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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ANTHONY HEREDIA,

Defendant and Appellant.

E055215

(Super.Ct.No. SWF10000382)

OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III,  
Judge. Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, James D. Dutton, and Stephanie  
H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Joseph Anthony Heredia's mother, Sally Heredia, had him arrested for

battery when he pushed her as she tried to break up an argument between defendant and his wife. As he was being taken into custody, defendant yelled that Sally would be sorry for her actions. A few days later, defendant was bailed out of jail and that same day Sally's trailer burned to the ground. A jury found defendant guilty of arson and making criminal threats. Defendant admitted several prison priors (Pen. Code, § 667.5, subd. (b)<sup>1</sup>), a serious felony prior (§ 667, subd. (a)), and a Strike prior (§ 667, subds. (c), (e)(1), § 1170.12, subd. (c)(1), and was sentenced to 25 years four months in state prison. He appealed.

On appeal, defendant argues (1) his conviction should be reversed due to error in admitting his confession into evidence; and (2) the court abused its discretion in declining to strike his Strike prior. We affirm.

## **BACKGROUND**

Joseph (the defendant) and his wife, Sara Heredia, lived in a trailer on the Cahuilla Indian reservation in February 2010. Joseph's mother, Sally Heredia, lived a few hundred feet away, downhill from Joseph and Sara.<sup>2</sup> Joseph's cousin, Luther Salgado, Sr., also lived a short distance away.

In the morning hours of February 18, 2010, Sara and defendant spoke with Sally on the telephone and asked her if she could watch their children while they went to do

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

<sup>2</sup> Because this case involves numerous family members with the same surnames, we refer to the participants by their first names.

laundry. Both defendant and Sara had gotten high on methamphetamine and Sara wanted the children to go, because defendant was acting strangely. Sally, the defendant's mother, came over with her sister Clarice, to pick up the children. While Sally helped Sara get the children ready, defendant demanded to know if Sara was leaving. Defendant and Sara started swinging at each other, so Sally stepped in between the two to break up the fight. Defendant grabbed her and pushed her out the door and onto the porch. Sally fell. Sally called 911 on her cell phone and she left with her sister and the children. She then took the children to her mother's (defendant's grandmother) house.

Defendant and Sara went to his grandmother's home, assuming that Sally had taken the children there. They were stopped up the road from the grandmother's house by sheriff's deputies, and a commotion broke out. Several other people, including Sally's brother (defendant's uncle), Antonio Heredia, Sr., and nephew (defendant's cousin), Antonio Heredia, Jr., were there. The deputies arrested the defendant for battery against Sally, based on her citizen's arrest.

Defendant was angry and upset, and did not cooperate with officers. He made statements to his mother that he was going to get her and accused her of touching his son inappropriately. As the sheriff's deputies attempted to put him in the patrol car, defendant yelled that he was going to take care of Antonio, Jr. and Antonio, Sr., and made a hand gesture. The uncle and cousin were aware that defendant was affiliated with the Nazi Low Riders or Aryan Brotherhood.

Sara bailed the defendant out of jail on the evening of February 22, 2010.<sup>3</sup> Later she went to stay with her mother, where she had been staying since defendant's arrest. The next morning, at approximately 11:00 a.m., Sara's sister, Angela, drove Sara over to the trailer to pick up some clothes and supplies. Defendant was there, and Sara told him that a Child Protective Services (CPS) worker had taken the children, and that CPS needed to talk to him. They talked for a short time and defendant did not want her to leave. She went to the car to tell Angela to leave her there for a while, but Angela refused to leave her there. The defendant came out of the trailer and saw the discussion going on between the sisters and approached the car. Defendant told them to leave, because "It's going to blow."<sup>4</sup>

Deputy Edwards was patrolling on Highway 371 on the afternoon of February 23, 2010, when she observed smoke coming from the reservation and followed it. Along the highway, Antonio Heredia, Sr., flagged her down and related the incidents that had occurred previously on February 18, and led her to the fire location. Antonio, Sr., informed the deputy that defendant had made threats to do something to his mother's house. Antonio, Sr., also told the deputy that Luther Salgado, Jr., had told him that he (Luther, Jr.) had seen defendant next to Sally's house near the time of the fire, although at

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<sup>3</sup> Sara's testimony is confusing, but defendant was bailed out the evening of the day before the fire, which occurred on February 23, 2010.

<sup>4</sup> Angela originally told an investigator that she thought defendant was "B.S.[ing]" when he made the statement because she had seen the house at 2:00 p.m. and there was not smoke then.

trial he testified he never heard Luther, Jr., say he had seen the defendant near Sally's trailer. By the time they arrived at the fire, it was out.

Meanwhile, Luther Salgado, Jr., defendant's cousin, was working at the Cahuilla tribal environmental office when he received a telephone call about the fire. Luther, Jr., and his family lived in a motor home behind the house of his father, Luther Salgado, Sr. Luther, Jr. was building a house within 100 feet of his parent's house, just a short distance from Sally Heredia's trailer.<sup>5</sup> Luther, Jr. immediately went to the site of his home under construction and saw that Sally's trailer was pretty much gone. He did not see the defendant at the site of the fire.

Captain Palmer, a fire specialist, was involved in the investigation of the fire at Sally Heredia's trailer. He examined the fire debris at the site and determined that the fire originated at the rear of the structure. He collected samples of the fire debris to submit for analysis, but no ignitable liquid residues were identified in the samples. After ruling out all natural and accidental causes of the fire, Captain Palmer concluded that arson was the cause of the fire, and based on witness statements, he determined that defendant caused it. During a videotaped interview, defendant admitted he started the fire.

Defendant was charged with residential burglary (§ 459, count 1), arson (§ 451,

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<sup>5</sup> Because witnesses described locations plotted on diagrams, maps, and pictures as "right here" or "this square box on the side of the road," we reviewed the exhibits to determine the relative locations of the various witnesses' homes.

subd. (b), count 2), witness intimidation (§ 140, subd. (a), count 3), and criminal threats against Sally, as well as Antonio Sr., and Antonio, Jr., (§ 422, counts 4-6). In addition, the information alleged that defendant had been previously convicted of four felonies for which he had served prison terms (prison priors, § 667.5, subd. (b)), one prior conviction of a serious felony (nickel prior, § 667, subd. (a)), and one prior conviction for a serious or violent felony under the Strikes law. (§ 667, subd. (c), (e)(1); § 1170.12, subd. (c)(1).)

Defendant was tried by a jury. On September 7, 2011, the jury acquitted defendant of burglary (count 1), witness intimidation (count 3), and one of the criminal threats counts. (Count 4.) In the bifurcated court trial proceedings relating to the prior conviction allegations, defendant admitted all the priors. Defendant's request that the court exercise its discretion to strike the Strike allegation was denied, and defendant was sentenced to an aggregate term of 25 years four months in prison.

On December 13, 2011, defendant timely appealed.

## **DISCUSSION**

### **1. The Trial Court Correctly Ruled Defendant's Confession Was Voluntary.**

During the trial, the court admitted into evidence defendant's videotaped interview, overruling defendant's objection that his statement was not voluntary. Relying upon the opinion of the expert presented during defendant's case in chief, he argues that the confession was the product of his medical distress, and the fire investigators' coercion. Defendant complains that the court made its determination of voluntariness based solely on the transcript of the interview without viewing the actual videotape.

Defendant therefore argues that the court's failure to review the DVD of the interrogation denied him the right to a fair hearing and reliable determination of the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. We disagree.

A criminal conviction may not be founded upon an involuntary confession. (*People v. Scott* (2011) 52 Cal.4th 452, 480, citing *Lego v. Twomey* (1972) 404 U.S. 477, 483 [92 S.Ct. 619, 30 L.Ed.2d 618].) Whether a confession was voluntary depends upon the totality of the circumstances. (*Scott*, at p. 480; *People v. Holloway* (2004) 33 Cal.4th 96, 114.) We accept the trial court's factual findings, provided they are supported by substantial evidence, but we independently review the ultimate legal question. (*People v. Williams* (2010) 49 Cal.4th 405, 436.)

Once a suspect has been properly advised of his rights, he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. (*People v. Holloway, supra*, 33 Cal.4th at p. 115.) A confession obtained while the defendant was under the influence of drugs is not necessarily involuntary. (*People v. Weaver* (2001) 26 Cal.4th 876, 921-922; *People v. Hendricks* (1987) 43 Cal.3d 584, 591.) The due process inquiry focuses on the alleged wrongful and coercive actions of the state, and not the mental state of the defendant. (*Weaver*, at p. 921.)

In determining whether a confession was voluntary, the question is whether the defendant's choice to confess was not essentially free because his or her will was overborne. (*People v. Williams, supra*, 49 Cal.4th at p. 436.) In evaluating the

voluntariness of a statement, no single factor is dispositive. (*People v. Williams* (1997) 16 Cal.4th 635, 661.) Relevant factors include (a) the element of police coercion; (b) the length of the interrogation; (c) its location; and (d) its continuity; as well as the defendant's maturity, education, physical condition, and mental health. (*Id.* at p. 660.)

Courts have found a constitutional violation in this context only where officers threaten a vulnerable or frightened suspect with the death penalty, promise leniency in exchange for the suspect's cooperation, and extract incriminating information as a direct result of such express or implied threats and promises. (*People v. Williams, supra*, 49 Cal.4th at p. 443, citing *People v. Ray* (1996) 13 Cal.4th 313, 340.) Thus, deception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is of a type reasonably likely to procure an untrue statement. (*People v. Jones* (1998) 17 Cal.4th 279, 299.) The Supreme Court has made it clear that investigating officers are not precluded from discussing any "advantage" or other consequence that will "naturally accrue" in the event the accused speaks truthfully about the crime. (*Ray*, at p. 340.)

Defendant's argument is two-pronged: he argues that his decision to speak to the fire investigators after being read the warnings prescribed under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] was involuntary, and that his subsequent confession was induced by deception. These are separate arguments. As to the first, that defendant's decision to waive his right to remain silent and speak to investigators without an attorney present was involuntary, the defendant argues that the

officers were required to cease interrogation until he was seen by medical professionals. This argument is not supported by the record. The investigators' promise to stop the interrogation when the medics arrived was not "tantamount to dissuading [defendant] from invoking his rights."

The record shows that after admonishing defendant pursuant to *Miranda*, one of the investigators asked if defendant was willing to be interviewed. Defendant explained that his head was tingling like his blood pressure was too low. Investigator LeClair asked defendant if he was on blood pressure medication and whether he had taken it, to which defendant replied in the affirmative.<sup>6</sup> The investigators stated that they would get someone to check him out, and, according to the videotape of the interview,<sup>7</sup> Investigator Palmer immediately left the room. During the time Palmer was out of the room, defendant mentioned that he did have an attorney, but that he did not need one, "but . . . this doesn't even need an attorney so I can talk to you."

At that moment, Palmer reentered the interview room where he was informed by LeClair that defendant was willing to talk to them. Palmer informed defendant that he had gone and gotten someone to look at him, and that if anything changed, defendant should let them know. LeClair added that they would stop the talking while he was being

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<sup>6</sup> Defendant later acknowledged taking six tablets, and described the medication as one intended to treat narcotic withdrawal as well as blood pressure. However, he could not recall the name of the medication.

<sup>7</sup> We have viewed the videotape.

checked. There is no evidence that the investigator “dissuaded” defendant from exercising his right to an attorney. Defendant’s decision to answer questions without the presence of counsel was free and voluntary.

As to defendant’s argument that his confession was the product of coercive tactics, defendant presents no argument or authority explaining why the trial court’s failure to observe the DVD infected its determination of voluntariness. At trial, while defense counsel did make references to the fact the defendant appeared “out of it” on the video, counsel did not object when the court indicated it had not viewed the DVD and did not specifically request that the court watch the video prior to making its ruling. Defendant also presents no authority to support his argument that the trial court’s findings are not entitled to deference due to its failure to watch the DVD. Points raised without argument or legal support require no discussion. (*People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Blankenship* (1989) 213 Cal.App.3d 992, 995-996.)

We have watched the DVD and found it adds little to what is obvious from the transcript. While defendant is clearly under the influence of an opiate (or other opioid compound), the voluntary ingestion of drugs does not undermine voluntariness. (*People v. Mayfield* (1993) 5 Cal.4th 142, 204; *People v. Hernandez* (1988) 204 Cal.App.3d 639, 648; *People v. Loftis* (1984) 157 Cal.App.3d 229, 235 [distinguishing between admissions obtained after receiving medication from law enforcement, and statements obtained after voluntary ingestion].) If the evidence shows the defendant understood and was able to intelligently respond to police questioning, we will find a knowing and

intelligent waiver. (*Loftis*, at pp. 235-236.) Here, defendant appeared to understand the questions, and his answers were coherent and relevant.

As to the fire investigators' use of deception by stating that it is not a problem if someone wants to burn his or her own property, the investigators may have implied such an act was less serious but never told the defendant so. In reaching this conclusion, we note that the officers never told him that setting fire to his mother's trailer was not a criminal act, or that he would be released if he confessed. One investigator told him that "... if you wanna burn it down, go ahead," and followed that statement up by saying that if someone else did it, he had to go look for him. Later, an investigator explained when there is a fire, they are called to investigate it to determine what caused the fire, adding, "if a property owner burns his house down and okay, that's it, but if, if it was caused by ... some bad people coming on your property trying to burn it down, well, then we start a bigger investigation." The investigators never stated that it was not a crime for defendant to burn down his mother's trailer just because it was on his own land.

Looking at factors relating to the defendant's maturity, education, physical condition, and mental health (*People v. Williams, supra*, 16 Cal.4th at p. 660), it is noteworthy that defendant has extensive experience with the criminal justice system, and demonstrated sophistication during the interview, especially when parsing his "affiliation" with the Nazi Low Riders and Aryan Brotherhood. Factors relating to the defendant do not support a finding of involuntariness. Further, defendant's conduct after confessing, where he did not express surprise or claim he was duped into making a

statement against his interests, supports a conclusion he was not coerced to confess by a promise or implication of leniency.

Turning to the other factors, the length of the interrogation (nearly two hours) was not unreasonably long, particularly considering that it was interrupted once for several minutes while medics checked his blood pressure and blood sugar when the defendant complained of light-headedness. The factors relating to the defendant's maturity, education, physical condition, and mental health do not compel a conclusion that his will was overborne.

The trial court did not violate defendant's due process rights by failing to watch the DVD of the interview. Its finding of voluntariness was proper as was admission of the confession into evidence.

**2. The Trial Court Did Not Abuse Its Discretion in Refusing to Strike the Strike.**

Defendant argues that the trial court abused its discretion by declining to strike his prior Strike conviction, which would permit a shorter sentence. We disagree.

Section 1385, subdivision (a), authorizes a trial court to act on its own motion to dismiss a criminal action "in furtherance of justice." This power includes the ability to strike prior conviction allegations that would otherwise increase a defendant's sentence. (*People v. Garcia* (1999) 20 Cal.4th 490, 496.) The Three Strikes law did not remove or limit the court's power to strike sentencing allegations under section 1385. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.)

A court's discretionary decision to dismiss or to strike a sentencing allegation

under section 1385 is reviewable for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 373.) This standard is deferential. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The burden is on the appellant to affirmatively show in the record that error was committed by the trial court. (*People v. Alvarez* (1996) 49 Cal.App.4th 679, 694.) 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. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 904-905.) We may not substitute our conclusions for those of the trial court. (*People v. McGlothlin* (1998) 67 Cal.App.4th 468, 477.)

In deciding whether to exercise its discretion to strike or vacate a prior conviction allegation or finding under the Three Strikes law, “in furtherance of justice” (Pen. Code, § 1385, subd. (a)), the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. (*People v. Williams, supra*, 17 Cal.4th at p. 161.) Once a career criminal commits the requisite number of strikes, the circumstances must be “extraordinary” before he can be deemed to fall outside the spirit of the Three Strikes law. (*People v. Carmony, supra*, 33 Cal.4th at pp. 377-378; *People v. Finney* (2012) 204 Cal.App.4th 1034, 1040.)

In the present case, the court considered the facts that defendant's criminal history was "abysmal." The court observed that defendant's prison commitments began 1996 when he was sentenced to prison for selling methamphetamine, and he violated parole "numerous times." The court also noted that defendant was convicted of spousal abuse two years later, when he was placed on probation only to violate probations and suffer another prison term, with subsequent parole violations upon release. It then cited defendant's conviction for possession of methamphetamine, following by his conviction and sentence for robbery, followed by parole and more violations of parole. The court commented on the fact that defendant did not remain long out of custody because in 2003, defendant was convicted of both being under the influence of a controlled substance and misdemeanor spousal abuse.

The trial court went on to note that the following year he was in prison again, when he was convicted of assault while in state prison and received an additional term of three years in prison, and then repeated his pattern of parole violations upon his release. Defendant's assault conviction was followed by three more convictions for battery. Based on his record comprising numerous felony convictions (including those in the current case), six misdemeanors, and a minimum of nine parole and probation violations, the court concluded defendant was "actually . . . a poster boy for why the three strikes law was passed in the first place."

The trial court considered all the relevant criteria in deciding not to strike the defendant's prior Strike conviction. Defendant did not present extraordinary

circumstances from which he could be deemed outside the spirit of the Strikes law. The particulars of his background, character, and prospects were not positive, as well as defendant's history of unapologetic domestic violence, possibly related to methamphetamine use (he informed the probation officer he used a lot until his arrest on the current matter), his violent nature, and overuse of prescription medicines,<sup>8</sup> show him to be well within the spirit of the Strikes law. Defendant is the kind of "revolving-door career criminal for whom the Three Strikes law was devised." (*People v. Pearson* (2008) 165 Cal.App.4th 740, 749, quoting *People v. Gaston* (1999) 74 Cal.App.4th 310, 320.)

### DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

KING

J.

MILLER

J.

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<sup>8</sup> The court had before it the probation report showing that between the ages of 28 and 35, the defendant's prescription drug use included 80 mg. of oxycontin five times a day, eight tablets of Norco (acetaminophen and hydrocodone, according to <http://www.drugs.com/norco.html> [as of November 5, 2012]), and five Vicodin, daily. During defendant's interrogation, defendant informed the fire investigators he had taken six pills of a drug he could not name, which was intended for narcotic withdrawal and to control blood pressure, although he asserted he had kicked his oxycontin dependence by this time.