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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KERRY LEE STEFFAN,

Defendant and Appellant.

D060031

(Super. Ct. No. SCN286022)

APPEAL from a judgment of the Superior Court of San Diego County, Harry Elias, Judge. Affirmed.

A jury convicted defendant Kerry Lee Steffan of two counts of stalking (Pen. Code, § 646.9, subd. (a)<sup>1</sup>). He was sentenced to prison for a total of seven years. Steffan appeals, contending the trial court committed reversible error by not instructing the jury on the unanimity requirement. We disagree, and affirm the judgment.

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<sup>1</sup> Count 1 was alleged to have occurred between November 1, 2010, and March 4, 2011, with Sondra Sutherland named as the victim. Count 2 was alleged to have occurred between November 1, 2010, and February 11, 2011, with Tina Steffan named as the victim. All statutory references are to the Penal Code unless otherwise stated.

## FACTUAL BACKGROUND

Steffan does not challenge the sufficiency of the evidence of his stalking convictions. Accordingly, we need only briefly recount Steffan's lengthy history of behavior underlying the convictions.

Steffan and Tina Steffan<sup>2</sup> were married from 1998 to 2010 and had four children together. Shortly after they married, Steffan began acting violently toward Tina. Over the course of the marriage Steffan was physically violent with Tina over 100 times, which in several instances resulted in Tina sustaining serious injuries. At times, Steffan threatened to kill Tina. Tina obtained restraining orders against Steffan in 2003 and 2006, the latter of which was prompted when Steffan tried to push Tina out of their truck on the freeway and threatened to kill her and her two oldest children. In 2007, Tina filed for divorce.

While their divorce proceedings were pending, Steffan harassed and threatened Tina and their children. After a January 2008 incident during which Steffan broke into Tina's vehicle and took her briefcase and work laptop, Tina obtained a 10-year restraining order against him.

Between November 1, 2010, and February 11, 2011, Steffan sent numerous threatening messages intended for Tina to Tina's divorce attorneys, Sondra Sutherland and Kandy Koliwer. For example, in court on November 5, 2010, Steffan placed a packet on the desk in front of attorney Sutherland containing Bible literature that

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<sup>2</sup> For clarity, we will refer to defendant as Steffan and Tina Steffan as Tina.

emphasized guilt for sins and contained a drawing of a bloody hand with Tina's name written on it. Because Steffan had repeatedly accused Tina of adultery, Tina interpreted the religious materials, which contained highlighted quotes referring to death, damnation, the punishment of sinners, and the "abomination" of sexual immorality, as a death threat.

On November 15, 2010, Steffan sent emails and texts to attorney Koliwer, which she forwarded to Tina and attorney Sutherland. In those messages, Steffan wrote that the Steffan family would be reborn: "It will all be over soon, not a divorce, the rebirth of our family," and that it would "end in eternity." Referring to himself as the "Holy King" and "Guardian Angel," Steffan stated that "everyone" would have "safe passage" and that he would forgive them all their evil deeds. That same day, acting pro per but asserting that he was represented by "the law firm of God," Steffan appeared with a sheriff's deputy at the security gate of Sutherland's home to serve papers related to the divorce case, and also to deliver a rose and notes for Tina. Although he left willingly, he suggested to Sutherland he would come back and asked if he could play golf at the golf course by her home.

Appearing in court again on November 17, 2010, Steffan referred to himself as a "loaded cannon" and repeated that he had "the law firm of God" with him. Steffan also threatened to return to Sutherland's home.

Steffan repeatedly referred to Sutherland as one of the "evil people" he wanted to harm. At a hearing on November 29, 2010, Steffan remarked that he would "blow [Sutherland] away." Referring to everyone involved in the divorce proceedings, Steffan said he would "clean [their] clocks." He also said, "[T]he cops can't touch me, the court

can't touch me." Steffan reiterated that he knew where Sutherland lived and it would not be hard for him to get behind her gate.

On November 30, 2010, Steffan went to the courthouse to file charges against Sutherland for what he perceived as her involvement in forgery. While there, he spotted Sutherland in the business office, became agitated, and started toward her until his escorting peace officer intervened. The peace officer heard Steffan say to Sutherland something to the effect of, "You'll get what's coming to you, you have no idea who you're messing with." Later that same day, Steffan told an investigator at the district attorney's office, "If you don't find a way to get [Sutherland] plucked off the street today, I'll find a way to get her plucked off the street." The peace officer informed Sutherland of these statements as a precautionary measure.

On December 1, 2010, Steffan was again at the courthouse and told his peace officer escort, "You will get what's coming to you, you all will" and then, "Don't worry, I will pluck you all off one by one, you don't know who you're messing with and that's not a threat." The next day, the court declared Steffan and Tina's divorce final. During that hearing, Steffan, representing himself, questioned Tina and stated that that the angels were on his side and he was going to drop a bomb on everyone, and that he would "never rest." He also threw something at Tina. Addressing both Sutherland and Tina, Steffan said several times, "You guys are in big trouble now."

On December 6, 2010, Steffan sent text messages to Tina through Koliwer that stated, "You all think you've won the battle, try the war." He also wrote, "You will all suffer consequences you all have and will ever have to endure." This concerned

Sutherland as well as Tina, because he commonly referred to Sutherland as Koliwer's "evil counterpart." On December 8, 2010, Steffan sent more messages to Koliwer, who forwarded them to Sutherland. These messages referenced Sutherland's "evil deeds" and asked, "Doesn't she [Sutherland] know that she will suffer consequences[?]"

On December 9, 2010, Steffan sent more text messages to Kowlier, who forwarded them to Sutherland. One stated that he would "end it all if you do not." At a permanent restraining order hearing on December 17, 2010, Steffan remarked in an aggressive manner that it would all be over soon, and there would be a rebirth of the family. On December 20, 2010, the court sent Sutherland a *Tarasoff* warning (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434-435),<sup>3</sup> which she forwarded to Tina.

Steffan was arrested and incarcerated on December 23, 2010. On February 11, 2011, while in prison, Steffan wrote a letter to the family court judge that was passed on to Tina, in which he referred to himself again as the "guardian angel" and "soon to be Holy King of this world." He declared he would reunite with Tina and his family, all of whom were "mine, mine, mine . . . [¶] . . . [¶] before, during, and after." On March 4, 2011, Sutherland had Steffan served in prison with a court order declaring him a

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<sup>3</sup> *Tarasoff v. Regents of University of California, supra*, 17 Cal.3d 425, imposed a duty on a therapist who determines or should have determined that a patient poses a serious danger of violence to another, to exercise reasonable care to protect the foreseeable victim of that danger. (*Id.* at pp. 431, 439.) The Legislature has since limited the psychotherapist's monetary liability to warn to instances in which the therapist actually believes or predicts the patient poses a serious risk of inflicting grave bodily injury. (See *Ewing v. Northridge Hosp. Medical Center* (2004) 120 Cal.App.4th 1289, 1300-1301.)

vexatious litigant. Steffan responded by threatening to kill the process server and Sutherland.

Steffan testified in his defense. A sheriff's detective who interviewed Steffan at the time of his arrest in December 2010 opined he thought Steffan was delusional and might be a "relentless stalker," but did not pose a specific physical threat. Steffan also called, among other witnesses, Clark Smith, M.D., a psychiatrist. Dr. Smith had interviewed Steffan about his mental health history and prior diagnoses, and explained that after almost one hour, Steffan terminated the interview. Dr. Smith testified that Steffan's behavior was consistent with what other mental health professionals had described, and concluded Steffan possibly suffered bipolar disorder with psychotic features, with mania predominating over depression. Dr. Smith observed that while one doctor found Steffan was at high risk of stalking and spousal assault, Steffan had not violated his parole for 13 months, suggesting he could avoid reoffending.

In closing arguments, Steffan's counsel argued that while Steffan's statements were bombastic, irritating, and delusional, they were not actually threats. She argued Steffan was flagrantly mentally ill and probably needed a conservator.

## DISCUSSION

### I. *The Unanimity Requirement*

A jury verdict must be unanimous in a criminal case. (See Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Additionally, the jurors must agree unanimously the defendant has committed one specific crime. (*Russo*, at p. 1132, citing *People v. Diedrich* (1982) 31 Cal.3d 263, 281 (*Diedrich*)). Therefore, "[a]s a general

rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty." (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) The unanimity requirement " 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' " (*Russo*, at p. 1132.)

As explained in *Russo*, "The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Russo, supra*, 25 Cal.4th at p. 1135, quoting *People v. Perez* (1993) 21 Cal.App.4th 214, 223.)

There are several exceptions to the unanimity rule. "For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises 'when the acts are so closely connected in time as to form part of one transaction' [citation], or 'when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time' [citation]. There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime." (*People v. Jennings, supra*, 50 Cal.4th at p. 679; see also *People v. Lueth* (2012) 206 Cal.App.4th 189, 195-196 [stating that a crime contemplating a continuous course of conduct or series of acts over a period of time shows only one discrete crime and is not actually an exception to the unanimity requirement].)

## II. *Statutory Elements of Stalking*

Section 646.9 subdivision (a) provides in part that "[a]ny person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking."

Generally, the offense of stalking has three elements: "(1) following or harassing another person; (2) making a credible threat; and (3) intending to place the victim in reasonable fear for her safety." (*People v. Uecker* (2009) 172 Cal.App.4th 583, 594.)

The term "harass" is defined by the statute as engaging in "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or

terrorizes the person, and that serves no legitimate purpose." (§ 646.9, subd. (e).) The term "course of conduct" is further defined for the purposes of this section as "two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." (§ 646.9, subd. (f).) The phrase "credible threat" is defined as "a verbal or written threat . . . or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family . . . ." (§ 646.9, subd. (g).)

The legislature defines stalking as a crime requiring a continuous course of conduct. (§ 646.9, subd. (e); *People v. Zavala* (2005) 130 Cal.App.4th 758, 769; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1198.) Course-of-conduct crimes against the person focus on "a *series* of acts occurring over a substantial period of time, generally on the same victim and generally resulting in cumulative injury." (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1311.) When the crime is defined as a course of conduct, "the prosecution may not divide that course up into multiple counts of the offense." (*Avina*, at p. 1311 [continuous child abuse]; *People v. Lewis* (1978) 77 Cal.App.3d 455, 459-462 [pimping].)

### III. *The Unanimity Instruction Was Not Required*

Pointing out that the prosecution introduced multiple instances to prove that he threatened Tina and Sutherland, Steffan contends the trial court committed reversible error by failing to instruct the jury on the unanimity requirement as to his stalking

convictions.<sup>4</sup> Steffan correctly acknowledges that a unanimity instruction is not required when an offense contemplates a continuous course of conduct. However, he argues that while the harassment element of stalking is statutorily defined as a course-of-conduct offense and thus does not need a unanimity instruction, subdivision (g) of section 646.9 does not so define the credible threat element of the offense. According to Steffan, because the threat may be either a discrete statement, a course of conduct, or a combination of both, it requires a unanimity instruction. Steffan maintains that without a unanimity instruction, the court prejudicially erred because under the instructions given, the jury may not have unanimously agreed on which of his comments constituted a credible threat. We disagree.

First, Steffan ignores this court's holding in *People v. Zavala*, *supra*, 130 Cal.App.4th 758, in which we squarely held that stalking is the type of course of conduct offense for which no unanimity instruction is necessary. (*Id.* at p. 769; see also *People v. Ibarra*, *supra*, 156 Cal.App.4th at p. 1198 [following *Zavala*; since the Legislature defines stalking as a crime requiring a continuous course of conduct over a period of time, no unanimity instruction was required]; *People v. Jantz* (2006) 137 Cal.App.4th 1283 [following *Zavala*; unanimity instruction not required for stalking, which consists of

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<sup>4</sup> The standard unanimity instruction states: "The defendant is charged with \_\_\_\_\_ <insert description of alleged offense> [in Count \_\_\_\_\_ ] [sometime during the period of \_\_\_\_\_ to \_\_\_\_\_ ]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed." (CALCRIM No. 3500.)

one continuous course of conduct and therefore constituted a single offense].) Steffan provides no authority for the unique proposition that a unanimity instruction must be given with respect to a single offense that is otherwise defined by statute as requiring a continuing course of conduct, when an *element* of that offense can be proved by various methods.

Rather, he seeks to distinguish *People v. Jantz, supra*, 137 Cal.App.4th 1283 and rely on *People v. Melhado* (1998) 60 Cal.App.4th 1529. But *Melhado* is inapposite as it involves a defendant charged with (among other crimes) the crime of making terrorist threats (§ 422), an offense that is not defined as requiring a continuing course of conduct.<sup>5</sup> And Steffan's attempt to distinguish *Jantz* is unpersuasive. The court in *Jantz* observed that the prosecutor had elected the threat she was relying on as the basis for the stalking offense, but held that no unanimity instruction was required in any event because the stalking was one continuous course of conduct and thus constituted a single offense. (*People v. Jantz*, at pp. 1292-1293.) It then added, in dicta, "Here, if there were multiple threats, they were similar and relatively contemporaneous in time, and the parties did not make any significant distinction between them." (*Id.* at p. 1293.) As in *Jantz*, Steffan's threats were relatively similar, and took place over a period of days. More importantly, the People did not meaningfully distinguish between the different threats, and Steffan presented the same defenses to them, namely, that they were not threats, but bombastic or irritating statements stemming from his mental illness.

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<sup>5</sup> Section 422 requires proof of a threat that causes the recipient "reasonably to be in sustained fear" for his or her own safety or that of his or her immediate family.

Because stalking is statutorily defined as a continuous course of conduct, it falls under the exception to the unanimity requirement. The threat element, being part of the offense, also falls under the continuous course of conduct exception to the unanimity requirement. But even accepting Steffan's assertion that we may parse the threat element from the offense as a whole and analyze the need for unanimity as to that element, we reach the same conclusion.

As stated, section 646.9, subdivision (g) provides that the threat may be made "*through* the use of an electronic communication device, or a threat implied *by* a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct" (italics added). The words "by" and "through" signify the means or manner in which the threat is communicated. That is, a defendant may convey his or her threat to the victim by means of one or numerous statements, and by any method of communication. This falls under the "alternative legal theory of the case" exception to the unanimity requirement of *People v. Russo, supra*, 25 Cal.4th at pages 1135-1136 [holding that unanimity instruction was not required as to the specific overt act committed for a conspiracy offense: "Thus, if the jurors disagreed as to what overt act was committed, and agreed only that *an* overt act was committed, they would still have unanimously found defendant guilty of a particular conspiracy. No danger exists that some jurors would think she was guilty of one conspiracy and others would think she was guilty of a different one"].) All Steffan's written and oral statements were the way in which he manifested his threat to his victims. Each statement did not constitute a distinct criminal act.

Here, the evidence showed Steffan repeatedly conveyed messages to both attorney Sutherland and Tina, any one of which could have been used to prove the threat element of stalking. Even if each juror had relied on a different instance of the alleged threats to satisfy the second element of stalking, all of the jurors would still have been convicting Steffan of the same crime, namely stalking Tina and attorney Sutherland between the specified dates.

Because stalking is a continuous course of conduct offense, section 646.9 subdivision (g) provides for alternative modes of making threats, and Steffan asserted the same defense for each of his actions, we conclude the trial court did not err by declining to sua sponte instruct the jury on the unanimity requirement. There being no instructional error, we need not address the issue of harmless error.

DISPOSITION

The judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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McINTYRE, Acting P. J.

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IRION, J.