

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

----

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
EARL MORRISHOW, JR.,  
  
Defendant and Appellant.

C067317  
  
(Super. Ct. No.  
10F04134)

A jury found defendant Earl Morrishow, Jr., guilty of attempting to make a criminal threat (Pen. Code, §§ 664, 422)<sup>1</sup> and making an annoying phone call (§ 653m, subd. (a)). After finding true a prior strike allegation, the trial court sentenced defendant to an aggregate term of six years four months in prison.

---

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

On appeal, defendant contends there was insufficient evidence to convict him of attempting to make a criminal threat. He also contends the trial court abused its discretion in refusing to dismiss his prior strike conviction. Defendant's contentions lack merit and we will affirm the judgment.

#### BACKGROUND

Alonzo Smith broke up with his girlfriend, Shavonda Townsend, and moved into defendant's apartment. Defendant agreed to store Smith's 1977 Chevrolet Caprice. Two weeks later, however, Smith and Townsend reconciled and Smith moved out of defendant's apartment. Defendant returned the Caprice to Smith, but the following day the Caprice was stolen from outside Smith's apartment. When Smith confronted defendant regarding the theft, defendant denied involvement.

Smith subsequently learned that defendant used Smith's rent money to pay another debt owed by defendant. Smith had an angry telephone conversation with defendant.

Soon after, Smith and Townsend were standing outside their home with their two-year-old daughter when Smith received a number of text messages from defendant. One message challenged Smith to meet defendant in the street to resolve their differences. Townsend testified that another message said "I see you outside with red shorts on" and "I should have your heads in the trunk," or something like that. Smith testified that the second text message indicated defendant knew what Smith was wearing at the moment, and that Smith's head will be in the trunk. Smith understood this to be a threat. Defendant also

sent Smith two more text messages: "[T]ell your bitch that I don't mind doing a bid,"<sup>2</sup> and "I'm like tic-tic-tock."

Smith, Townsend and their daughter were afraid and left in Smith's SUV. As they drove past a nearby park, Smith and Townsend saw defendant talking to Townsend's uncle. Smith and defendant cursed at each other. Defendant got into his car and drove away. Smith and Townsend contacted the police.

Defendant was subsequently arrested and charged with making a criminal threat against Smith (§ 422), being a felon in possession of a firearm (former § 12021, subd. (a)(1)), making an annoying telephone call to Townsend (§ 653m, subd. (a)), and making an annoying telephone call to Smith (§ 653m, subd. (a)). It was further alleged that defendant was previously convicted of assault with a firearm in Washington State.

Defendant pleaded not guilty to the charges and denied the prior conviction allegation. A jury found defendant guilty of the lesser included offense of attempting to make a criminal threat against Smith, and also of making an annoying phone call to Smith. Defendant was acquitted on the charge of being a felon in possession of a firearm. The jury deadlocked on the charge of making an annoying phone call to Townsend, and the trial court declared a mistrial as to that charge.

The trial court found true the prior strike allegation, denied defendant's request to dismiss the prior strike, and

---

<sup>2</sup> A "bid" means jail time.

sentenced defendant to an aggregate term of six years four months in prison. The trial court imposed various fines and fees and awarded defendant 307 days of custody credit (205 actual and 102 conduct).

#### DISCUSSION

##### I

Defendant contends there was insufficient evidence to support his conviction for attempting to make a criminal threat. He argues the prosecution failed to prove the threat was immediate and unconditional or that the victim experienced sustained fear.

“‘In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”’ ([*People v.*] *Rowland* [(1992)] 4 Cal.4th [238,] 269, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560].) We apply an identical standard under the California Constitution. (*Ibid.*) ‘In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court “must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”’ (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)” (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

The testimony of a single witness suffices to support a factual finding unless the testimony is inherently improbable or physically impossible. (*People v. Young, supra*, 34 Cal.4th at p. 1181.) When the evidence supports the conviction, we will not disturb the judgment even if the other evidence presented at trial might have supported an acquittal. (*People v. Abilez* (2007) 41 Cal.4th 472, 504.)

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

In assessing whether the words were sufficiently unequivocal, unconditional, immediate and specific to convey to the victim an immediacy of purpose and an immediate prospect of execution of the threat, we consider the defendant's statement in light of all the surrounding circumstances. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.)

Defendant sent Smith a text message indicating that he knew what Smith was wearing at the moment. This indicated that defendant could see Smith even though Smith could not see defendant. The text also informed Smith that his head would be in the trunk. Smith understood this to be a threat. Defendant then sent two more text messages saying, "[T]ell your bitch that I don't mind doing a bid," and "I'm like tic-tic-tock."

Defendant argues the threat was not immediate but "framed in the past tense" because Smith remembered defendant's message saying defendant "could have" had their heads in the trunk. He argues the same language indicates defendant lacked the requisite intent. We conclude, however, that defendant's statements established the requisite intent, and also conveyed the immediate prospect of inflicting great bodily injury or death on Smith. Defendant noted what Smith was wearing, which a trier of fact could infer indicated proximity and Smith's vulnerability, because defendant could see Smith but Smith could not see defendant. Defendant texted that Smith's head will be in the trunk and that defendant was willing to go to jail. Defendant also made reference to the ticking of a clock, which a trier of fact could infer indicated immediacy.

The jury necessarily found that defendant intended to make a threat, intended his texts to be taken as a threat, and that the threat was immediate and unconditional. Viewing the evidence in a light most favorable to the judgment, we conclude the evidence supports the verdict.

Defendant further argues there is insufficient evidence that Smith experienced sustained fear as a result of the threat. But even if that is true, the evidence supports the conviction on the lesser included offense of attempted criminal threat. In *People v. Toledo* (2001) 26 Cal.4th 221, the California Supreme Court explained that a defendant may be found guilty of the lesser included offense of attempted criminal threat when a threat is made with the requisite intent and is understood by the victim as a threat, but the victim is not placed in sustained fear for his or her safety. (*Id.* at p. 231.)

## II

Defendant also contends the trial court abused its discretion in denying his motion to dismiss the prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). He argues the trial court gave too little weight to the nonviolent nature of his current offense.

Penal Code section 1385 gives the trial court the authority, on its own motion or upon application of the prosecution, "and in furtherance of justice," to order an action dismissed. (§ 1385, subd. (a).) In *Romero*, our Supreme Court held a trial court may utilize section 1385 to strike or vacate a prior conviction allegation for purposes of sentencing under the three strikes law, "subject, however, to strict compliance with the provisions of section 1385 and to review for abuse of discretion." (*Romero*, at p. 504.) Likewise, a trial court's "failure to dismiss or strike a prior conviction allegation is

subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.)

In ruling on a *Romero* motion, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Dismissal of a strike is a departure from the sentencing norm. Therefore, in reviewing a *Romero* decision, we will not reverse for abuse of discretion unless the defendant shows the decision was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike, or refused to do so at least in part for impermissible reasons. (*Id.* at p. 378.) But where the trial court, aware of its discretion, "'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Ibid.*)

Defendant contends "the relevant facts demonstrate that this case is little more than an intra-familial spat possibly motivated by hard feelings." Thus, he argues it was an abuse of

the trial court's discretion to refuse to strike his 2004 conviction for assault with a firearm. We disagree.

In denying defendant's *Romero* request, the trial court expressly stated that it considered defendant's background, character, prospects for rehabilitation, and propensity for violence. The trial court explained, "I would note that in our current case there is no violence. I would further note that in our case that may play into the Court's ultimate decision on the judgment and sentencing which is yet to come. But based on the circumstances and the history of the defendant here, the motion to strike the prior is denied."

Defendant's criminal history supports the trial court's decision. In 1996, when defendant was 16 years old, he was committed to the California Youth Authority for escaping from a juvenile facility (Welf. & Inst. Code, § 871, subd. (a)). He was subsequently convicted in 2003 for residential burglary in the State of Washington. During the commission of the burglary, defendant and another individual forced their way into the victim's home, beat her, waved a gun at her, and then hit her over the head with a vase before leaving. That same year, defendant was convicted of misdemeanor theft.

Defendant was convicted of assault with a pistol in 2004. Three months later, he was convicted of second degree assault. The following year defendant received two more convictions for assault.

In 2006, defendant was arrested on federal weapons charges and for being a felon in possession of a firearm. He was

granted supervised release two years later and twice violated the terms of his release. He was also twice arrested, and once convicted, for driving with a suspended license, and earned another theft conviction.

The record demonstrates that the trial court exercised its discretion and concluded this is not an extraordinary case warranting dismissal of the strike. Under the facts and circumstances presented, the trial court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ ROBIE \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.