges that his case must be remanded for resentencing because the trial court was unaware of its discretion under section 1385 to strike his prison priors in the interests of justice. Where the record affirmatively discloses that a trial court misunderstood the scope of its discretion under section 1385 to strike one or more of defendant's prior felony conviction allegations under the "Three Strikes" law, remand to the trial court is required "to permit that court to impose sentence with full awareness of its discretion as clarified in *Romero*." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 943-944; see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13.) On the other hand, "in light of the presumption on a silent record that the trial court is aware of the applicable law, including statutory discretion at sentencing, we cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of [its] discretion." (*People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527.)

As described above, the information contained six special allegations, the first five of which alleged prior prison terms within the meaning of section 667.5, subdivision (b), including one for a 1996 conviction of attempted car jacking. These allegations exposed appellant to a one-year prison term for each prior prison term. (§ 667.5, subd. (b).) The sixth special allegation alleged that the attempted car jacking conviction came within the meaning of sections 1170.12 and 667, exposing appellant, among other things, to a doubled term for the present offense. (§§ 1170.12, subd. (c)(1), 667, subd. (e)(1).)

The probation report noted that Malinda wanted appellant to receive the lowest sentence possible and that appellant's parole officer described him as a "model parolee" who worked hard and never caused problems, but that appellant "could not grasp the seriousness of the crime he was found guilty of." Finding several aggravating circumstances related to appellant's criminal history and poor performance on parole and no mitigating circumstances, the probation report recommended that appellant be sentenced to the aggravated term, that this term be doubled as required by section 1170.12 pursuant to the sixth special allegation, and that consecutive one-year

terms be imposed for the prior prison terms described in the first through fourth special allegations. The report noted that the term for the fifth special allegation should be stayed because that prison sentence was concurrent with the one described in the fourth special allegation.

Prior to sentencing, appellant filed a “Request for the Court to Exercise its Discretion and Dismiss Prior Strike Pursuant to Penal Code Section 1385.” This request referred to “prior strike” in the singular throughout, with the exception of the last sentence, which asked that “all strike counts be stricken.” Respondent’s opposition, titled “Response to Defendant’s Motion to Strike 6th Special Allegation,” mainly argued against the court striking the prior car jacking conviction but at one point asked that appellant’s sentence be “enhanced based on all the Special Allegations, all his prison priors, as well as his strike offense.”

At sentencing, defense counsel argued that appellant had been doing well on parole and the present offense was “just verbal,” not the kind of crime deserving “a sanction that a strike is intended for.” The prosecutor argued that the present offense was “not de minimis” and was itself a strike, enumerated in section 1192.7 as a serious felony (§ 1192.7, subd. (c)(37)), and that appellant had an extensive criminal history. The court denied the motion to strike after stating that it viewed the present offense as “serious conduct,” not “de minimis,” that it was also considering that the victim and parole officer did not believe appellant intended to carry out his threats; and that appellant had a “horrendous” record and was on parole when he committed the present offense.

Turning to other sentencing issues, the probation officer and prosecutor argued that the aggravating circumstances outweighed the mitigating, and the prosecutor pointed out, with respect to the “prison priors,” that there was only one commitment on the two cases alleged in the fourth and fifth special allegations. Defense counsel called the case “a sad indictment” of district attorneys “trying to get convictions based on things that should have been dealt with in a different way” and “an injustice.” He referred in particular to the process by which the jury decided whether appellant had suffered the

prior convictions and served the prison terms as alleged in the special allegations, which he described as the jurors having been given two exhibits (two “969(B) packets” containing the certified priors) and told to “ferret it out” for themselves. Malinda begged the court to give appellant the minimum sentence, urging that although they argued, appellant was a good man and father, they deserved to be a family and her son needed his father.

After stating that probation was prohibited by section 1170.12, the court imposed the mitigated term on appellant’s section 136.1 conviction, explaining that although appellant’s conduct was not de minimis, Malinda’s wishes and appellant’s efforts on parole “strongly mitigate the circumstances” of the case. The court then stated, “I looked at 667.5(B) to see if the court had any discretion to run of any of those concurrent. And I do not. I’m obligated to impose a consecutive one year for the first special allegation, the second special allegation, the third special allegation, and the fourth special allegation. [¶] As indicated by the prosecution and as reported in the probation officer’s report, I think, the fifth special allegation is 654 and will be one-year stayed. [¶] I have to double the term for count 1, which would be an additional two years.”

Appellant argues that the court’s remarks at sentencing suggest it did not realize it had discretion to strike the prison priors and, had it realized it did, it might have imposed a more lenient sentence. Appellant notes that the court said the law did not permit it to grant probation without saying it would not have considered probation if permitted to do so. He particularly points to the court’s statement that it “looked at section 667.5(B) to see if the court had any discretion to run any of those concurrent” as demonstrating the court was looking for a way to impose a more lenient sentence. We are not persuaded that the court was unaware of its discretion.

Preliminarily, as far as we can discern from the record, appellant never asked the trial court to dismiss the prior prison allegations under section 1385. The request under section 1385 was directed at the single alleged prior “strike”—that is, the special allegation that invoked sections 667 and 1170.12. (See *People v. Fuhrman, supra*,

16 Cal.4th 930, 932, fn. 2 [“We use the term ‘strike’ to describe a prior felony conviction that qualifies a defendant for the increased punishment specified in the Three Strikes law.”].) The request never mentioned the prison priors. Respondent’s opposition was specifically entitled “Response to Defendant’s Motion to Strike 6th Special Allegation.”¹¹ “[F]ailure on the part of a defendant to invite the court to dismiss under section 1385 following *Romero* waives or forfeits his or her right to raise the issue on appeal.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376; see *People v. Lee* (2008) 161 Cal.App.4th 124, 131.)

In any event, if we construe appellant’s request as asking the court to exercise its section 1385 discretion to dismiss all the special allegations, we could not view the record as affirmatively demonstrating the trial court was unaware it could dismiss the prior prison allegations as well as the prior strike. As respondent points out, appellant’s

¹¹ The only reference to the alleged prison priors was in respondent’s opposition to the request to dismiss, and this reference distinguished the prison allegations from the strike prior at which appellant’s request was directed: In the section of its pleading addressing “objective of criminal sentencing” (which preceded the discussion specifically discussing the Three Strikes law), respondent asked the court to enhance appellant’s sentence “based on all the Special Allegations, all his prison priors, *as well as* his strike offense.” (Emphasis added.)

Respondent’s assertion that defense counsel “specifically requested that the court dismiss all of the special allegations, including the prior prison term allegations” misreads the record. At the page of the reporter’s transcript cited, defense counsel was arguing that process by which the jurors decided the special allegations was improper. The court had already denied the motion to strike and turned to other sentencing issues. After stating that the jurors had been given the section 969(B) packets and told to figure out for themselves whether the special allegations were true, defense counsel argued, “So, this is an injustice and it’s an injustice that offends me. I think those five allegations should have been stricken. I think that they should have been mistrialed right at the beginning. [¶] I think that the fact that the D.A. did not even present the evidence in the proper fashion should have been—should have been grounds for dismissal of those allegations.” In context, it is clear that defense counsel was not asking the court to dismiss the special allegations pursuant to its discretion under section 1385 but arguing they should have been dismissed because they had not been properly proven by the prosecution.

request to dismiss quoted from cases describing the court's broad authority to dismiss all or part of a case, including sentencing allegations, in furtherance of justice. These quotations set forth the principles that should guide a court's exercise of discretion to "dismiss[] a case, or a sentencing allegation" (*Romero, supra*, 13 Cal.4th at p. 531) or "strike prior conviction allegations in a Three Strikes case" (*People v. Garcia* (1999) 20 Cal.4th 490, 498). The request to dismiss thus provided the court with authority for exercising its discretion to strike any or all of the special allegations.

The court's comments about investigating whether it had discretion to sentence concurrently on the prison priors do not affirmatively demonstrate that the court would have stricken these enhancements if it believed it had the authority to do so. Appellant assumes that the court's expression of interest in leniency means it would have done whatever it could to reduce his sentence. Such an assumption ignores the court's decision not to strike the section 667/1170.12 enhancement. In refusing to strike that prior, the court stated that despite the mitigating circumstances of the present offense, the offense was serious and appellant's criminal record was "horrendous." The court's decision was thus consistent with the principles that are supposed to guide a court's determination whether to strike a prior conviction allegation: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question 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. Williams* (1998) 17 Cal.4th 148, 161.)

The Three Strikes law "establishes a sentencing norm" and "carefully circumscribes the trial court's power to depart from this norm." (*People v. Carmony*,

supra, 33 Cal.4th at p. 378.) “ ‘[T]he circumstances must be “extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record[.]’ ” (*Id.* at p. 378, quoting *People v. Strong* (2001) 87 Cal.App.4th 328, 338.) Here, considering both the current offense and appellant’s criminal history, the trial court was unwilling to depart from the established sentencing scheme triggered by appellant’s prior strike.

By contrast, the trial court *did* exercise leniency in sentencing appellant to the lower term for the present offense—contrary to the recommendation of the probation department. The court thus demonstrated a willingness to be lenient where it had discretion to do so within the ordinary sentencing scheme. In context, the court’s remarks about considering whether it had discretion to sentence concurrently on the prison priors appear to reflect this same willingness to exercise leniency if permitted under standard sentencing rules. They do not justify a conclusion that the court would have viewed the circumstances as justifying the “extraordinary” step of striking the prison priors under section 1385. We find no affirmative indication that the court was unaware of its discretion.

IV.

Respondent points out several errors in the abstract of judgment that require correction.

First, as earlier indicated, the abstract of judgment lists appellant’s conviction as a violation of section 136.1, subdivision (b)(2). Consistent with the jury’s findings and the trial court’s oral statements and sentence (as discussed in section II, above), the abstract of judgment must be corrected to indicate that appellant’s conviction was under subdivision (c)(1) of section 136.1.

Second, although the abstract of judgment indicates the correct length for the base term imposed on appellant’s conviction (four years), it incorrectly indicates that the trial court imposed the middle term sentence. The trial court stated on the record that it was

imposing a lower term sentence, doubled as required due to appellant's prior strike. The trial court minutes incorrectly indicate the sentence imposed was the middle term.

Third, the abstract of judgment indicates that sentence on one of the prior prison enhancements was stayed. The record reflects that the prosecutor and court agreed that appellant served his sentences for the convictions described in special allegations 4 and 5 concurrently. Rather than stay sentence on the fifth alleged enhancement under section 654, as the trial court did, the enhancement should have been dismissed because the alleged prior was not a "separate prison term" as required under section 667.5, subdivision (b).¹²

DISPOSITION

The abstract of judgment must be corrected to state that appellant's conviction was under subdivision (c)(1) of section 136.1; to state that the sentence imposed for this conviction was the lower term, doubled; and to delete reference to a stayed one-year term under section 667.5, subdivision (b). The trial court minutes shall be corrected accordingly, as well as modified to reflect that the finding on the fifth special allegation is stricken.

With these modifications, the judgment is affirmed.

¹² Respondent additionally states that the abstract of judgment incorrectly indicates the court imposed three one-year terms pursuant to section 667.5 rather than the four such terms actually imposed. The abstract of judgment does accurately reflect four one-year terms for the section 667.5, subdivision (b), enhancements. No correction is required in this regard.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.