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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.

JASON THOR BROADBENT,

Defendant and Appellant.

A141538

(San Mateo County Super. Ct.
Nos. SC076334A & SC076974A)

Jason Thor Broadbent was convicted, following a jury trial, of 14 misdemeanor counts of violating a court order, two felony counts of attempting to dissuade a victim from testifying and two felony counts of attempting to dissuade a victim from causing criminal charges to be filed. On appeal, he contends (1) the evidence was insufficient to support any of the four dissuading a victim convictions; (2) the trial court erred when it failed to instruct the jury more specifically regarding the difference between the two dissuading a victim subdivisions under which he was convicted; and (3) the court abused its discretion when it denied his motion to reduce the dissuading a victim offenses to misdemeanors or, alternatively, when it refused to dismiss a prior strike offense. The judgment is affirmed.

PROCEDURAL BACKGROUND

On November 19, 2012, appellant was charged by amended information in case No. SC076334A with one felony count of stalking (Pen. Code, § 646.9, subd. (a)—count

1);¹ three felony counts of making criminal threats (§ 422—counts 2, 3, & 4); and 15 misdemeanor counts of violating a court order (§ 273.6, subd. (a)—counts 5-19). The information also alleged a prior strike conviction (§ 1170.12, subd. (c)(1)); probation ineligibility due to seven felony convictions between 1988 and 2010 (§ 1203, subd. (e)(4)); a prior serious felony conviction (§ 667, subd. (a)); and a prior prison term (§ 667.5, subd. (b)).

Also on November 19, 2012, appellant was charged by information in case No. SC076974A with two felony counts of attempting to dissuade a victim from testifying (§ 136.1, subd. (a)(2)—counts 1 & 2); two felony counts of attempting to dissuade a victim from causing criminal charges to be filed (§ 136.1, subd. (b)(2)—count counts 3 & 4); and one misdemeanor count of violating a court order (§ 273.6, subd (a)—count 5). The information also contained the same prior conviction and prison term allegations as those set forth in the amended information filed in case No. SC076334A.

On February 14, 2013, the trial court dismissed counts 2 and 5 in case No. SC076334A and consolidated the two cases.

On November 25, 2013, following a bifurcated trial on the prior conviction and prison term allegations in both cases, the trial court found the allegations true.

On December 3, 2013, the jury found appellant not guilty of the three remaining felony counts and found him guilty of the 14 remaining misdemeanor counts in case No. SC076334A. In case No. SC076974A, the jury found appellant guilty as charged.

On February 18, 2014, in case No. SC076974A, the trial court sentenced appellant to a total term of eight years, eight months in prison.

On April 10, 2014, appellant filed a notice of appeal from the judgment in both cases.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL BACKGROUND

Maria Broadbent² testified that appellant is her former husband. They dated for less than a year before getting married in 2003. When she met appellant, Maria had a two-year-old son, Demetrius, whose father is Jason Pember. There were five or six instances of domestic violence during Maria's relationship with Pember.

In 2004 or 2005, the police came to the home Maria shared with appellant while they were having a verbal argument. They also had verbal arguments in May and June 2005. On December 15, 2005, Maria called the police regarding a phone bill because she suspected that appellant was having an affair. On another occasion, Maria bit appellant while he was physically restraining her and refused to let her go. Although Maria spoke to the police that night, neither she nor appellant was arrested.

In October 2005, Maria gave birth to Donovan, who is also appellant's son. Before Donovan's birth, other than the biting incident and "some pushing and shoving," all of the other incidents between Maria and appellant were verbal in nature. After Donovan's birth, there were more physical altercations. On one occasion, appellant "smothered" Maria with a pillow while saying he was going to kill her. On another occasion, appellant hit her with a tire iron. He also raped her five to seven times, and regularly verbally abused her, calling her names such as "bitch," "slut," and "crazy."

While Maria was pregnant with Donovan, as well as on multiple occasions after his birth, Maria told appellant she wanted to leave him. He would either threaten to kill her or say, "Just do it and see what happens.'" He also would say that her two children would never see her again. He threatened to do something to her mother, sister, and brother if she "ever told them anything." Maria kept these threats from her family because she did not want them to get hurt and because she was embarrassed. Appellant did not work after 2005, which was a stressor in their relationship. He would come to her workplace "all the time" while she was working.

² We refer to Maria Broadbent as "Maria" to avoid confusion.

In January 2011, appellant went to prison. Maria wrote to him frequently—as many as 100 letters—between January and May. She did this because she knew she was supposed to play the role of supportive wife.³ However, in May 2011, Maria decided she wanted a divorce, which she told appellant by phone.⁴ He responded that she “kn[e]w what would happen” if she went through with it. In June or July, Maria saw a friend of appellant’s known as “Ghandi” sitting in a car in the parking lot of her workplace; he sat there for 15 or 20 minutes looking at her through a window before leaving. Another time, she saw a different friend of appellant’s standing outside her workplace for a similar length of time.

Maria first obtained a temporary restraining order in November 2011, because of appellant’s threats, and ultimately got a divorce. In her application for a restraining order, she included a letter, dated November 10, 2011, in which appellant wrote, “ ‘I’m in no position not to be informed or played with Mama.’ ” He also wrote, “ ‘You’re my wife, and you already know my pedigree. I don’t play. [¶] . . . [¶] I go hard in the paint when my back is against the wall.’ ” Maria felt more comfortable about taking action to leave appellant because she knew he would be in custody for at least another year.

In May 2012, Maria began to receive regular collect phone calls from appellant from prison, after the automated portion of which there was a pause in which appellant had the opportunity to say his name. Maria did not accept any of the collect calls. On May 23, she received a collect call in which, in the space for the inmate to announce himself, she heard appellant say, “ ‘You’re dead.’ ” This scared her. The next two evenings she also received collect calls with appellant saying the same thing. She reported these threatening calls to police. On another occasion, Maria received a phone

³ The letters, which were admitted as defense exhibits at trial, contained many expressions of love. For example, as late as May 5, 2011, Maria wrote to appellant: “I love you dad [appellant’s nickname], with all my heart and I miss you even more. I can’t wait to hold you again. Thank you for EVERYTHING and I mean EVERYTHING! I always knew you were a BOSS forreal [*sic*]. SEE YOU SOON DADDY!!!!”

⁴ Appellant acquired a cell phone while in prison, in approximately May 2011.

call from a woman, who then brought appellant on the line too. Maria asked the woman not to call again.

After Maria obtained the restraining order, appellant wrote numerous letters to her and the children at her sister's house in Pacifica, many of which she turned over to the Pacifica Police Department because they were sent to her in violation of the restraining order. In one letter, appellant asserted that “ ‘I'm fucking you up,’ ” if he came home and found that Maria had cheated on him. Based on the letters Maria gave to the police, a criminal case was initiated.

In a June 12, 2012 letter to Maria's older son, Demitrius, who was 11 years old at the time, appellant added a note at the bottom for Maria, in which he wrote, inter alia, that “ ‘the D.A. is trying to strike me out. . . . I'm done if you don't help. They're trying to bury me.’ ” In another letter from appellant to his and Maria's son, Donovan, which came in the same envelope as the letter to Demitrius, appellant wrote at the bottom, “ ‘Merly [Maria's nickname], I don't know if you understand the significance of what you're doing, or have done, but now I'm threatened with strike “3” . . . that's life . . . in prison . . . The only way to avoid it, you must . . . “drop all” . . . petitions’ ” Maria understood the phrase, “drop all petitions” to mean that he wanted her “to drop all that he was being charged with, to retract the restraining order, to take everything back.” She believed he wanted her to lie and say that she had been lying or that the letters “weren't true,” in order “to drop the charges that were being filed against him.”

Hussein Nava testified that he was an employee with Scurus Technologies, which was the Internet phone provider for the San Mateo County Jail. Inmates can either prepay for phone calls or call collect. When an inmate makes a call, the recipient is told whether it is a collect call and that the call is coming from the jail. The inmate is then given two or three seconds to state his or her name. The calls are recorded only if the collect call is accepted, although the system will retain the number called. Between May 2 and May 26, 2012, 355 calls were made to Maria's phone number from the jail; none of the attempted calls was completed.

Pacifica Police Officer Steven Mansker testified that he met with Maria on December 21, 2011, at which time she provided him with a copy of the restraining order and letters from appellant. She subsequently gave him additional letters sent to her by appellant and participated in a recorded interview with Mansker on February 7, 2013.

Pacifica Police Detective Bill Glasgo testified that he met with Maria on May 26, 2012, regarding appellant's possible violation of the restraining order. She gave him 16 letters and reported that appellant was constantly calling her in violation of the order. On that same date, Glasgo contacted jail staff about the possible violation and requested termination of appellant's phone privileges. Glasgo again met with Maria in September 2013, and she gave him additional letters.

Christopher Morita testified that he was married to Maria's sister. Morita had known appellant for approximately 10 years. Appellant, Maria, and their children lived with Morita and his wife for at least nine months before appellant was taken into custody. Appellant had once told Morita that if he ever cheated with Maria, " 'I would have to kill you.' " This scared Morita because appellant was "kind of a violent person. He gets these ideas in his head and reason doesn't seem to matter to him." Appellant once told Morita that he had broken down a bedroom door in his house to get to Maria, who "was apparently trying to make a phone call to get out of the house."

After Donovan's birth, Maria contacted Morita two or three times for assistance, which led Morita to go to her house. She also came to his house on many occasions. She was upset at these times, but would not talk about what had happened. Morita also received letters from appellant at his home in Pacifica.

Nancy Lemon testified as an expert in domestic violence and intimate partner battery. Domestic violence incidents are underreported to law enforcement. Lemon described some of the myths related to domestic violence, as well as the cycle of violence that often occurs in domestic violence cases. It is common for victims to stay with their abusers and hide the abuse from others or to report minor incidents of abuse while not reporting more serious incidents. Abuse often increases during pregnancy and after the birth of a child.

Lemon testified that sometimes a victim waits to report domestic violence until she feels safe to do so, for instance after a partner is arrested. Lemon had seen cases in which a woman writes a love letter to an abusive spouse and later informs him that she wants a divorce. This could be because the woman is initially trying to placate the person until she feels safe enough to take action. Many times, when an abuser is incarcerated, he will have friends check on the victim and report back to him. Most, though not all, victims of domestic violence do not subsequently enter into another abusive relationship.

Alisha Pember testified that she was married to Maria's ex-boyfriend, who was also the father of one of Maria's children. Once, soon after Maria's second son was born, Maria called Pember to make arrangements to pick up her older son, and she sounded upset. When Pember asked what was wrong, she said that appellant "took a crowbar to her neck." Another time, Maria told her that appellant had "forced himself on her" sexually.

Pember did not believe Maria was a credible person. She had made false allegations during a family law custody hearing related to the child she shared with Pember's husband. She believed Maria when she told her about the two incidents with appellant, but, after Maria lied in the family court matter, she thought, "If you can lie about my son, what else are you capable of lying about."

Deborah Ferrer-Buckley testified that she had worked with Maria at a warehouse in Brisbane for two years. Buckley recalled appellant coming to the warehouse some three years before trial. He was combative and argumentative with Buckley as he tried to get in to see Maria. Ferrer-Buckley said he would have to leave the premises or she would call the police. Ferrer-Buckley had previously heard Maria on the phone with appellant, and Maria was crying. It was not common for employees' spouses to visit them at the warehouse.

DISCUSSION

I. *Sufficiency of the Evidence of Dissuading a Victim*

Appellant contends the evidence was insufficient to support any of his convictions under section 136.1.

A. *Trial Court Background*

Appellant was charged with two counts of attempting to dissuade a victim from testifying, pursuant to section 136.1, subdivision (a)(2), and two counts of attempting to dissuade a victim from causing criminal charges to be filed, pursuant to section 136.1, subdivision (b)(2). Those counts were based on the notes to Maria at the bottom of two letters, both dated June 12, 2012,⁵ and both written by appellant, with one addressed to appellant's stepson, Demetrius (nickname "Dee"), and one addressed to his son, Donovan (nickname "Papa"). The note at the end of the letter to Demetrius read:

"Tell Mom read Donovan's letter. . . . The D.A. is trying to strike me out!! [¶]
God will bare [sic] witness.

"Merly, I went to Court this morning 6-12-12, @ 9 AM, 3 Felony Counts—422 P.C. [¶] (I got (2) strikes already) 422 P.C. are strikes!! [¶] (That's 3 more strikes[.]

"Is this how you intended for this to turn out. . . ??

"On my Dad, my Mom, Donovan & all my kids lives, I'm DONE if you don't help!! They're trying to bury me!!"

The note at the end of the letter to Donovan read:

"Merly, I don't know if you understand the significance of what you're doing, or have done—but now I'm threatened with strike '3'. . . That's Life in Prison. . . . The only way to avoid it, you must 'drop all' petitions!! Look, point taken, & made. . . . You win. . . . But is this how you want to do it. . . . Locked away, and toss the key away—because the D.A. is filing a FELONY plus 11-other counts. . . . You're EF-n me up in

⁵ This was the date of appellant's arraignment on felony charges and also apparently the date on which the preliminary hearing date was set in case No. SC076334A.

ways that are irreversible. . . . You must drop everything or I'm done. . . (FOREVER LOCKED AWAY) on my Dad!!”

The trial court instructed the jury on these counts with CALCRIM No. 2622.⁶

B. Legal Analysis

“To assess a claim of insufficient evidence in a criminal case, ‘we review the whole record to determine whether any rational trier of fact could have found the

⁶ The court’s instruction under CALCRIM No. 2622, with respect to the two counts alleging violations of section 136.1, subdivision (a)(2), read as follows: “To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant maliciously tried to discourage or discouraged Maria Broadbent from attending or giving testimony at a preliminary hearing or trial.

A person acts maliciously when he 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.

“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 her.

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

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

The court’s instruction under CALCRIM No. 2622, with respect to the two counts alleging violations of section 136.1, subdivision (b)(2), read as follows: “To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant tried to prevent or dissuade Maria Broadbent from causing a complaint or information to be sought and prosecuted, and assisting in the prosecution thereof.

“ ‘Information’ used herein means the first pleading on the part of the people in the superior court in a felony following a preliminary hearing.

“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 her.

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

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

essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. . . . “We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” [Citation.] [Citation.]” (*People v. Wahidi* (2013) 222 Cal.App.4th 802, 805-806 (*Wahidi*)). To the extent we are required to interpret the applicable statutory provisions, our review is de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.)

Appellant’s convictions on counts 1 and 2 were for violations of subdivision (a)(2) of section 136.1, and his convictions on counts 3 and 4 were for violations of subdivision (b)(2) of that statute.

Section 136.1, subdivision (a), provides, in relevant part:

“Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense . . . : [¶] . . . [¶]

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

Section 136 provides the applicable definition of malice used in subdivision (a)(2) of section 136.1: “As used in this chapter: [¶] (1) ‘Malice’ means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice.”

Section 136.1, subdivision (b), provides, in relevant part:

“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 . . . : [¶] [¶]

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

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. [¶] Some of the statutes in this chapter target threats of violence made by a defendant after his conviction of a felony, or in retaliation for cooperation with law enforcement. (§§ 139, 140.) Others punish efforts to prevent a victim or witness from appearing in court and giving testimony. (§§ 136.1, subds. (a)(1) & (2), (c); 138, subd. (a); [citation].) Still others punish attempts to influence the *content* of testimony given, as distinguished from efforts to prevent a victim or witness from appearing at all. (§ 137, subds. (a)-(c); [citation].)” (*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.)

1.

Appellant first argues that there was insufficient evidence to show that he had the specific intent to dissuade Maria either from testifying (§ 136.1, subd. (a)(2)), or interfering with the filing of an information (§ 136.1, subd. (b)(2)). According to appellant, his “benign” and “desperate” comments, added as “postscripts” and “afterthought[s]” to his letters to his son and stepson, do not reflect the specific intent required under section 136.1. We disagree.

There is “ ‘no talismanic requirement that a defendant must say “Don’t testify” or words tantamount thereto, in order to commit the charged offenses. As long as his words or actions support the inference that he . . . attempted by threat of force to induce a person to withhold testimony [citation], a defendant is properly’ convicted of a violation of [a section 136.1 violation]. [Citation.]” (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1344 (*Mendoza*) [discussing subdivision (c)(1) of section 136.1].) Indeed, “[i]f the defendant’s actions or statements are ambiguous, but reasonably may be interpreted as

intending to achieve the future consequence of dissuading the witness from testifying, the offense has been committed. [Citation.]” (*Wahidi, supra*, 222 Cal.App.4th at p. 806.)

For example, in *People v. Lyons* (1991) 235 Cal.App.3d 1456, 1459, footnote 3 (*Lyons*), the defendant had sent the victim a letter from jail, which stated: “ ‘Hello Don: [¶] I’m in the county jail and you won’t believe what I am charged with. guess? . . . “Robbery.” Some white guy with a black leather jacket pointed me out to the police the day before Thanksgiving, saying I robbed him for his watch and gold chain. Ain’t that a bitch? All this supposedly happened in front of the Greyhound station. [¶] I’ll be going to a “preliminary-hearing” on the 14th of next week. A “preliminary hearing” is a court proceeding where the guy that said I robbed him has to come to court and testify and identify me as the person that robbed him. The guy has a right not to show up in court, and if he does not, I will be set free. And if he does show up in court and says I’m not the person that robbed him, or that he’s not sure if I’m the person that robbed him, I will be set free. But if he does come to court and says I’m the person that robbed him I will still be set free because I have three witnesses that will testify that I was no-where [*sic*] near the Greyhound station during the time the robbery took place. [¶] Well, back to you. How are you feeling? I hope you’re in the best of health and manage to stay that way, because when I get out we’re going to do some drinking and partying and celebrate the holidays and look forward to a prosperous future in 1990. [¶] See Ya!! [¶] P.S. Come by and visit me. Visiting is from 9:AM to 11:PM.’ ” With respect to whether the evidence demonstrated the defendant’s specific intent to violate section 136.1, subdivision (a), the court stated that it could find “no plausible explanation for defendant’s act of sending the letter” to the victim “without ascribing to him an intention to dissuade” the victim from testifying at the preliminary hearing. (*Lyons*, at p. 1461.)

Here, the jury could reasonably infer that appellant’s notes to Maria, repeatedly referring to the lengthy prison term he faced if she did not help him and “drop all petitions”—sent the same day appellant was arraigned on felony charges and the same day the preliminary hearing date was set—were written with the specific intent to influence her to act in ways described in section 136.1, subdivision (a)(2) and (b)(2).

(See *Wahidi, supra*, 222 Cal.App.4th at p. 806; *Mendoza, supra*, 59 Cal.App.4th at p. 1344.)⁷ Moreover, although appellant is correct when he states that, in his letters, he “did not allude to any consequences that would befall Maria if she were to testify against him or cooperate with the prosecution,” threats are not an element of either of these subdivisions. (Compare § 136.1, subd. (c)(1) [further penalizing a defendant who performs acts described in subdivisions (a) or (b) “[w]here the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim . . .”].)

Substantial evidence thus supports the interpretation argued by the prosecutor and accepted by the jury: that, when he wrote to Maria, appellant had the specific intent to convince her to not cooperate in the case against him, in violation of section 136.1, subdivisions (a)(2) and (b)(2). (See *Wahidi, supra*, 222 Cal.App.4th at pp. 805-806.)

2.

Appellant next argues, more specifically, that there was insufficient evidence to prove a violation of section 136.1, subdivision (a), in that the record does not support a finding of malice.

Section 136 defines “malice” as it is used in subdivision (a) of section 136.1: “ ‘Malice’ ” means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice.” (§ 136, subd. (1).)

In *Wahidi, supra*, 222 Cal.App.4th at page 807, the appellate court discussed the potential problem with this definition of malice, first noting that it “appears to write the word ‘maliciously’ out of section 136.1. [Citations.] Section 136.1, subdivision (a)(2),

⁷ In his briefs, appellant emphasizes certain evidence presented at trial and the jury’s numerous verdicts of not guilty to support his assertion that Maria was not credible and that appellant intended in his letter only to implore her to reconsider her exaggerated version of events. Our role on appeal, however, is not to resolve either credibility issues or evidentiary conflicts. It is simply to determine whether the jury’s verdicts are supported by substantial evidence. (See *Wahidi, supra*, 222 Cal.App.4th at p. 806.)

makes it a crime to attempt to prevent a witness from testifying when the attempt is made with knowledge and malice. Substituting the definition of malice from section 136, and recognizing that preventing a witness from testifying always interferes in some manner ‘with the orderly administration of justice,’ section 136.1, subdivision (a)(2), makes it a crime to attempt to prevent a witness from testifying when the attempt is made with knowledge and with the intent to prevent the witness from testifying.”

The court then discussed the legislative history of sections 136 and 136.1, which “were enacted together in 1980 as part of Assembly Bill No. 2909 (1979-1980 Reg. Sess.) (Stats. 1980, ch. 686, §§ 2, 2.1, p. 2076.) Among other revisions, Assembly Bill 2909 . . . ‘clarifie[d] existing California law by requiring the act of dissuasion to be done with knowing and malicious intent.’ [Citation.]” (*Wahidi, supra*, 222 Cal.App.4th at p. 807.) The *Wahidi* court observed that both the Assembly Committee on Criminal Justice and the Senate Committee on Judiciary had stated that the proposed legislation would enact a new law on intimidation of witnesses and victims that was patterned after the Model Statute drafted by the American Bar Association (ABA) Section on Criminal Justice. (*Wahidi*, at p. 808; see *Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 956 [Legislature replaced former section 136 with, inter alia, new sections 136 and 136.1 “[i]n large part in response to” ABA report and recommendations]; see also, e.g., *Khan v. Los Angeles City Employees’ Retirement System* (2010) 187 Cal.App.4th 98, 107 [“ ‘Committee materials are properly consulted to understand legislative intent, since it is reasonable to infer legislators considered explanatory materials and shared the understanding expressed in the materials when voting to enact a statute’ ”].)

As the court in *Wahidi* explained, the Legislature ultimately incorporated the model statute’s definition of the term “malice,” regarding which the commentary section of the ABA Section on Criminal Justice, Committee on Victims had stated: “ ‘The Committee felt a need to draw a distinction between persuasion, often rather vigorous, which may be exercised by, for example, a victim or a witness’ family members whose motivation for attempting to persuade the person not to testify is legally blameless. Consequently the malice intended in and defined by the statute should be intentionally

and knowingly exercised. The committee grappled considerably with this issue. Some members wished to punish all dissuading but for certain narrowly drawn exemptions, but the majority felt that the statute would potentially punish, for instance, a person casually remarking to a potential witness that he or she should not bother getting involved in the process.’ [Citation.]” (*Wahidi, supra*, 222 Cal.App.4th at p. 809.)

The *Wahidi* court concluded: “Thus, the model statute, on which California’s statute was based, was designed to apply to persons who attempt to dissuade witnesses from testifying, other than persons such as family members and individuals who make offhand comments about not becoming involved.^[8]” (*Wahidi, supra*, 222 Cal.App.4th at p. 809.) By including in section 136 the definition of malice “that is unique to the statute (to thwart or interfere in any manner with the orderly administration of justice),” “the Legislature envisioned a relatively broad application of the term.” (*Wahidi*, at p. 809.)⁹ In light of this statutory definition of malice and the related legislative history, the court held that there was substantial evidence to support the jury’s conclusion that the defendant had acted maliciously in attempting to persuade the victim not to testify at the preliminary hearing the following day. (*Ibid.*)¹⁰

⁸ The court noted that section 136.1, subdivision (a)(3), was added in 1997 (Stats. 1997, ch. 500, § 1, p. 3123) to “directly address[] the issue of family members who attempt to dissuade a witness or victim from testifying not as part of an effort to interfere with the administration of justice, but out of concern for the welfare and safety of the witness or victim.” (*Wahidi, supra*, 222 Cal.App.4th at p. 809, fn. 4; see § 136.1, subd. (a)(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”].)

⁹ In this opinion, we at times refer to this latter definition of malice in section 136, subdivision (1)—“to thwart or interfere in any manner with the orderly administration of justice”—as the “second definition” or “second type” of malice.

¹⁰ While the legislative history demonstrates that the Legislature intended that the term “malice” have a “relatively broad application” (*Wahidi, supra*, 222 Cal.App.4th at p. 809), it also shows that this second definition of malice does not, as appellant avers, “in effect, remove[] malice from the equation entirely, absent a finding under its traditional definition.”

We find persuasive the *Wahidi* court’s analysis and agree that the legislative history reflects the Legislature’s intent for the second definition of malice set forth in section 136, subdivision (1), to broadly encompass efforts to dissuade a witness from attending or testifying at a proceeding in a case such as this one. (See § 136.1, subd. (a)(2).)¹¹ Here, the evidence showed that appellant wrote two letters, which included the notes to Maria emphasizing the penalties he faced and telling her not to cooperate with the authorities, on the same day he was arraigned on felony charges and the date for the preliminary hearing was set. It is thus apparent that the notes to Maria were intended neither to protect her nor as offhand comments about not becoming involved in the criminal justice system. (See *Wahidi, supra*, 222 Cal.App.4th at p. 809.) Rather, the evidence supports the jury’s finding that appellant’s intent was to knowingly “interfere . . . with the orderly administration of justice” by keeping Maria from attending or testifying against him at the preliminary hearing. (§ 136, subd. (1); see § 136.1, subd. (a)(2); see *Mendoza, supra*, 59 Cal.App.4th at pp. 1344-1345 [rational juror could find, based on reasonable inferences from evidence presented at trial, that defendant’s comments expressing dissatisfaction with witness’s past testimony “were also an attempt to prevent her from giving any further damaging testimony in the future”]; *Lyons, supra*, 235 Cal.App.3d at p. 1461 [finding “no plausible explanation” for defendant’s act of sending letter to victim other than an intent to dissuade victim from testifying].)

¹¹ Appellant claims that it is clear that the jury’s verdicts on counts 1 and 2 were based on this second definition of malice in light of a post-trial email from the jury foreman, in which he wrote that, as to the charges under section 136.1, subdivision (a)(2), “the jury felt Jason Broadbent ‘intended to interfere with the orderly administration of justice,’ this is why the jury’s verdict was guilty. However, many on the jury did not think Jason Broadbent intended to ‘annoy, harm, or injure someone.’ ” Respondent asserts that appellant cannot rely on this email, which describes the jury’s mental process. (See Evid. Code, § 1150.) Even were we to consider this email and conclude from it that the jury’s verdicts were based solely on the second definition of malice described in section 136, subdivision (1), as we have already explained, the evidence supported the jury’s verdict based on that definition.

Appellant’s claim that the evidence of malice was insufficient to support his convictions on counts 1 and 2 must therefore fail. (See *Wahidi, supra*, 222 Cal.App.4th at pp. 805-806.)

We also reject appellant’s claim that section 136, subdivision (a)(2), as defined by section 136, subdivision (1), violates due process because the second definition of malice is unconstitutionally vague. (See, e.g., *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 498-499 [“A law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited violates due process under both the federal and California Constitutions”].)¹²

As previously discussed, the legislative history demonstrates the intended breadth of the challenged definition of malice. (See *Wahidi, supra*, 222 Cal.App.4th at pp. 807-809.) It also shows, however, that the definition was intended to exclude innocent conduct that is performed without the requisite specific intent. (*Ibid.*) We believe that, while drafted to have a broad sweep, this definition of malice makes plain to whom it applies pursuant to subdivision (a)(2) of section 136.1: anyone who prevents or dissuades a witness from attending or testifying at any proceeding while also possessing the specific intent “to thwart or interfere in any manner with the orderly administration of justice.” (§ 136, subd. (1).)¹³ Consequently, because the challenged definition of malice provides sufficient notice of what is prohibited, section 136.1, subdivision (a)(2), is not so vague as to render it unconstitutional. (Compare *In re Davis* (1966) 242 Cal.App.2d

¹² Although appellant did not challenge section 136.1, subdivision (a)(2), on this ground in the trial court, “courts generally consider constitutional challenges to penal statutes for the first time on appeal where . . . the arguments are legal, based on undisputed evidence, and center on review of abstract and generalized legal concepts. [Citation.]” (*People v. Navarro* (2013) 212 Cal.App.4th 1336, 1347, fn. 9 (*Navarro*).) Accordingly, to the extent appellant’s argument is legal rather than factual in nature, we will address it.

¹³ In contrast, a person who makes an offhand comment about not getting involved in the criminal justice system or who is concerned about the safety of a family member is plainly outside the scope of subdivision (a)(2) of section 136.1. (See *Wahidi, supra*, 222 Cal.App.4th at p. 809, fn. 4; see also § 136.1, subd. (a)(3).)

647, 665 [holding unconstitutional a statute that made it a misdemeanor to “ ‘openly outrage public decency,’ ” given indefiniteness of phrase’s meaning].)¹⁴

3.

Appellant also argues that the evidence does not support the jury’s finding that appellant violated section 136.1, subdivision (b)(2), which prohibits attempting “to prevent or dissuade a victim or witness from “[c]ausing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.” In particular, he asserts that the prosecutor relied on the same evidence to prove all charges under section 136.1, which he claims showed only “that appellant attempted to dissuade Maria from testifying at the preliminary hearing. Had she not shown up to testify, the prosecutor’s argument went, an Information would not later have been filed.”¹⁵ According to appellant, evidence that appellant attempted to dissuade Maria from *testifying* at his preliminary hearing, “which might, incidentally,

¹⁴ We decline to address appellant’s argument that the jury’s questions related to counts 1 to 4 demonstrate its confusion about the malice requirement, since that would go beyond “review of abstract and generalized legal concepts” (*Navarro, supra*, 212 Cal.App.4th at p. 1347, fn. 9), and, instead, would involve a factual interpretation of the jury’s state of mind as it relates to appellant’s constitutional claim. We also note that a review of these questions would not change our conclusion that section 136.1, subdivision (a)(2), is constitutional, for the reasons discussed in the text, despite any jury confusion.

¹⁵ What the prosecutor actually said during closing argument was, “So if you drop all charges and don’t come to court for the preliminary hearing that was set, he is thwarting the prosecution of the complaint. So the preliminary hearing is a complaint. It has testimony of witnesses. You know that Maria Broadbent ultimately did testify at the preliminary hearing. And that letter is written the day the preliminary hearing is set. So there is one way in which he is dissuading a witness, assuming you accept that the letter is drop the petitions; don’t cooperate with the prosecution.” The prosecutor further stated, “So you have to have a preliminary hearing to file an information. So there can’t be an information—again, drop the charges and the information won’t get filed. And that will kill the case. . . . And if you don’t show up at the preliminary hearing or you ask that the charges get dropped, that is preventing the complaint from being acted upon and preventing the filing of the information.”

have the [e]ffect of preventing an Information from being filed,” does not support a conviction under subdivision (b)(2) of section 136.1.

As appellant observes, a conviction under subdivision (b)(2) of section 136.1 “involve[s] efforts to dissuade a victim or witness from acts other than testifying in court.” (*People v. Fernandez, supra*, 106 Cal.App.4th at p. 950.) In this case, contrary to appellant’s claim, the evidence (and the prosecutor’s argument) did not solely involve appellant’s efforts to keep Maria from testifying at the preliminary hearing. The evidence showed that he repeatedly admonished that, for him to avoid a sentence of life in prison, she “must ‘drop all’ petitions!!” and “must drop everything or I’m done.” He also wrote, “I’m DONE if you don’t help!!” The jury could plainly infer from these words that—as the prosecutor argued—appellant was attempting to persuade Maria to drop the charges against him and not assist the prosecution, conduct that falls squarely within the parameters of subdivision (b)(2) of section 136.1. (See *People v. Velazquez* (2011) 201 Cal.App.4th 219, 227-228 (*Velazquez*).)¹⁶

Appellant’s claim that substantial evidence does not support his conviction on counts 3 and 4 cannot succeed. (See *Wahidi, supra*, 222 Cal.App.4th at pp. 805-806.)¹⁷

¹⁶ In *Velazquez, supra*, 201 Cal.App.4th at pages 227-228, the defendant had repeatedly told the victim to “drop the charges” or she would be hurt. The defendant claimed that section 136.1, subdivision (b), applied only to prearrest efforts to dissuade a witness from reporting a crime, rather than attempts to persuade a witness to drop charges after the defendant’s arrest. (*Velazquez*, at p. 232.) The appellate court disagreed: “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 [the victim] 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), for attempting to dissuade a victim from causing a complaint or information to be prosecuted.” (*Velazquez*, at p. 233.)

¹⁷ Appellant notes that the jury asked a question during its deliberations that reflected some confusion about the difference between the elements of subdivision (a)(2) and subdivision (b)(2) of section 136.1. While the offenses described in these two subdivisions are similar, as we have discussed in the text, *ante*, the differences between them are plainly set forth in the language of each, and the evidence supported the jury’s

II. *Alleged Instructional Error*

Appellant contends the trial court erred when it failed to respond more thoroughly to a jury question regarding the difference between the two subdivisions of section 136.1 under which he was convicted.

A. *Trial Court Background*

During deliberations, the jury submitted the following written question to the trial court:

“We are having difficulty in determining the difference between P.C. Section 136.1(a) and P.C. Section 136.1(b). The sentence in P.C. 136.1(a), which follows, is a problem for us: [¶] (1) A person acts maliciously when he unlawfully intends to annoy, harm, or injure someone else in any way, OR intends to interfere in any way with orderly administration of justice.”

“If guilty on 136.1(b) does the ‘OR’ mean Jason is guilty on 136.1(a)[?]”

The trial court responded: “No. Section 136(a) requires malice.”

Defense counsel did not object to the court’s response or request that any additional instruction be given.¹⁸

B. *Legal Analysis*

According to appellant, the trial court’s “cursory responses to the jury notes, . . . while accurate, gave no guidance to a jury manifesting difficulty with critical issues in this case. Additionally, there is a reasonable likelihood that the court’s terse remarks

findings that appellant violated both subdivisions. (Cf. *Navarro, supra*, 212 Cal.App.4th at p. 1353 [rejecting vagueness challenge to section 136.1, subdivision (b)(1), stating: “The words used in the statute are clear and give notice to members of the public that attempting to prevent or dissuade a person from contacting authorities to report a crime is itself a crime”].) Another jury question referred to by appellant appears to have been related to a typographical error on a verdict form, not juror confusion about the differences between the offenses.

¹⁸ The court also responded to several other jury questions, none of which appellant challenges here.

actually misled the jurors on a relevant point of law and contributed to the erroneous verdict.”

Appellant acknowledges that defense counsel did not request any additional response, but asserts that this issue has been preserved for appeal because the court’s response affected his substantial rights. (See *People v. Young* (2005) 34 Cal.4th 1149, 1211 [no forfeiture due to defendant’s possible failure to object to *erroneous* instruction if error affected his substantial rights].)

“ ‘Generally, 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.’ [Citation.] But that rule does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law. [Citation.]” (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

Here, appellant acknowledges that the court’s response to the jury’s question *was* a correct statement of the law, but asserts that it did not go far enough. He claims that the jury was likely misled by the response, due to the court’s failure to also remind the jury that the elements of the two offenses were different.¹⁹ If defense counsel believed that this instruction was insufficient, however, it was incumbent upon her to request “ ‘appropriate clarifying or amplifying language.’ ” (*People v. Hudson, supra*, 38 Cal.4th at pp. 1011-1012.) By failing to do so, appellant may not now complain that the court should have given additional clarifying instructions as well. (See *ibid.*; compare *People v. Young, supra*, 34 Cal.4th at p. 1211.)²⁰

¹⁹ Appellant again refers to the email the jury foreman sent to the trial court after trial. (See fn. 12, *ante.*) Even were we to consider this email (but see Evid. Code, § 1150), it centered on the jury’s finding that appellant had acted with the second type of malice, as defined in section 136, subdivision (1), when it found him guilty of violating section 136, subdivision (a)(2). The email does not shed light on whether the jury understood the differences between subdivisions (a)(2) and (b)(2) of section 136.1.

²⁰ In any event, before responding to the jury’s question, the court had already given the standard instruction regarding both subdivision (a)(2) and subdivision (b)(2) of section 136.1, which set forth the distinct elements of each offense. (See CALCRIM No.

III.

Appellant contends the trial court abused its discretion in not reducing the dissuading a victim offenses to misdemeanors or, alternatively, when it refused to dismiss appellant's prior strike offense.

A. Trial Court Background

Defense counsel moved to reduce appellant's four felony convictions under section 136.1 to misdemeanors, pursuant to section 17, subdivision (b), or, in the alternative, to dismiss the prior strike conviction in the interest of justice, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and section 1385. The prosecutor opposed the motion.

At the sentencing hearing, the trial court stated that it had reviewed the probation memorandum, the defense sentencing memorandum, and the prosecution's sentencing brief. The court also stated that defense counsel had just given it appellant's certificates of completion for the Choices program and domestic violence and parenting education programs, entry letters for the Delancey Street and Common Ground programs, enrollment information for classes at City College of San Francisco, and documentation showing his completion of a GED the previous year.

The probation report listed appellant's prior convictions, which included at least seven felony convictions and two misdemeanor convictions as an adult, between 1988 and 2011. His criminal history also included numerous parole violations. The prior strike allegation was based on a 1993 conviction for assault with a deadly weapon (§ 245, subd.

2622.) Presumably, after receiving the trial court's response, in which it stated that only subdivision (a) required malice, the jury did not simply ignore the CALCRIM instruction, which articulated the differences appellant now claims the court should have added to its response. “[W]e must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.” [Citation.]” (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) Hence, even were the issue not forfeited, we would find it to be without merit. (Cf. *ibid.* [in determining whether there is a reasonable likelihood that the jury has applied a challenged instruction in a way that violates the Constitution, “ ‘we are mindful that “ ‘a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge” ’ ”].)

(a)(2)). The probation report included a summary of the offense, which involved appellant shooting “a subject in the back 13 times with a nine millimeter handgun over a dispute concerning narcotics.” It was noted that an attempted murder charge in that case was dismissed pursuant to a plea agreement.

Following argument by both attorneys, the trial court denied appellant’s motion to reduce the offenses to misdemeanors, stating: “I do not think that this is [section] 17(b) conduct. And I agree with you [defense counsel] that the rules of determinate sentencing make the consequences of his convictions in this case absurdly long.”

The court also denied the motion to dismiss appellant’s prior strike offense, explaining, “I have to agree with [the prosecutor] that in this case, given the record and given the letter and intent of both the determinate sentencing laws and the *Romero* case and its progeny, I do not believe that Mr. Broadbent qualifies for the granting of a *Romero* motion.” The court further stated: “[W]hat comes up over and over and over again, Mr. Broadbent, in your history and in the persistence with which you have focused on Jason’s way, Jason Broadbent’s way, Jason being in control and ignoring the pleas of those that you have terrorized is that—the ability to accept that is still a question in my mind.

“And it’s an illness. It’s an untreated disease. And . . . I wish I had the power to help you get treated. I wish there were an option that would allow this sentence to stand for, that we have an individual who can be put into treatment.”^[21]

“And because of all the things that we have to deal with here, all the determinate sentencing rules, all the things that I have to administer as the sentencing judge here, I don’t believe I have that power. I believe what I have power to do, given the denial of the [section] 17(b) motion, given the denial of the *Romero* motion, is to follow the

²¹ The trial court apparently was referring to drug treatment. In the probation report, the probation officer noted that, while in prison, appellant had “admitted smoking marijuana two to three times a week and he stated he is a drug addict. However, he does not make this assertion currently.”

recommendations of probation, to return you to the Department of Corrections and just hope that they will find a way to help you get the treatment you need. [¶] . . . [¶]

“[Y]ou’ve had plenty of bottoms in your life. And this case, which you accurately predicted when you wrote those letters and you had the communications that you know you weren’t supposed to have, is yet another unfortunate chapter in your reaching bottom. [¶] And I’ll be very honest with you. I wish that I weren’t the judge that had to make this order. It’s very tough. And you may in your heart laugh and say: Well, the judge really doesn’t feel that way. But I do.

The court then sentenced appellant to one year in county jail on all of the misdemeanor counts in case No. SC076334A, with credit for time served. It also sentenced appellant to a 16-month mitigated term on each of the four felony counts (counts 1 to 4) in case No SC076974A, doubled pursuant to section 1170.12, subdivision (c)(1), to be served concurrently. The court stayed counts 2, 3, and 4, pursuant to section 654. Finally, it imposed six additional years for the prior conviction and prison term, pursuant to sections 667, subdivision (a), and 667.5, subdivision (b), for a total term of eight years, eight months in prison.

B. Legal Analysis

1. Motion to Reduce Section 136.1 Offenses to Misdemeanors

Section 136.1, subdivision (a), is a “wobbler” offense, punishable as either a felony or a misdemeanor. (§ 136.1, subd. (a); see § 17, subd. (b).) “[S]ection 17, subdivision (b), read in conjunction with the relevant charging statute, rests the decision whether to reduce a wobbler solely ‘in the discretion of the court.’ By its terms, the statute sets a broad generic standard. [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) In addition, “three strikes prior convictions do not preclude a trial court from reducing an offense originally charged as a felony either by imposing a misdemeanor sentence (§ 17(b)(1)) or by declaring it a misdemeanor upon a grant of probation (§ 17(b)(3)). [¶] A necessary concomitant of this authority is the discretion to weight the various sentencing considerations commensurate with the individual circumstances. [Citations.] For that reason, the fact a wobbler offense originated as a

three strikes filing will not invariably or inevitably militate against reducing the charge to a misdemeanor. Nonetheless, the current offense cannot be considered in a vacuum; given the public safety considerations underlying the three strikes law, the record should reflect a thoughtful and conscientious assessment of all relevant factors including the defendant's criminal history. [Citations.] Furthermore, in evaluating the severity of a three strikes sentence relative to the gravity of the charge, the court must remain cognizant that the present violation of law only *triggers* the mandated penalty, which ultimately is the consequence of both that offense and the defendant's recidivist status. [Citation.]” (*Alvarez*, at pp. 979-980.)

In this case, we first address appellant's claim that the trial court did not properly exercise its discretion. The record shows that, although the court did not detail its reasoning, it clearly stated: “I do not think that this is [section] 17(b) conduct.” The court's failure to set forth its reasoning on the record does not mean it did not analyze the applicability of section 17, subdivision (b). It noted at the start of the hearing that it had reviewed the probation report, the parties' sentencing briefs, and other relevant documentation. It also listened to the prosecutor's and defense counsel's arguments on this issue. In addition, immediately after its ruling on section 17, subdivision (b), the court detailed the various reasons it would decline to strike appellant's prior conviction. (Cf. *People v. Erdelen* (1996) 46 Cal.App.4th 86, 90 [court's statement of its reasons for denying probation and for imposing upper term clearly indicated court would not have considered reducing defendant's offense to a misdemeanor].) Finally, appellant had the opportunity at the sentencing hearing to ask the court to further explain its reasoning, but failed to do so. His failure to make such a request forfeits any complaint regarding the lack of articulated reasons. (See *People v. Scott* (1994) 9 Cal.4th 331, 353; *Erdelen*, at p. 91.)

Second, we find no abuse of discretion. Appellant had suffered numerous felony convictions between 1988 and 2011. Many of his arrests for those offenses occurred within months of his release from prison, often while he was still on parole. In addition, as the prosecutor observed, appellant had a prior strike conviction that involved him

shooting at the victim somewhere between 11 and 13 times. He also, “while in custody in state prison, had write-ups for riots.” In addition, appellant refers to the “non-threatening, harmless nature of [his] actions in writing to his estranged wife.” Such a characterization ignores the fact that appellant’s letter-writing was a criminal offense, which he committed while already incarcerated and in violation of a domestic violence restraining order.²²

The court did not abuse its discretion in determining that the nature of the present offenses and appellant’s extensive criminal history outweighed any other factors, such as his demeanor at trial or his responsible behavior while out on bail. (See *Alvarez, supra*, 14 Cal.4th at pp. 974, 979-980.)²³

2. Motion to Dismiss the Prior Strike Offense

Under section 1385, subdivision (a), a judge “may, either on his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.” In *Romero, supra*, 13 Cal.4th 497, the California Supreme Court “ ‘held that a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, “in furtherance of justice” pursuant to . . . section 1385(a).’ [Citation.] . . . [The court] further held that ‘ [a] court’s discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is’ reviewable

²² Appellant again raises Maria’s alleged lack of credibility. However, he ignores the direct evidence showing that he did in fact write the notes to Maria on which his convictions were based, as well as the direct evidence showing that he attempted to call her 355 times over less than a four-week period shortly before he wrote those notes.

²³ Appellant points out that at the conclusion of trial, the court permitted him to remain out of custody on bail pending the sentencing hearing. At that hearing, the court stated, “My initial reaction was that I trust you. That I trust that the behavior that you have shown here and the fact that you’ve been out on bail, that you have responded as a responsible adult to this process is worthy of you being able to have the court’s trust in this. . . .” This does not, however, negate the court’s determination that the felony convictions should not be reduced to misdemeanors. (See *Alvarez, supra*, 14 Cal.4th at pp. 974, 979-980.)

for abuse of discretion. [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*), quoting *People v. Williams* (1998) 17 Cal.4th 148, 158.)

Following *Romero*, our Supreme Court in *Carmony*, *supra*, 33 Cal.4th at page 374, addressed whether a trial court’s decision *not* to dismiss a prior strike conviction pursuant to section 1385 is reviewable for abuse of discretion, and concluded “that a court’s failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” The court then explained that, “[i]n reviewing for 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 the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’” [Citations.] 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.’” [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational and arbitrary that no reasonable person could agree with it.” (*Id.* at pp. 376-377.)

The *Carmony* court described the “stringent standards that sentencing courts must follow in order to find such an exception,” including the consideration of “ ‘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.’ [Citation.] [¶] Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.

“In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss. [Citation.] [¶] But ‘[i]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegations. [Citations.] . . . Because the 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, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Carmony, supra*, 33 Cal.4th at pp. 377-378.)

In the present case, appellant contends the trial court abused its discretion in failing to conclude that the circumstances of the current and prior offenses, as well as appellant’s background, character, and prospects, warranted dismissing the prior strike conviction. We find no abuse of discretion.

The trial court’s explanation for its denial of the *Romero* motion shows that it examined the nature and circumstances of both the present convictions and the prior serious and/or violent felony convictions suffered by appellant, as well as appellant’s “ ‘background, character, and prospects.’ ” (*Carmony, supra*, 33 Cal.4th at p. 376.) As the court stated, “what comes up over and over and over again, Mr. Broadbent, in your history and in the persistence with which you have focused on Jason’s way, Jason Broadbent’s way, Jason being in control and ignoring the pleas of those that you have terrorized is that—the ability to accept that is still a question in my mind.” Given the circumstances of the present case, in which appellant committed these felony offenses while in prison and in violation of a restraining order, as well as his long criminal history that included violent and/or serious felonies and numerous violations of probation or parole, the court’s expressed concerns were reasonable. Moreover, that the court

expressed dismay over the long sentence appellant faced and his need for treatment does not render its decision “so irrational and arbitrary that no reasonable person could agree with it.” (*Carmony*, at p. 377.) Rather, it shows that the court thoughtfully considered all of the relevant circumstances before concluding that appellant’s situation was not so extraordinary as to fall outside the spirit of the three strikes scheme. (See *ibid.*)

The court did not abuse its discretion in denying appellant’s *Romero* motion. (See *Carmony, supra*, 33 Cal.4th at p. 373.)

DISPOSITION

The judgment is affirmed.

Kline, P.J.

We concur:

Richman, J.

Miller, J.