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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SADAT F. MOUSA,

Defendant and Appellant.

A128906

(San Francisco City & County  
Super. Ct. No. 211060)

**I.**

**INTRODUCTION**

Appellant Sadat F. Mousa was convicted by jury of making criminal threats, a felony (Pen. Code, § 422)<sup>1</sup> and making annoying telephone calls, a misdemeanor (§ 653m, subd. (b)). The victim in each of these convictions was appellant's brother, Amjad. The court sentenced appellant to a four-year term, consisting of an aggravated three-year prison term for the felony and to a consecutive one-year term in the county jail for the misdemeanor. Appellant raises numerous issues on appeal, including that (1) the court abused its discretion in denying his motions for new appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*); (2) there was insufficient evidence to support his conviction for making criminal threats (§ 422); (3) the court erred at sentencing in imposing an aggravated and consecutive term; and (4) defense counsel rendered ineffective assistance at trial. We affirm.

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

## II.

### FACTS AND PROCEDURAL HISTORY

Appellant's conviction for making criminal threats (§ 422) is based upon his threat to kill his brother, Amjad, made in open court during a hearing on November 4, 2009. The hearing that day related to a request by Amjad and Badea Mousa (appellant's mother) for a domestic violence restraining order against appellant. They sought a restraining order against appellant after a series of disturbing incidents involving appellant, including repeated threats which they believed to be real and capable of being carried out. They reported an incident on September 2, 2009, in which appellant locked his mother in the family's convenience market for several hours by closing and securing the large rolling security doors, and by cutting the electricity and phone lines to the store. In another incident, Amjad got between an agitated appellant and their mother, and appellant started punching him. As appellant left, he said, "let your kids live without their father." Although it was never entirely clear, it appears appellant's ill will toward Amjad and his mother was based on financial dealings involving the family's business.

During the hearing seeking a restraining order, appellant was repeatedly disruptive and continually interrupted the judge. The judge eventually found appellant in contempt and ordered the bailiffs to remove him from the courtroom. The judge stated, "What has happened in front of me unfortunately is a disregard of the court's order to remain silent. Accordingly, I find it necessary, Mr. Sadat [*sic*], to have you placed in custody." Appellant stood up, turned to his brother Amjad, and screamed, "We're both going to die, you and me. We're going to fucking die. We're going to die. We're going to die. . . . I'm going to shoot myself . . . ." Appellant continued to scream hysterically the whole way out of the courtroom. The court reporter transcribed appellant's in-court statements and certified the transcript. Amjad was about seven or eight feet from appellant when the threats were made. Amjad appeared "confused, scared, and shaken." Appellant's mother also appeared to be afraid.

The court signed the restraining order on November 4, 2009, ordering that appellant have no further contact with his mother or his brother personally or by

telephone. Appellant was personally served with the restraining order after the hearing while he was in the holding cell.

Inmates at the county jail, such as appellant, are given a standard “universal admonition” at the beginning of each call from jail that the call is monitored and recorded. Jail telephone records for November 6, 2009, through January 21, 2010, showed that appellant called his mother 16 times. Appellant called his sister Hanan approximately 63 times during the same period. Jail telephone records for November 4, 2009, through January 21, 2010, showed that appellant called his brother Amjad at work 12 times. The calls were recorded and transcribed from Arabic to English. The telephone records and transcriptions of the recorded calls were introduced into evidence at trial, and provided the basis for appellant’s misdemeanor conviction for making annoying telephone calls in violation of section 653m, subdivision (b). In these telephone calls, appellant made numerous threats to kill family members if they came to court and testified against him, and to kill them if they did not drop the charges.

For example, on one occasion, when he called his sister Hanan from county jail, appellant told her, “Tell Amjad to go and testify against me, now for sure when I leave from here, this boy will die.” Hanan told appellant, “I really don’t understand about you Sadat, may Allah [God] guide you?” Appellant responded, “He will die for good.” Appellant continued, “I swear to God he will die, he will die, I’ll kill Amjad. . . . I am not worry [*sic*] about anything, I have no children to leave behind, I’ll hit him, just wait a little, we both shall die me and him, he shall die with me this loser [*sic*], this garbage.”

Hanan pleaded with appellant who repeated the threats, “He must die . . . his end is getting closer, I’ll go to his store and strike him in the middle of the store, just tell him to buy insurance for his children, now tell him to buy insurance for his children so they can survive.” Again Hanan said that she did not “know about you both” and appellant said, “I want to see how he will sustain his children? Because they will die, they will die from starvation . . . .” Appellant continued, “I swear, I’ll kill him when I leave, I swear I’ll shoot him . . . .” He stated, “God damn his children, this son of a bitch why his wife shall live and spend his money? They shall go to the shit and beg, don’t tell him anything.”

Appellant told Hanan that he (appellant) warned their mother not to go to court and “she caused me all the troubles . . . .”

At trial appellant’s relatives had a change of heart and clearly did not wish to testify against appellant. His brother Amjad essentially testified that he could not remember what had occurred, that he did not recognize his voice on recorded telephone conversations with appellant, and that he was not placed in fear by appellant. He claimed to have no memory of appellant threatening him or his mother. Amjad indicated that he repeatedly asked the court and the district attorney to dismiss the charges against his brother, and he “absolutely” felt the same way when he testified at trial. Amjad wanted his family to know that he sought to have the charges against appellant dropped. He did not want to testify against appellant. Amjad explained, “He’s my brother, and I believe in a second chance.” The case was causing “the whole family” a lot of stress. Amjad asked the prosecutor and defense counsel “not to make [his mother] a part of this case” because he was concerned about her health.

The parties stipulated that if appellant’s 11-year-old niece Haneen were to testify, she would state that she had no memory of calling the police at 10:00 p.m. on September 24, 2009, to report that appellant had threatened to vandalize their home with a hammer. She had no memory of the police arriving that evening.

Appellant testified in his own defense. His testimony was a rambling, disjointed, and virtually incomprehensible narrative. He denied threatening to kill his brother at the November 4, 2009, restraining order hearing. He testified that he was very frustrated with the manner in which his attorney handled the case, and believed his attorney “did not ask the appropriate and right question to prove [his] innocence.” He also testified “the District Attorney want[s] to destroy my life based on nothing.”

The jury returned verdicts on both counts. At the sentencing hearing held on June 4, 2010, defense counsel indicated that appellant would not accept probation or participate in a psychological evaluation. Appellant was sentenced to a total of four years of confinement, computed as follows: The court imposed the aggravated term of three years on Count One, the felony conviction for making criminal threats, and a consecutive

one-year county jail term on Count Two, the misdemeanor conviction for making annoying telephone calls (§ 653m, subd. (b)). This appeal followed.<sup>2</sup>

### III.

#### DISCUSSION

##### A. Denial of Appellant's *Marsden* Motions

During the course of the proceedings in this case, appellant made four separate motions for the substitution of a new court-appointed counsel, commonly referred to as *Marsden* motions. (See *Marsden*, *supra*, 2 Cal.3d 118.) The first motion was made on January 13, 2010. Although the court denied the motion, it granted defense counsel's request to be relieved, and new counsel was appointed. Appellant made a second *Marsden* motion on March 8, 2010, which was denied. The third and fourth *Marsden* motions were made after the start of appellant's trial, on May 5, 2010, and on May 6, 2010. Appellant claims the court abused its discretion in denying the last two *Marsden* motions.<sup>3</sup>

The law governing a *Marsden* motion is well settled. “ ‘ ‘ ‘When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result . . . .’ [Citations.]” [Citation.]’ . . . We review the trial

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<sup>2</sup> Appellant originally sought to proceed in propria persona on appeal and filed briefing on his own behalf. By order of this court issued on April 7, 2011, we struck the briefs filed and directed the First District Appellate Project to arrange for the appointment of counsel to represent appellant in this matter. (Reardon, Acting P. J.)

<sup>3</sup> Appellant's opening brief addresses only the denial of the last two *Marsden* motions made after the start of his trial. Appellant's failure to discuss his other two *Marsden* motions in his opening brief effects a forfeiture of any argument he might make that the denial of those motions was improper. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

court's ruling on the motion for an abuse of discretion. [Citation.]" (*People v. Henning* (2009) 178 Cal.App.4th 388, 403.)

A judge abuses his or her discretion if the judge "denies a motion for substitution of attorneys solely on the basis of his [or her] courtroom observations, despite a defendant's offer to relate specific instances of misconduct," or makes a decision "without giving a party an opportunity to present argument or evidence . . . ." (*Marsden, supra*, 2 Cal.3d at p. 124; see, e.g., *People v. Groce* (1971) 18 Cal.App.3d 292, 297 [reviewing court reversed conviction on grounds that the trial court did not adequately investigate defendant's objections to counsel's handling of the case].)

Appellant made his third *Marsden* motion on May 5, 2010, the third day of trial. The court held a hearing outside the prosecutor's presence to allow appellant to state his reasons for being dissatisfied with counsel. Appellant complained that counsel would not subpoena "the people in my behalf to prove my innocence." Appellant also accused counsel of improperly agreeing to a mental evaluation, and he "suspended my speedy trial from process." Appellant claimed that counsel was "destroying the evidence" in his case, and that counsel failed to provide him with a copy of the preliminary hearing transcript. Finally, appellant asserted his attorney had a "conflict of interest."

The court asked defense counsel to respond, and counsel explained, "I have spoken to [appellant] several times about witnesses. You know, and I've explained to him, and he has gotten copies of the information. He has copies of the police reports. He's got copies of the telephone calls that were made. He's got copies of various, various documents. [¶] And I still don't think he's quite clear about understanding that his mother is not named as a victim in the felony information, number one. And number two, that I'm sure he's aware of her medical situation, but without her telling me, because she speaks only Arabic, I know she's under a lot of stress. She doesn't need to be put under any more. And I don't think it will help him, and I've explained it to him, okay. [¶] He wants me to call Judge Mahoney. And Judge—you know, Judge Mahoney ordering him into contempt and taking him into custody, he's not a helpful witness. So the other witnesses, and I just don't think he gets it, though I continue to try to explain it

to him.” After hearing counsel’s explanation, the court denied appellant’s request to substitute counsel.

The next day, in the midst of jury selection, appellant made another *Marsden* motion. The court commented, “There have been multiple *Marsden* motions in this case. And I have come to the conclusion that Mr. Mousa is abusing his privilege to bring a *Marsden* motion for the purpose of disrupting these proceedings. I will hear his motion [o]n the chance that there is something new to hear at an appropriate time . . . .” Once again, after asking the prosecutor to leave the courtroom, the court allowed appellant an opportunity to state his reasons for wanting to substitute counsel.

Appellant again complained that his attorney asked for a mental health evaluation, which appellant believed violated his right to a speedy trial, and failed to provide him with a copy of the preliminary hearing transcript. He also asserted that counsel told “one of the judges to not let me hire my own private lawyer. . . . And that’s the reason I will never trust him, because it’s make [sic] me think he’s working against my best of [sic] interests, because why he mentioned something like this in court.” Appellant repeated that his attorney failed to subpoena five or six witnesses. He stated, “So I have the right to subpoena, and I have the right for fair trial. And I’m not receiving this, because [defense counsel], he’s not going to subpoena nobody. He’s told me his decision. It’s not mine. I’m the victim. . . . And I’m going to go to prison if I [am] f[ou]nd guilty. . . . I cannot trust him.” Appellant explained that he filed a complaint against his attorney with the State Bar. He said that the attorney he tried to retain (Walker) apologized to him that he could not represent appellant because “they don’t want [attorney Walker] to take [appellant’s] case.”

Defense counsel explained that when the prosecutor said he intended to file charges “it was the consensus that Mr. Mousa has mental health problems. . . . [W]hen there was a discussion about waiving time, it was for the purpose of putting the two cases together, having Mr. Mousa go to behavioral health court, get the appropriate treatment and getting him a very favorable disposition, something other than what he’s facing at trial now, which is a strike. . . .” Counsel further commented, “We made efforts

yesterday to come up with another charge which was a nonstrike. He rejected that also. This is just another example of what I'm trying to say that that was why it was discussed with him to waive time. He chose not to do that."

Counsel emphatically denied that he discouraged private defense counsel from taking appellant's case. "I have been in communication with Mr. Walker a few times and told him over the phone . . . where we were on certain dates . . . . [T]he record is made very clear about the situation with Mr. Walker. He was paid a certain amount of money to do an initial evaluation of the case. He asked the family for more money to represent [appellant]. They didn't pay him. . . . I explained to Judge Morgan we were trying to accommodate Mr. Walker's schedule, because I believed that he would come into the case. [¶] So [defense counsel] . . . didn't interfere with [Walker] getting into the case . . . . [¶] . . . The fact remains that Mr. Walker can come into the case at any time if either Mr. Mousa or his family pays . . . the money that was requested for the trial."

Counsel also explained he provided appellant with the documents he had requested. "I've gone to see Mr. Mousa a number of times in San Bruno [c]ounty [j]ail. And when he has asked me for documents, I have provided them to him. He got a copy of the felony information. . . . He got a copy of the police report. . . . He's got a copy of the telephone calls transcript. . . . He asked me for the preliminary hearing transcript yesterday. I got it to him today. I've given him the documents that he has asked me for, for the most part."

The court denied the request to substitute counsel commenting, "There is absolutely no indication in the record . . . that Mr. Walker has attempted to substitute in at any point in time. If Mr. Walker has a desire to substitute in, I'd be happy to have a discussion with everybody involved about that possibility. But Mr. Walker has not made that request. . . . [¶] There is no reason for me to believe that [defense counsel] withheld any information from Mr. Mousa. . . . I accept what [defense counsel] said, and I think there is no basis to think otherwise. . . . And with respect to the mental health issue, we've been over that. And the *Marsden* motion is denied."

Appellant now argues that the trial court should not have denied his *Marsden* motion without conducting a more thorough inquiry into the causes for his dissatisfaction with his counsel. His sole complaint appears to be his disagreement with counsel about whether his mother should have been called as a witness for the defense. We review this contention under well-settled law.

In conducting a *Marsden* hearing, the “court must inquire on the record into the bases of defendant’s complaints and afford him an opportunity to relate specific instances of his attorney’s asserted inadequacy. [Citations.] Depending on the nature of the grievances related by defendant, it may be necessary for the court also to question his attorney. [Citations.]” (*People v. Hill* (1983) 148 Cal.App.3d 744, 753; *People v. Turner* (1992) 7 Cal.App.4th 1214, 1218-1219.) However, “[o]nce the defendant is afforded an opportunity to state the reasons for discharging an appointed attorney, the decision to allow a substitution of attorney is within the discretion of the trial judge unless defendant has made a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation. [Citations.]” (*People v. Crandell* (1988) 46 Cal.3d 833, 859.)

In this instance, the trial court gave appellant an opportunity to state his complaints concerning his trial counsel, and counsel was given an opportunity to respond. The record reflects that appellant’s complaints focused primarily on the fact that he disagreed with defense counsel regarding the appropriate strategy for his defense. However, disagreement over tactics, as to which counsel is “ ‘captain of the ship,’ ” does not demonstrate an irreconcilable conflict. (*People v. Welch* (1999) 20 Cal.4th 701, 728-729.)

Among numerous other complaints, appellant explained that he believed his counsel had not secured witnesses who could testify on his behalf, including his mother. The trial court asked for further information on this point. Counsel replied that he had considered the possibility of calling appellant’s mother as a purported witness and had discussed this topic with appellant. However, counsel had decided not to call appellant’s mother as a witness because she was not named as a victim on the felony count, she was

under extreme stress and in poor health, and counsel did not believe her testimony would be particularly helpful to the defense. Therefore, the strategic reasons underlying counsel's decision not to call appellant's mother as a witness were explained in sufficient detail during the course of the *Marsden* hearings.

Appellant's tactical disagreement with counsel over the value of his mother's testimony did not constitute an irreconcilable conflict that indicates that counsel's representation had become inadequate under *Marsden*. (See *People v. Smith* (2003) 30 Cal.4th 581, 606; *People v. Valdez* (2004) 32 Cal.4th 73, 95; *People v. Cole* (2004) 33 Cal.4th 1158, 1192.) Further, defense counsel's replies to the court's questions evidenced that he was ready and willing to discuss the case with appellant and to consider his input in preparing a defense. The trial court was entitled to conclude that there was no irreconcilable conflict that required the appointment of new counsel.

### **B. Substantial Evidence Supporting Criminal Threat Conviction**

Appellant contends that the evidence was insufficient to support his felony conviction for making criminal threats (§ 422). Claims challenging the sufficiency of the evidence to uphold a criminal conviction for making a criminal threat are generally reviewed under the substantial evidence standard. (*In re George T.* (2004) 33 Cal.4th 620, 630.) Under that standard, “ ‘an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt.’ ” [Citations.] “ ‘If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.’ ” ” (*Id.* at pp. 630-631.)

The California Supreme Court has identified five elements that need to be proven for the crime of making a criminal threat: “(1) that the defendant ‘willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,’ (2) that the defendant made the threat ‘with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,’ (3) that the

threat—which may be ‘made verbally, in writing, or by means of an electronic communication device’—was ‘on its face and under the circumstances in which it [was] 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) that the threat actually caused the person threatened ‘to be in sustained fear for his or her own safety or for his or her immediate family’s safety,’ and (5) that the threatened person’s fear was ‘reasonabl[e]’ under the circumstances.” (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)<sup>4</sup>

It was recently explained in *People v. Wilson* (2010) 186 Cal.App.4th 789 (*Wilson*), that section 422 “ ‘was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others. [Citation.]’ [Citation.] The statute ‘does not punish such things as “mere angry utterances or ranting soliloquies, however violent.” [Citation.]’ [Citation.] Instead, a criminal threat ‘is a specific and narrow class of communication,’ and ‘the expression of an intent to inflict serious evil upon another person. [Citation.]’ [Citation.]” (*Wilson, supra*, at p. 805.) The *Wilson* court went on to explain, “ ‘A threat is sufficiently specific where it threatens death or great bodily injury. A threat is not insufficient simply because it does “not communicate a time or precise manner of execution, section 422 does not require those details to be expressed.” [Citation.]’ [Citation.] In addition, section 422 does not require an intent to actually carry out the threatened crime. [Citation.] Instead, the defendant must intend for the victim to receive and understand the threat, and the threat must be such that it would cause a reasonable person to fear for his or her safety or the safety of his or her immediate family. [Citation.] ‘While the statute does not require that the violator intend

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<sup>4</sup> Section 422 makes it a crime to “willfully threaten[ ] to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . 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 . . . .”

to cause death or serious bodily injury to the victim, not all serious injuries are suffered to the body. The knowing infliction of mental terror is equally deserving of moral condemnation.’ [Citation.]” (*Wilson, supra*, at p. 806.)

On November 4, 2009, appellant was in court because his brother Amjad and his mother had sought a domestic violence restraining order against him. Appellant continually interrupted the judge during the hearing. When the judge found appellant in contempt and ordered him to be removed from the courtroom, appellant stood up, turned to his brother Amjad, and screamed, “We’re both going to die, you and me. We’re going to fucking die. We’re going to die. We’re going to die.” Amjad was about seven or eight feet from appellant when the threats were made. Amjad appeared “confused, scared, and shaken.”

Appellant contends the evidence does not support his conviction because “[t]he words were uttered while appellant was upset and in a highly emotional state, while he was being forcibly removed from a courtroom by at least two deputy sheriffs.” Appellant also noted that after this incident, when Amjad testified at appellant’s trial, he testified that he was not afraid of appellant.

In determining whether a particular threat is a criminal threat, we consider all of the circumstances surrounding the threat including the words used, the manner in which the communication is made, the prior relationship of the parties, and the actions of the accused after communicating the threat. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 860.) Considering the surrounding circumstances, a jury could have reasonably found that appellant willfully used words to convey a threat to seriously physically injure or kill Amjad. (See *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221 (*Martinez*) [defendant’s threats were “not subject to protection on the basis that they were couched in ambiguous terms”].)

Here, the history between the parties can be relevant to interpreting a threat. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340-1341 [prior history of hostile behavior between defendant and victim permitted inference of defendant’s knowledge and criminal intent in making threat]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155-

1156 [history of domestic violence between defendant and victim provides meaning for threats]; *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431-1432 [defendant more likely to follow through on his threat because of prior violent history].) The People presented ample evidence at trial that appellant frequently threatened Amjad's life when he was in an angry and agitated state, and Amjad took the threats seriously enough to seek help from law enforcement. In September 2009, Amjad told the police that he had received approximately 30 threatening telephone calls from appellant. In one of the threatening phone calls, appellant said he was not afraid of the police and that he was willing to throw gasoline on their mother and light her on fire. In another call, appellant threatened to shoot Amjad and then shoot himself. The officer explained that Amjad appeared "nervous and scared" when he reported the threats. Thereafter, Amjad sought a restraining order to protect himself and his family from appellant. It was at that hearing, that appellant again repeated this threat to kill Amjad. Amjad appeared shaken and scared on that occasion.

After appellant was placed in jail and served with a restraining order, he continued his personal vendetta against Amjad, making numerous threatening telephone calls during which he berated Amjad and continued to threaten his life. Consequently, we find no substantiation in the record for appellant's argument that his in-court death threat directed toward Amjad was a spur-of-the-moment reaction to "being forcibly removed from a courtroom by at least two deputy sheriffs." Instead, it was just one more episode in a continuous criminal campaign by appellant to intimidate Amjad.

In attempting to minimize the significance of this conduct, appellant points to Amjad's testimony at trial that he was not afraid of appellant. However, it was well within the jury's province to disbelieve Amjad's backtracking on this point. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 849.) The jury is charged with evaluating the credibility of a witness's in-court testimony when it is contradicted by out-of-court statements, and on appeal we may not substitute our determination as to credibility. (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

In sum, appellant's words, when combined with the surrounding circumstances and the history between appellant and Amjad, are "susceptible to an interpretation that defendant made a grave threat to [Amjad's] personal safety." (*Martinez, supra*, 53 Cal.App.4th at p. 1221.) The facts, when considered in total, fully support the jury's verdict.

### **C. Sentencing Errors**

#### ***1. Imposition of the Aggravated Term on Count One***

Appellant first contends the trial court erred in imposing the upper term on Count One, making a criminal threat, when it erroneously considered an aggravating factor that constituted an element or common characteristic of the offense for which he was convicted. At the sentencing hearing, the court first pointed out that appellant "has indicated through his counsel that he would reject probation." In imposing the aggravated sentence of three years for appellant's felony conviction, the court first cited the fact "that the crime involved the threat of acts that would have—that involved a high degree of cruelty, viciousness, and callousness." The court also indicated that it was relying on the fact that appellant "threatened witnesses unlawfully, attempted to prevent or dissuade witnesses from testifying, and in that way, illegally interfered with the judicial process.

On appeal, appellant claims that in imposing the aggravated term, the sentencing court erroneously relied on the fact that appellant threatened acts involving "a high degree of cruelty, viciousness, and callousness" when this is an element of the offense of making criminal threats (§ 422). A circumstance that is an element of the substantive offense cannot be used as a factor in aggravation. (Cal. Rules of Court, rule 4.420(d) ["A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term"].)

However, the record reveals appellant never contested the sentencing court's reliance on the aggravating factors challenged on appeal. To preserve a claim that a sentencing court improperly relied on certain aggravating factors, a defendant must object at the sentencing hearing on the specific grounds he asserts on appeal. (*People v. de Soto*

(1997) 54 Cal.App.4th 1, 8-9 (*de Soto*), citing *People v. Scott* (1994) 9 Cal.4th 331, 356.) In *de Soto*, the defendant claimed, inter alia, that the sentencing court improperly relied on an element of the crime to impose the upper term. (*de Soto, supra*, at p. 7.) The *de Soto* court rejected the claim and held that general objections are insufficient because they do not give the sentencing court a genuine opportunity to evaluate the claims and correct any errors it may have made. (*Id.* at p. 10.) Similarly, in the case before us, appellant failed to object specifically that the court was relying on an aggravating factor that constituted elements or common characteristics of the offense for which he was convicted. The argument and general objections he advanced below are insufficient to preserve appellate review of his contention.

Even if not forfeited, there was no sentencing error. Although it is improper to use an element of a crime as an aggravating factor (Cal. Rules of Court, rule 4.420(d)), “where the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence. [Citation.]” (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562.) Section 422 is violated with a single credible threat to the victim. Here, appellant engaged in a pattern of threatening behavior, both before the November 4 hearing and afterward, that went well beyond the minimum necessary to establish the crime of making a criminal threat.

He repeatedly threatened to kill Amjad and his mother in such vivid and descriptive terms that there can be no doubt that he was attempting to intimidate them. He threatened to burn Amjad’s mother to death. He repeatedly threatened to leave Amjad’s children without a father. On one occasion appellant called his sister and said, “I want to see how he will sustain his children? Because they will die, they will die from starvation . . . .” He stated, “God damn his children, this son of a bitch why his wife shall live and spend his money? They shall go to the shit and beg . . . .” The record shows appellant engaged in a systematic and calculated course of severely bullying his brother. The court did not abuse its discretion in finding that appellant displayed a high degree of

cruelty, viciousness, and callousness toward his brother. These factors justify the imposition of the upper term and the trial court did not abuse its discretion in imposing it.

In any event, even if the sentencing court improperly relied on a fact that is an element of the crime (Cal. Rules of Court, rule 4.420(d)), a remand is not required if it is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729 (*Osband*); *People v. Avalos* (1984) 37 Cal.3d 216, 233, *People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434 (*Cruz*)). Only one aggravating factor is necessary to justify imposing the upper term. (*Osband, supra*, at p. 728.) Here, the sentencing court specifically stated on the record that it was relying on *two* aggravating factors in imposing the upper term: (1) the crime involved the threat of acts disclosing a high degree of cruelty and viciousness; and (2) appellant attempted to interfere with the judicial process by threatening witnesses to dissuade them from testifying against him. (See Cal. Rules of Court, rule 4.421(a)(6) [“The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process”].) The record contains ample evidence relating to this aggravating factor, and appellant does not contend otherwise. When appellant called his family members from jail, he made such statements as “Tell Amjad to go and testify against me, now for sure when I leave from here, this boy will die.” Appellant also told Hanan that he (appellant) had warned their mother not to go to court and “she caused me all the troubles. . . .”

Thus, it is not reasonably probable that the trial court would have chosen a lesser sentence even if we assume it considered “improper” aggravating circumstances, especially since a single factor in aggravation is sufficient to justify the imposition of the upper term. (*Cruz, supra*, 38 Cal.App.4th at pp. 433-434; *Osband, supra*, 13 Cal.4th at p. 730.) In sum, the trial court’s imposition of the upper term was neither irrational nor arbitrary and the trial court did not abuse its discretion in imposing the upper term.

## **2. Imposition of Consecutive Terms**

The trial court imposed a consecutive rather than a concurrent term on Count Two, making annoying telephone calls (§ 653m, subd. (b)), explaining, “the reason that’s going

to run consecutive is that the crimes were committed at different times in separate places, and they were not committed so closely in time and place as to indicate a single period of aberrant behavior.” (See Cal. Rules of Court, rule 4.425(a)(3).) Appellant contends the trial court abused its discretion in imposing this term because “[t]hree weeks [between making the criminal threat and making the annoying calls] are not a long time, especially when the misdemeanor and felony are closely connected in terms of cause and effect.” We disagree.

Criteria lending themselves to the imposition of consecutive rather than concurrent terms include the following: the crimes and their objectives were predominantly independent of each other; the crimes involved separate acts of violence or threats of violence; the crimes were committed at different times or separate places rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. (See Cal. Rules of Court, rule 4.425(a)(1)-(3).)

Although appellant’s crimes were committed against the same victim for the same motive, that does not change the fact that the trial court could reasonably find that these offenses did not represent a single period of aberrant behavior. Instead, appellant chose to continue brutalizing his brother after having an opportunity to reflect before committing the next offense. The factual basis for Count One was appellant’s criminal threat to kill Amjad at the November 4, 2009 restraining order hearing. The record shows that even after he was remanded into custody and served with the restraining order prohibiting him from contacting his mother and brother, he went on to commit Count Two when he continued to place repeated telephone calls to threaten his brother and other relatives.

“It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse, the trial court’s discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered.” (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) Utilizing this lenient standard, we find the court did not abuse its discretion in deciding to

impose consecutive sentences. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.) The two crimes—which trial testimony established occurred over the course of approximately three weeks—were committed at different times and places, and were not committed “so closely in time and place as to indicate a single period of aberrant behavior.” (Cal. Rules of Court, rule 4.425(a)(3).)

#### **D. Ineffective Assistance of Counsel**

Appellant claims he received ineffective assistance of counsel at trial. Appellant offers numerous examples of why he believes trial counsel inadequately failed to investigate and to prepare his case for trial, and why he believes trial counsel fell substantially short of his duties to represent appellant during the trial itself. Specifically, he alleges counsel was incompetent by (1) failing to investigate whether his mother could provide favorable testimony on his behalf; (2) stipulating that appellant’s 11-year-old sister, Haneen, would testify that she had no memory of an incident she reported to police where appellant threatened to vandalize the house with a hammer; (3) failing to obtain an independent translation of his telephone calls from jail from Arabic to English; (4) failing to exercise peremptory challenges against three jurors; (5) failing to object to the admission of a portion of the certified court transcript of the November 4, 2009 hearing where the judge stated that there were “very serious threats made to the parties here”; (6) failing to prevent his brother Amjad from testifying; (7) failing to argue to the jury that appellant was wrongfully placed in custody during the November 4, 2009 hearing on the restraining order and consequently “was rightfully angry at what had happened to him”; and (8) threatening appellant with confinement if appellant did not stop his courtroom antics which “signaled to the jury that his client could not be controlled . . . .”

“To establish ineffective assistance of counsel, a defendant must show that (1) counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant. [Citation.] ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citation.] ‘In

determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny . . . ' and must 'view and assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.' [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. [Citation.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212.) Generally, whether counsel performance was inadequate and whether such inadequacy prejudiced the defense are subject to de novo review. (*In re Resendiz* (2001) 25 Cal.4th 230, 248-249, abrogated on another ground by *Padilla v. Kentucky* (2010) 130 S.Ct. 1473, 1484.)

Initially we note that appellant's complaints are directed at defense counsel's decisions that are inherently tactical, including the decision to interview witnesses, object to evidence, exercise peremptory challenges or to retain experts. (See *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1093 ["Counsel is only required to make a reasonable investigation; reasonableness depends upon the totality of the circumstances, and great deference is given to counsel's judgment"]; *People v. Knight* (1987) 194 Cal.App.3d 337, 345 ["choice of which, and how many, potential witnesses to interview or call to trial is precisely the type of choice which should not be subject to review by an appellate court"]; *People v. Bemore* (2000) 22 Cal.4th 809, 838 [the decision whether to accept the jury as constituted is "inherently nuanced and tactical"]; *People v. Maury* (2003) 30 Cal.4th 342, 415-416 (*Maury*) [the decision to object to the admission of evidence is a tactical choice that rarely supports a claim of ineffective assistance of counsel].)

As to these decisions, there is no affirmative evidence in the record of counsel's incompetence. On a direct appeal, relief will be granted for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442 (*Lucas*).) When, however, the record " "sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory

explanation,” the claim on appeal must be rejected.’ [Citations.]” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Case law recognizes that counsel’s omission may have been based, in part, on legitimate considerations that do not appear on the record. (*Lucas, supra*, 12 Cal.4th at p. 443.)

Given the applicable standards, we conclude appellant cannot succeed on his claim of ineffective assistance of trial counsel, because the record does not affirmatively establish counsel’s performance was deficient. (See *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1448. Nor is this a situation where “ ‘there simply could be no satisfactory explanation’ ” for counsel’s act or omission.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.) Indeed, the record before us instead shows that counsel adequately developed and presented the only potentially meritorious defense available to appellant on this record: that Amjad had “heard all these threats before. They were never carried out. . . . He wasn’t frightened. He testified he wasn’t frightened.” Appellant’s complaints about trial counsel’s representation, when considered individually or collectively, fail to establish that he received ineffective assistance of counsel at trial.

Additionally, appellant “must establish ‘prejudice as a “demonstrable reality,” not simply speculation as to the effect of the errors or omissions of counsel. [Citation.] . . . The petitioner must demonstrate that counsel knew or should have known that further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover.’ [Citation.] Prejudice is established if there is a reasonable probability that a more favorable outcome would have resulted had the evidence been presented, i.e., a probability sufficient to undermine confidence in the outcome. [Citations.] The incompetence must have resulted in a fundamentally unfair proceeding or an unreliable verdict. [Citation.]’ [Citation.]” (*In re Cox* (2003) 30 Cal.4th 974, 1016.)

Considering the necessity of establishing prejudice as “ ‘a demonstrable reality and not a speculative matter,’ ” appellant’s numerous claims of ineffectiveness are meritless based upon the entirety of this record. (*People v. Karis* (1988) 46 Cal.3d 612, 656.) Defense counsel was faced with overwhelming irrefutable evidence against

appellant on both of the charged offenses. The prosecution presented ample evidence that appellant had a substantial history of repeatedly threatening Amjad, both directly and indirectly through other family members, without regard for the criminal consequences of his actions. Appellant's criminal threat to kill his brother was made during a court hearing and proved to the jury by a certified court reporter's transcript and numerous eyewitnesses who were in court when the threat was made. The telephone calls that formed the basis for appellant's other conviction were tape-recorded and transcribed.

Accordingly, we find no basis for appellant's sweeping claim that the collateral matters about which he now complains would have fundamentally undermined the prosecution's case. In light of the overwhelming evidence introduced against him, he has completely failed to establish that "his trial counsel's performance deprived him of any meritorious defense, or to demonstrate a reasonable probability that the result would have been more favorable to him in the absence of any alleged ineffectiveness. [Citations.]" (*People v. Hart* (1999) 20 Cal.4th 546, 632; *Maury, supra*, 30 Cal.4th at p. 389.)

**IV.**  
**DISPOSITION**

The judgment is affirmed.

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RUVOLO, P. J.

We concur:

\_\_\_\_\_  
REARDON, J.

\_\_\_\_\_  
RIVERA, J.