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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO CASTILLO MORALES,

Defendant and Appellant.

A143465

(Sonoma County
Super. Ct. No. SCR-645251)

A jury convicted appellant Alberto Castillo Morales¹ of making criminal threats, a serious felony, and falsely identifying himself to a police officer, a misdemeanor. (Pen. Code, §§ 422, subdv. (a), 148.9, subd. (a), 1192.7, subd. (c)(38).)² He was sentenced to prison for 25 years to life, plus five years, after the court determined he had suffered three prior convictions under the “Three Strikes” law and one prior conviction for purposes of the five-year serious felony enhancement. (§ 1170.12, 667, subds. (a), (b)–(i).) Appellant contends: (1) the evidence was insufficient to show he committed a criminal threat; (2) the court should have granted his motion for new trial based on the discovery of new evidence or at least conducted an evidentiary hearing on the motion; (3) the court improperly used a prior juvenile adjudication to impose a five-year serious felony

¹ Most of the documents in the record, including the abstract of judgment, refer to appellant as “Alberto Morales-Castillo.” Appellant testified at trial that he uses Castillo as his middle name and Morales as his last name, and “Alberto Castillo Morales” is the name used in the notice of appeal.

² Further statutory references are to the Penal Code unless otherwise indicated.

enhancement; and (4) he should have been sentenced as though he had suffered only one prior conviction qualifying as a strike. We agree the five-year serious felony enhancement must be reversed but otherwise affirm the judgment.

I. BACKGROUND

During the jury trial on the charges, the following evidence was adduced:

A. *Prosecution Evidence*

In January 2014, Givanny Martinez and his then-pregnant wife Cynthia Maldonado lived in Apartment 4 of a complex located on Herbert Street in Santa Rosa. They shared a wall with Apartment 3, which was occupied by Eric Fitzhugh. Martinez and Maldonado had been complaining for months to the apartment manager about the noise from Apartment 3 and the number of people coming and going.

On January 17, 2014, at about 3:45 p.m. to 4:00 p.m. in the afternoon, Martinez saw appellant standing in front of Apartment 3 talking to several other people including Fitzhugh. Fitzhugh and appellant began insulting Martinez, who was standing a few feet away on the other side of a fence between the units. Appellant said he was the “owner of the streets” and told Martinez “don’t bother my brother,” referring to Fitzhugh. Appellant said Martinez would be in a lot of trouble if he did bother Fitzhugh. “He started to threaten me with death and my wife and family that he was going to make them all disappear because he was the owner of the streets.” Appellant walked back and forth as he made the threats and used both Spanish and English. Martinez was very scared and called the apartment manager to complain, but he did not call the police because he did not want to upset his wife.

The following afternoon, while making trips to and from his car to unload his work tools, Martinez saw appellant outside, apparently waiting for him. Appellant was shirtless and was wearing long shorts, two different-colored socks and white tennis shoes. As Martinez passed by, appellant insulted him again, “using even stronger words” than the day before. Appellant called Martinez a rat, a kangaroo, a crab, a serpent and a snake,

all very offensive terms in Spanish. He said he was going to make Martinez disappear, together with his family, and said anywhere Martinez ended up he would find out where his family was living to make them disappear. Appellant used different words to indicate he would make Martinez disappear and indicated he would bury Martinez in cement. He told Martinez he was allied with different criminal organizations in Mexico that kill innocent people and had “Mexican cartel” and “Mexican Mafia” connections. Appellant bragged again that he was the “owner of all of these streets” and threatened to kill Martinez and his family.

Martinez was very frightened. Appellant had put on his tee shirt, but took it off again and said he was going to hit Martinez. Martinez noticed tattoos on appellant’s arm, chest and back, including numbers, a cross and faces. Appellant pointed at some of his tattoos, including one on his back, and said he “could call for people that know about this thing that has happened.” Appellant was shouting, moving around, and making signs with his hands. He kicked a nearby pickup truck. The incident lasted about 15 to 20 minutes and appellant said “about 20 or even 30 times” he was going to kill Martinez.

Maldonado came outside when she heard the yelling and asked appellant what was wrong with him. Appellant told Martinez, “What does your wife have to do with us? It’s just between you and me.” Maldonado heard appellant tell Martinez he “wasn’t man enough” and warn him “he better not call the police.” She also saw appellant pointing at his tattoos and telling Martinez he needed to be careful because he (appellant) knew people who were part of whatever gang the tattoos signified. Maldonado told appellant they were going to call the police and appellant told her they would be sorry if they did and they better not even try.

Maldonado went to look for the apartment manager and when she could not find her, returned to their apartment and called the police. Santa Rosa Police Department Officer Matthies arrived at the complex at about 4:00 p.m. and Officer Meloche arrived less than five minutes later. Martinez told Officer Matthies he had been threatened by an

associate of his neighbor and described the perpetrator as “a Hispanic guy,” roughly 30 years old, with a “medium build and he has tattoos on his neck.”

Officer Matthies went to Apartment 3 and knocked on the door. Fitzhugh answered, and Matthies asked him if there was a Latino male inside who had tattoos on his neck and was of medium build. Fitzhugh, who appeared to be under the influence, went inside to check and appellant came to the door wearing a tee shirt and pants, along with a hat and sunglasses. Appellant gave Officer Matthies a false name—Franciso Topete—but Matthies was eventually able to locate appellant’s actual name by running a description of his tattoos through a data base. As Officer Matthies was in the process of arresting appellant and putting him in his police car, Fitzhugh became combative and was subdued and arrested.

There were three other people in the house, but they all denied having witnessed an altercation between appellant and the next-door neighbor and Matthies did not mention them in his police report. Martinez testified he saw three other people in the apartment: a black woman, a white man and a black man who was bald. He identified appellant as the person who had threatened him.

Appellant, who was 32 years old at the time of the incident, has a number of tattoos, including (1) the word “OSO” written in very large letters on his chest with a large cross underneath, (2) a large face on his abdomen that appellant described as a female soldier from the Mexican Revolutionary War, (3) “14” in dots on his fingers and (4) a “Playboy Bunny.” Martinez thought the “OSO” tattoo was composed of numbers—two zeroes between either an “8” or a “6.”

B. Defense Evidence

Appellant testified and acknowledged he had been convicted of a robbery and an assault with a deadly weapon in 2001 and of evading a police officer in 2007. He denied any gang affiliation. Appellant understood his tattoos of a Playboy Bunny and the number “14” are considered by the authorities to have gang connotations, but he denied

this was his purpose in getting the tattoos. His “OSO” tattoo refers to his childhood nickname, “Oso” being Spanish for bear.³

On January 17, 2014, appellant was given a ride to Fitzhugh’s house after leaving a motocross event. He noticed Martinez outside in the corner of a yard “staring at the blank, at nothing.” Appellant thought Martinez was “probably high off of meth or something” and he told Fitzhugh to offer him some pizza. Other people whom appellant did not know were present at Fitzhugh’s apartment. Appellant spent the night there, but could not sleep so he stayed up until 3:00 or 4:00 a.m. smoking marijuana and talking to Fitzhugh and a “couple of chicks.” Appellant was uncomfortable at the apartment but stayed anyway because he did not want to pay for a night in the hotel where he had been staying.

Appellant awoke at about 3:50 p.m. the following day, January 18, 2014, and went outside to work on his dirt bike. He was wearing jeans, a long sleeved shirt and shoes with argyle socks—one pink and one green. He heard Martinez talking but did not have any contact with him. He never made threats of any kind to Martinez.

II. DISCUSSION

A. *Evidence of Criminal Threats*

Appellant argues the evidence was insufficient to support his conviction for making criminal threats in violation of section 422. Specifically, he complains the evidence did not establish he threatened to immediately harm Martinez. We disagree.

As with all challenges to the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty. (*People v. Lewis* (2009)

³ Officer Matthies believed the term “Oso” was consistent with gang affiliation with the Northern Riders. Officer Meloche testified that to the best of his knowledge, “Oso” did not have a particular significance in gang culture.

46 Cal.4th 1255, 1289.) We do not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses. (*People v. Little* (2004) 115 Cal.App.4th 766, 771.) Evidence is not rendered insufficient simply because a different trier of fact might have reached a different result. (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.)

The California Supreme Court has interpreted section 422 to require five elements: (1) the defendant willfully threatened to commit a crime that would result in death or great bodily injury to another person; (2) the defendant made the threat with the specific intent the statement would be taken as a threat, even if there was no intent of actually carrying it out; (3) the threat was on its face and under the circumstances in which it made “ ‘*so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,*’ ” (4) the threat actually caused the person threatened to be in sustained fear for his own or his immediate family’s safety; and (5) the threatened person’s fear was reasonable under the circumstances. (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228 (*Toledo*), italics added.) Appellant’s challenge is limited to the third element. He acknowledges the evidence showed he made explicit threats to Martinez, but argues there was no “ ‘immediate prospect of execution’ ” of the threats because “[t]he most that the words conveyed [was] that the threat[s] would be carried out sometime in the indefinite future.” We are not persuaded.

In determining whether the third element of immediacy is satisfied, we look beyond the words to all the relevant circumstances, including the parties’ history. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.) Here, the evidence showed Martinez had made noise complaints to the apartment manager about Fitzhugh, who was appellant’s friend. On January 17, 2014, appellant and Fitzhugh confronted Martinez through a fence separating the apartments, during which time appellant said he was “the owner of the streets,” warned Martinez not to bother “his brother” Fitzhugh, threatened

Martinez with death, and said he would make Martinez's wife and family disappear. The next day, on January 18, appellant appeared to be waiting for Martinez in the parking lot, and began to insult him again using "stronger words" than the day before. He repeatedly said he would kill Martinez, called him offensive animal names, said he would make Martinez and his family disappear, and boasted of his alliance with criminal organizations in Mexico. At one point appellant said he was going to hit Martinez and took his shirt off, pointing at his tattoos and insinuating they showed his gang affiliation. Appellant's demeanor was aggressive and he told Martinez and his wife they would be sorry if they called the police.

“ ‘[A] threat is sufficiently specific where it threatens death or great bodily injury.’ ” (*People v. Wilson* (2010) 186 Cal.App.4th 789, 816.) It need not “ ‘communicate a time or precise manner of execution, [as] section 422 does not require those details to be expressed.’ ” (*Ibid.*) An “immediate” threat is one with a “degree of seriousness and imminence which is understood by the victim to be attached to the *future prospect* of the threat being carried out” (*Id.* at p. 816, original italics.)

The People proceeded on the theory the criminal threats were made during the second confrontation on January 18, 2014, but the jury was entitled to consider appellant's conduct on the previous day, when he and Fitzhugh insulted and threatened Martinez over the fence. This first incident, along with appellant's intimidating and angry demeanor and his reference to his gang association, easily satisfied the requirement that appellant “convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat” during the second confrontation. (*People v. Toledo, supra*, 26 Cal.4th at p. 228; cf. *People v. Solis* (2001) 90 Cal.App.4th 1002, 1009 [threat left on the victims' answering machine stating, “ ‘I'm coming for you. You're going to die . . . I'm going to kill you’ ” qualified as threat within the meaning of section 422]; *People v. Brooks* (1994) 26 Cal.App.4th 142, 144 [statement that “ ‘If you go to court and

testify, I'll kill you' ” was a criminal threat].) The evidence was sufficient to show appellant made a criminal threat within the meaning of section 422.

B. *Motion for New Trial*

Appellant argues the trial court erred when it denied his motion for new trial under Penal Code section 1181, subdivision 8, which applies “[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.” He further contends the court should have held an evidentiary hearing before resolving factual issues regarding the credibility of witnesses. We disagree.

1. Proceedings Below

Prior to sentencing, defense counsel filed a motion for new trial based on newly discovered evidence supporting a third party culpability defense, namely, that: (1) Andy Navarro (a.k.a. James Somersall) matched the description of the man who had threatened Martinez and was present in Fitzhugh’s apartment when appellant was arrested for those threats, and (2) a woman named Regaat Isaac had also been present in the apartment and could testify appellant was inside with her when the threats were made. Counsel also argued the prosecution had violated its duty to provide appellant with exculpatory evidence pertaining to the identity of these witnesses, because the police reports did not mention them. (*Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).)

In support of the motion for new trial, defense counsel submitted a declaration stating the following: (1) during her representation of appellant, he had consistently denied the charges; (2) appellant had told her there were other people present in the apartment when he was arrested, including an African-American woman who had attended the same high school; (3) appellant did not know the names of any of these individuals; (4) about a month after the trial, appellant contacted counsel because a man who had been present in the apartment was brought into the jail as an inmate, and appellant had learned his name was Andy Navarro; (5) Integrated Justice Systems

showed Navarro was 5' 9" tall, 190 pounds, and would have been 27 years old at the time of the offense; (6) Navarro's race was listed as "M" for Mexican and he had tattoos that included "707" and "X4" on his arm and chest; (7) Martinez had told police the perpetrator's tattoos included numbers on parts of his arm and his chest; (8) appellant does not have any tattoos that are numbers; (9) Navarro has a prior conviction for criminal threats; (10) appellant told counsel the name of the African-American woman from his high school was something like "Ray-Got," and counsel realized he was referring to a former client of hers, Regaat Isaac. Included as exhibits were copies of the police reports (which did not mention the presence of others in Fitzhugh's apartment at the time appellant and Fitzhugh were arrested), excerpts of testimony by Martinez at the preliminary hearing and trial, Andy Navarro's record of arrests and prosecutions (containing a photograph and vital statistics including a description of his tattoos), and a declaration by Reggat Isaac.

Isaac's declaration stated: (1) she was staying at Fitzhugh's apartment on January 17 and 18, 2014, and had invited appellant to stay there for a short time; (2) Navarro was also present on those days, as were other individuals; (3) she was inside with appellant on January 18 when Navarro arrived in the late afternoon, and shortly after that the police knocked on the door; (4) she tried to tell the police she did not even think appellant had gone outside that afternoon, but they would not let her talk; (5) she did not see the police examine Navarro's tattoos; and (6) Navarro speaks some Spanish and is affiliated with a street gang.

The prosecution filed opposition papers arguing appellant had not demonstrated due diligence in obtaining the evidence and a different result was not reasonably probable on retrial. The trial court denied the motion, stating: "Okay. First, I believe a bunch of information is suspicious at best. I heard the trial and the evidence in the trial, and based on the motions filed, I'm going to deny the motion for a new trial."

2. Analysis

When a motion for new trial is based on newly-discovered evidence, the trial court considers whether: (1) the evidence, and not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) the evidence is such as to render a different result probable on retrial; (4) the party could not with reasonable diligence have discovered and produced the evidence at trial; and (5) these facts are shown by the best evidence of which the case admits. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) A new trial motion based on newly discovered evidence is looked upon with disfavor, and we will only disturb the trial court's denial of such a motion if there is a clear showing of a manifest and unmistakable abuse of discretion. (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1151 (*Mehserle*); *People v. Shoals* (1992) 8 Cal.App.4th 475, 485–486.) The decision to hold an evidentiary hearing on the motion similarly rests in the sound discretion of the trial court. (*People v. Williams* (1997) 16 Cal.4th 635, 686.)

The new trial motion in this case was based on the alleged “discovery” that a man named Andy Navarro was inside Fitzhugh’s apartment when appellant was contacted by police and arrested, and that Regaat Isaac could offer appellant a limited alibi. This evidence was material, appellant argues, because Navarro matched the description Martinez gave to police of the man who had threatened him, being 27 years old and heavily tattooed. Coupled with Isaac’s proffered testimony that appellant had remained in the apartment on the afternoon when the threats were made to Martinez, this could potentially have raised a reasonable doubt regarding the identity of the man who threatened Martinez.⁴

The trial court did not abuse its discretion in denying the motion. To begin with, appellant has made no showing he could not with reasonable diligence have discovered and produced the alleged “newly discovered” evidence. Navarro’s presence in

⁴ Appellant does not pursue the *Brady* claim he raised in the trial court.

Fitzhugh's apartment was known to appellant, who could, through reasonable investigation, have learned his name. Similarly, appellant knew the identity of Regaat Isaac, a former classmate, even if he did not accurately recall her name, and he should have been able to procure her testimony at trial through reasonable efforts.

Case law has recognized that a lack of diligence will not defeat a motion for new trial based on newly discovered evidence when that evidence would probably lead to a different result at trial. (*People v. Dyer* (1988) 45 Cal.3d 26, 51–52; *People v. Soojian* (2010) 190 Cal.App.4th 491, 514–516.) Here, a new trial was not required “because the new evidence would have added little to the trial and would not have rendered a different result probable on retrial.” (*Mehserle, supra*, 206 Cal.App.4th at p. 1151.)

Both Martinez and his wife positively identified appellant at the scene and at trial as the man who had made the threats. Martinez had seen the perpetrator not once, but twice, on two separate days, and was able to recognize him from the first encounter when he saw him the second time. Martinez saw other people coming out of the apartment when appellant was arrested, including a “white” man who was apparently Navarro. Even if Navarro is actually Hispanic, Martinez's characterization of him as white and his ability to distinguish him from the Hispanic perpetrator makes it unlikely a jury would find Martinez's identification to be discredited based on Navarro's presence in the apartment.

We note that photographs of both appellant and Navarro appear in the record on appeal, and while they share some physical characteristics (male gender, short dark hair, tattoos) we do not think they would easily be mistaken for one another. Appellant suggests Martinez's description of the perpetrator's tattoos at the preliminary hearing did not match appellant's tattoos, in part because they did not include numbers on the chest area. However, the large “OSO” tattoo on his chest could readily be mistaken for two zeroes on either side of the number “8,” as Martinez explained at trial.

Nor was the trial court required to hold an evidentiary hearing. The evidence on which appellant relied in support of his motion was clearly set forth, and to the extent the court made determinations based on the declarations and other evidence, it was entitled to do so. (See *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 201.) Isaac was the only percipient witness to offer a declaration, and her claim that appellant remained inside the apartment on the afternoon the threats were made was directly contradicted by appellant's own trial testimony that he went outside to work on his motorcycle shortly after awaking at 3:50 p.m. The court did not abuse its discretion in making its ruling based on the evidence submitted.⁵

C. Prior Convictions

Appellant raises several challenges to the true findings on the prior conviction allegations. We agree the five-year serious felony enhancement under section 667, subdivision (a), must be reversed because it is predicated on a juvenile adjudication rather than an adult conviction. We also agree the record supporting the "strike" based on the same juvenile adjudication was not sufficient to establish it qualified as a serious or violent felony.

1. Proceedings Below

The information alleged appellant had suffered three prior convictions qualifying as strikes under the Three Strikes law (§ 1170.12): (1) a 2001 conviction for robbery under section 211 in Sonoma County Superior Court Case No. SCR-30473; (2) a 2001 conviction for assault with a deadly weapon or by means of force likely to cause great bodily injury under former section 245, subdivision (a)(1), accompanied by an enhancement for the personal infliction of great bodily injury under section 12022.7, subdivision (a), also in Sonoma County Superior Court Case No. SCR-30473; and (3) a

⁵ We deny appellant's request that we take judicial notice of an unpublished opinion affirming Navarro's 2012 conviction of assault by means of force likely to cause great bodily injury under former section 245, subdivision (a)(1).

1999 juvenile adjudication for assault with a deadly weapon under section 245, subdivision (a)(1), with a gang enhancement under section 186.22, subdivision (b)(1), in Sonoma County Superior Court Case No. 26375-J. The information alleged the 1999 juvenile adjudication for assault with a deadly weapon also qualified as a serious felony under section 667, subdivision (a)(1). The prior conviction allegations were bifurcated and tried before the court after appellant waived his right to a jury trial.

In support of the allegations based on the 2001 robbery and assault convictions in Case No. SCR-30473, the prosecution presented a certified copy of the “Criminal Docket” from the case, showing a printout of “Courtroom Minutes.” This document showed appellant was originally charged with attempted murder, robbery and possession of a dirk or dagger, along with allegations of personal use of a deadly weapon, personal infliction of great bodily injury and a prior conviction under the Three Strikes law. (§§ 187/664, 211, 12020, subd. (a)(4), 12022, subd. (b)(1), 12022.7, subd. (a), 1170.12.) Appellant pled guilty to the robbery and an assault under “PC 245” with a great bodily injury enhancement, in exchange for a dismissal of the other counts and allegations. He was sentenced to prison for an aggregate term of seven years, consisting of three years for the assault, three years for the great bodily injury enhancement, and a consecutive one-year term for the robbery.

With respect to the allegations based on the 1999 juvenile adjudication in Case No. 26375-J, the prosecution presented a certified “Register” from the juvenile court case. That document showed a wardship petition was filed on February 5, 1999, charging appellant (then 17 years old) with “F PC 245(a)(1)” and “xPC 186.22(b)(1)” in Count 1 and “M PC 148(a)” in Count 2. The entry for March 23, 1999, indicates: “Testimony taken. [¶] ALLEGATION TRUE BEYOND A REASONABLE DOUBT AFTER TESTIMONY FOR COUNT 1. [¶] ALLEGATION TRUE BEYOND A REASONABLE DOUBT AFTER TESTIMONY FOR COUNT 2. [¶] Minor comes within Welfare and Institutions Code section 602.”

Based solely on these documents, the trial court found all the prior conviction allegations to be true. Defense counsel filed a motion asking the trial court to reduce the current conviction of criminal threats to a misdemeanor under section 17, subdivision (b), and to exercise its discretion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and dismiss the prior convictions in the interests of justice. Among other things, counsel argued a “strike” based on a juvenile conviction was outside the spirit of the Three Strikes law and the two adult convictions arose from a single incident. The court denied the motion. It cited appellant’s “abysmal” criminal record, which consisted of several convictions in addition to the strikes, including resisting arrest, reckless evasion of a peace officer and driving under the influence. (§ 148, subd. (a)(1); Veh. Code, §§ 2800.2, 23152, subds. (a) & (b).) The court imposed a sentence of 25 years to life, plus five years for the serious felony enhancement under section 667, subdivision (a).

2. The 1999 Juvenile Adjudication cannot Support a 5-Year Enhancement

Appellant argues a juvenile adjudication cannot be used to impose a five-year serious felony enhancement under section 667, subdivision (a). The People agree a juvenile adjudication is not a prior felony “conviction” within the meaning of that statute, and further agree the five-year enhancement must be stricken. (*People v. O’Neal* (2000) 78 Cal.App.4th 1065, 1068; *People v. West* (1984) 154 Cal.App.3d 100, 109–110.) Additionally, for the reasons discussed below, the juvenile adjudication was not proved to be a “serious” felony. We reverse the five-year enhancement.⁶

⁶ The information did not allege the adult convictions for robbery and assault qualified as serious felonies for purposes of section 667, subdivision (a). The People make no argument that the court’s true findings on the strikes arising from the 2001 adult case may be used at this juncture to support a five-year enhancement.

3. The 1999 Juvenile Adjudication was not Proved to be a “Strike”

In support of the 1999 juvenile adjudication, the prosecution presented a certified “Register” from the juvenile case indicating (1) appellant was alleged to have violated “F PC 245(a)(1)” with a special allegation under “PC 186.22(b)(1),” along with “M PC 148(a).” At the time of the offenses, section 245, subdivision (a)(1) provided, “Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison. . . .” (Former § 245, subd. (a)(1).) Appellant argues the evidence was insufficient to prove the prior assault qualified as a serious or violent felony as required by the Three Strikes law. We agree.

A prior conviction may be used as a strike only when it qualifies as a serious felony under section 1192.7, subdivision (c), or a violent felony under section 667.5, subdivision (c). (§ 1170.12, subd. (b)(1).) Juvenile adjudications for serious or violent felonies may also qualify as strikes in certain circumstances. (§ 1170.12, subd. (b)(3).) Although the text of the Three Strikes law suggests that juvenile adjudications for any offense listed in Welfare and Institutions Code section 707, subdivision (b) will qualify as a strike when other criteria are met (§ 1170.12, subd. (b)(3)(B)), equal protection principles do not permit a juvenile adjudication for a “707(b)” offense to be used as a strike unless an adult conviction for the same offense would also qualify. (*People v. Leng* (1999) 71 Cal.App.4th 1, 10–15.)

The only evidence presented by the prosecution indicated appellant’s 1999 juvenile adjudication was for a violation of “PC 245(a)(1).” Section 245 prohibits various types of aggravated assault, including assault with a deadly weapon and assault by means of force likely to cause great bodily injury. The current version of section 245 places these two variants of aggravated assault in separate subdivisions of the statute, but this is a relatively recent development. (§ 245, subs. (a)(1) & (4), as amended by Stats. 2011, ch. 183 (A.B. 1026), § 1.) When appellant committed the offense leading to his

juvenile adjudication in 1999, section 245, subdivision (a)(1) prohibited “an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury.”

Assault with a deadly weapon is now an enumerated serious felony under section 1192.7, subdivision (c)(31), but an assault by means of force likely to cause great bodily injury is not. Accordingly, an assault by means of force likely to cause great bodily injury will qualify as a strike only when the prosecution proves the offense involved some other conduct bringing it within the definition of a serious or violent felony, such as the personal use of a deadly weapon or the infliction of great bodily injury. (§ 1192.7, subd. (c)(8), (23); *People v. Banuelos* (2005) 130 Cal.App.4th 601, 605.)

The bare reference to a violation of “PC 245(a)(1)” in the court document from appellant’s 1999 juvenile adjudication does not establish appellant was found to have committed an assault with a deadly weapon rather than an assault by means of force likely to cause great bodily injury. Nor does it establish whether the offense involved the personal use of a weapon or the infliction of great bodily injury. “[I]f the prior conviction was for an offense that can be committed in multiple ways, and the record of conviction does not disclose how the offense was committed, a court must presume the the conviction was for the least serious form of the offense. [Citations.] In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, the evidence is thus insufficient, and the People have failed in their burden.” (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066.) Here, the evidence showed only the least adjudicated elements of former section 245, subdivision (a)(1), and it was insufficient to establish the juvenile adjudication qualified as a strike. (Cf. *id.*, at pp. 1065–1072 [notation on abstract that conviction under former § 245, subd. (a)(1) was for “ ‘Asslt w DWpn.’ ” sufficient to show conviction was for assault with a deadly weapon].)

There was another possible basis for finding the juvenile adjudication to be a strike. The assault charge in that case was accompanied by a gang enhancement allegation under section 186.22, subdivision (b)(1). Section 1192.7, subdivision (c)(28) includes as a serious felony “any felony offense, which would also constitute a felony violation of Section 186.22.” Our Supreme Court has held that this provision “includes within its ambit any felony offense committed for the benefit of a criminal street gang under the section 186.22, (b)(1) gang sentence enhancement.” (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) Thus, if the gang enhancement had been found true by the juvenile court, appellant’s juvenile adjudication for assault would qualify as a strike by virtue of that enhancement.

The docket from the juvenile case states the “ALLEGATION. . . FOR COUNT 1” was found true, but does not specifically refer to the disposition on the enhancement. We agree with appellant that this scant record, which does not directly and unambiguously refer to the disposition on the gang allegation, did not supply substantial evidence that the juvenile assault was “a felony in violation of section 186.22.” (§ 1192.7, subd. (c)(28).) The People do not argue that the “strike” based on the juvenile adjudication can be upheld on this theory, though they do argue, unpersuasively, that the gang allegation was found true and therefore proves the personal use of a deadly weapon.

When a finding on a prior conviction is reversed for insufficient evidence, the normal remedy is a remand for retrial on the issue. (See *People v. Barragan* (2004) 32 Cal.4th 236, 239.) In this case, however, that would be a waste of judicial resources. As we explain below, the trial court properly treated appellant’s adult convictions of robbery and assault as two separate strikes, and in light of the court’s comments at sentencing, we can see no reasonable probability it would revisit its decision to impose a life sentence and the Three Strikes law based solely on the reclassification of the juvenile adjudication as a non-strike. Because appellant has already received the maximum possible sentence

he can receive under the Three Strikes law—25 years to life—we will simply reverse the strike allegation based on the juvenile adjudication.

4. The Court was not Required to Strike One of the Two Prior Adult Convictions

Appellant argues the two strikes arising from his adult convictions for robbery and assault must be treated as a single strike under the authority of *People v. Vargas* (2014) 59 Cal.4th 635, 645 (*Vargas*), because they arose from the same 2001 case and were not proved to involve separate acts. We disagree.

In *Vargas*, the Supreme Court found an abuse of discretion in the trial court’s denial of a *Romero* motion seeking to strike one of two prior convictions (robbery and carjacking) that arose out of a single act against a single victim. (*Vargas, supra*, 59 Cal.4th at p. 637.) Under this “unusual circumstance” (*People Rusconi* (2015) 236 Cal.App.4th 273, 277 (*Rusconi*)), treating such a defendant as a third strike offender “was inconsistent with the intent underlying both the legislative and initiative versions of the Three Strikes law.” (*Vargas*, at p. 645.) The *Vargas* opinion distinguished *People v. Benson* (1998) 18 Cal.4th 24, 28–31, in which the court upheld the denial of a motion to strike one of two prior convictions arising from different acts within the same course of conduct, even though sentence had been stayed under section 654. Also distinguishable are cases involving two separate victims. (*Rusconi*, at p. 281.)

Appellant argues the prosecution failed to carry its burden of proving the robbery and assault in his 2001 case involved separate acts. We disagree with the premise that the “separateness” of the acts underlying the convictions was an element the prosecution was required to prove. We are not here concerned with the validity of a finding on a prior conviction allegation (on which the prosecution does bear the burden of proof), but rather, with an alleged abuse of discretion in denying a *Romero* motion after the prior conviction has been proved. (See *Vargas, supra*, 59 Cal.4th at pp. 646–649.) A defendant bears the burden of establishing an abuse of discretion in the denial of a *Romero* motion by showing the decision was irrational or arbitrary; i.e., “where no

reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme” (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377, 378.)

Appellant’s *Romero* motion acknowledged there were two victims in the 2001 case, a circumstance that renders the reasoning of *Vargas* inapplicable. (*Rusconi, supra*, 236 Cal.App.4th at p. 281.) Moreover, the probation report prepared in the instant case described the underlying robbery and assault as follows: “On 12/27/00, the defendant struck a passerby twice in the head. When the victim intervened on the passerby’s behalf, with whom he was walking, the defendant stabbed the 16-year-old victim in the neck. Just after the stabbing, victim M.M. was assaulted and robbed by the defendant. M.M. was forced at knife point by the defendant to remove his shoes, pants, jacket, and hat. Victim L.W. sustained a right-posterior neck stab wound. He was released from the hospital on 12/29/00. However, on 04/05/01, victim L.W. was transported to San Francisco Hospital, after he suffered a mild stroke and had a brain aneurysm as a result of the stabbing.” The trial court could properly consider this information when ruling on a *Romero* motion. (See *People v. Otto* (2001) 26 Cal.4th 200, 212 [courts routinely consider probation reports, including hearsay statements therein, to evaluate defendant’s level of culpability].) It did not abuse its discretion in denying the *Romero* motion based on the record before it.

III. DISPOSITION

The five-year enhancement under section 667, subdivision (a), is stricken, as is the Three Strikes allegation based on appellant’s 1999 juvenile adjudication in Case No. 26375-J. The sentence is modified to 25 years to life. The court shall prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.