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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RALPH JOHN GAMBINA,

Defendant and Appellant.

G044728

(Super. Ct. No. 10SF0721)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer and Richard M. King, Judges. Affirmed as modified.

Marta I. Stanton and Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Kelley Johnson, Deputy Attorney General, for Plaintiff and Respondent.

Ralph John Gambina appeals from a judgment after a jury convicted him of two counts of making criminal threats and one count of simple assault, arising from separate incidents. Gambina argues: (1) insufficient evidence supports his conviction for making criminal threats; (2) the trial court erroneously consolidated his cases; (3) the court erroneously admitted prior uncharged domestic violence evidence; (4) there was cumulative error; and (5) the court erroneously failed to stay the sentence on one of the counts of making criminal threats. Aside from his sentencing claim, none of his contentions have merit. We affirm the judgment as modified.

FACTS

Gambina and Leslie Gambina (Leslie) were married in 1981 and divorced 10 years later. They have four children: Salvatore, John (Johnny), Laticia, and Dorothy. Gambina has a younger brother, John Gambina (John). In June 2010, Leslie obtained a restraining order against Gambina. At that time, Leslie lived with Gambina, Salvatore, Johnny, and Gambina's brother, John. Leslie and Salvatore moved out and rented an apartment.

June 26, 2010

Gambina rented a motel room for one week at the Carmelo Motel in San Clemente. On the afternoon of the day Gambina was scheduled to check out, the motel manager, Mahinda Wijesekara, went to Gambina's room and discovered Gambina had checked out but not left the room key. Wijesekara called Gambina and left him a message. When Gambina called back, Wijesekara asked Gambina to return the room key and pay for one additional night because he checked out late. Gambina said he left the key in the office and he was not going to pay for the additional night; Gambina hung up the telephone.

The next day, Gambina went to the office window. Gambina called Wijesekara a “motherfucker,” showed him the key, and threw the key into the street. Wijesekara walked to the main office door holding a tape dispenser, and Gambina said, “Motherfucker, don’t come. I’m going to kill you.” Wijesekara did not take Gambina seriously because Gambina appeared to be intoxicated. Gambina walked to his car and walked back to the office. In his hand Gambina held a folding knife with the blade opened. As Gambina walked towards Wijesekara, who was walking backwards, Gambina kicked a couple flower pots and repeatedly said, “Motherfucker, come, come. I’m going to kill you. Come, come.” Wijesekara’s wife and son walked outside to try to calm the situation. Wijesekara’s wife saw Gambina armed with a knife; his son went back inside but did not call 911. Gambina returned to his car and drove away; Wijesekara called the police. A deputy sheriff responded to the motel and found a motel key in two pieces and a plastic potted plant laying on its side.

August 2, 2010

One evening about five weeks later, Leslie was home with Salvatore. Gambina called Leslie and said “he was coming to kill [her].” He stated, “[she] better give his check back or else.” Leslie ended the call and turned off her telephone. Gambina called Salvatore and told him that if Leslie did not return his check “he was going to tear her head off.”

When she turned her telephone on, Gambina had left her a message on her voicemail. Gambina’s voicemail message stated: “Hey, Bitch, you better fuckin’ talk to me or I’m going to come down there and show you some fucking hell. You understand me, you fucking cunt? I know you got my fucking shit. You were the only one that was in that fucking safe. Don’t fucking lie to me. You’re a fucking lying fucking cunt. That’s all you fucking ever were. I need 500 bucks tomorrow to pay my fucking bail or

I'm going back to jail. And if I go back to jail, I'm going back on a fucking murder charge.”¹

Leslie called 911.² Leslie told the dispatcher her ex-husband called her and said he was going to kill her. Leslie explained to the dispatcher that Gambina believes she stole a check from him and he threatened to kill her if she did not return the check. Leslie stated Gambina had guns.

Deputy Jeff Guffey, who knew Leslie and Gambina from prior contacts, and another deputy responded to the call. Leslie appeared to be scared and nervous. Leslie told Guffey that Gambina threatened to kill her because she owed him money. Leslie was “a little frightened for [her] life.” Guffey obtained an emergency protective order for Leslie. Deputies arrested Gambina, who appeared to be intoxicated, hours later at his home.

Procedural History

With respect to the June 26, 2010, incident, an information charged Gambina with aggravated assault (Pen. Code, § 245, subd. (a)(1))³ (count 1) and making criminal threats (§ 422) (count 2).

As to the August 2, 2010, incident another information charged Gambina with two counts of making criminal threats (§ 422) (counts 1 and 2). The information alleged Gambina committed these counts while released from custody and on bail (§ 12022.1, subd. (b)).

¹ The voicemail message was played for the jury.

² The jury heard the recording of the 911 telephone call.

³ All further statutory references are to the Penal Code, unless otherwise indicated.

The prosecutor filed a written motion to consolidate the cases, conceding for purposes of argument that evidence was not cross-admissible but contending three of the four charges are identical and both cases had strong evidence. Although defense counsel did not file a written response, counsel opposed consolidation at the hearing on the motion before Judge Gary S. Paer. Counsel argued the evidence was not cross-admissible and both cases were weak. Judge Paer granted the prosecutor's motion, explaining public policy favors joint trials of multiple actions. The court opined the cases involved the same class of crimes and because three of the four offenses were the same, joinder was unlikely to inflame the jury. The court added that cross-admissibility of evidence was just one factor in the analysis, and its absence did not establish prejudice.

An amended information charged Gambina with two counts of making criminal threats (§ 422) (counts 1 and 2) against his wife, and aggravated assault (§ 245, subd. (a)(1)) (count 3) and making criminal threats (§ 422) (count 4) against Wijesekara's wife. The information alleged Gambina committed counts 1 and 2 while released from custody and on bail (§ 12022.1, subd. (b)).

Approximately two weeks later, Gambina filed a written motion to sever counts 3 and 4 from counts 1 and 2. Gambina argued counts 3 and 4 were not connected in their commission with counts 1 and 2 and evidence was not cross-admissible. He additionally argued joinder was prejudicial because the evidence supporting counts 3 and 4 was weaker than the evidence supporting counts 1 and 2. Gambina added he was prejudiced because joinder implicated his federal constitutional right to remain silent. Gambina planned to testify he acted in self-defense as to counts 3 and 4, but he did not plan to testify as to counts 1 and 2.

At a hearing on the motion before Judge Richard M. King, the prosecutor explained Judge Paer had already ruled on the prosecutor's consolidation motion. The prosecutor stated that in the consolidation motion, she assumed for purposes of argument the evidence was not cross-admissible but after having reviewed the police reports believed Gambina's motivation for making the criminal threats in both cases was that he was "cheated out of money or money is being stolen from him." Judge King asked defense counsel whether his motion to sever was essentially the same motion Judge Paer ruled on in granting the prosecutor's consolidation motion. Defense counsel argued circumstances had changed because Leslie refused to testify and the evidence supporting counts 1 and 2 was weaker than the evidence supporting counts 3 and 4. Counsel argued the prior evidence of domestic violence further illustrated the prosecutor's attempt to "link the two together to make a much stronger case." Counsel added the cases were not connected and Gambina would likely testify he was acting in self-defense regarding counts 3 and 4, but it was unlikely he would testify concerning counts 1 and 2. Citing to local rule 800, the prosecutor argued Gambina did not file a written opposition to the prosecutor's consolidation motion and thus the motion to sever was untimely because the changed circumstances occurred that morning and not before counsel filed the motion to sever. The prosecutor repeated her substantive arguments. In response to Judge King's questions, the prosecutor essentially conceded evidence was not cross-admissible but stressed that did not alone establish prejudice. The prosecutor stated she would seek to admit Leslie's 911 telephone call to counter defense counsel's suggestion that if Leslie did not testify the case was doomed.

Judge King granted the rule 800 waiver and denied the motion to sever. He explained that although it was unlikely the evidence was cross-admissible, that fact alone did not support the granting of a motion to sever. He reasoned the cases included the same class of crimes, criminal threats. Judge King disagreed with defense counsel the prosecutor was attempting to join a weak case with a stronger case as the telephone

voicemail message was compelling. Finally, considering the charges and the characteristics of the victims, he concluded joinder of the offenses would not inflame the jury. Judge King stated there were procedural safeguards that would ensure Gambina would not be prejudiced concerning his decision whether to testify.

At the same hearing, Judge King stated he understood the prosecutor intended to offer evidence of prior uncharged acts of domestic violence from June 2, 2010, and June 16, 2010, “*not* under [Evidence Code section] 1109 for disposition, but . . . having to do with the reasonableness of the fear of the alleged victim on counts 1 and 2.” (Italics added.) The prosecutor agreed. With respect to the June 2 incident, the prosecutor stated that after Gambina discovered there was money missing from his safe, Gambina grabbed, shook, and scratched Leslie in the neck area. As to the June 16 incident, the prosecutor said Leslie refused Gambina’s request to go to the store and steal a bottle of wine, so he slapped her, pulled her hair, and forced her out of the house.

Defense counsel objected to admission of the prior uncharged domestic violence evidence because it was not connected and dissimilar to the charges, it was unduly prejudicial, and it would consume an undue amount of time. Judge King denied defense counsel’s motion to exclude the prior uncharged domestic violence evidence. He stated: “[T]he court finds [the evidence] to be probative under [Evidence Code section] 1109 in that legally the jurors could take this information, if they believe it, and use it for disposition which is an exception to [Evidence Code section] 1101[, subdivision] (a). However, the [prosecutor] [has] indicated [she’s] not offering it under that theory.” He added the prior uncharged domestic violence was relevant under the theory the prosecutor advanced (Leslie’s sustained fear). Judge King concluded, “When that evidence comes in, if the defense so elects, I will give a limiting instruction to ensure that they will not use it for disposition which legally, unless I’m missing something, they would be entitled to use it for.”

At trial, Leslie and Salvatore testified under grants of use immunity. Leslie repeatedly testified that when she called 911 she was mad at Gambina and not frightened. Leslie admitted she told Guffey that Gambina threatened to kill her and she was scared but she testified both of those statements were lies. Leslie explained she did not attempt to make the restraining orders permanent because she was not afraid of Gambina. Leslie testified she had taken 12 different medications for the previous five years and they made her “wacky a little bit.” She claimed Gambina’s problems with Salvatore stemmed from Salvatore’s drug use and stealing.

Leslie testified that when she was divorced from Gambina but still living with him, she called the police twice. On the first occasion, Gambina scratched Leslie’s neck and chest after accusing her of stealing a check. Leslie was afraid, and she called 911. An officer saw cuts on Leslie’s chest and he arrested Gambina. On the second occasion, Gambina got mad at Leslie because she refused to go to the store. Gambina told Leslie to get out of the house and as she passed through the front door, Gambina closed the door and Leslie’s shoe got caught in the door. She called 911. Leslie denied Gambina slapped her or pulled her hair and denied telling the police that. She later testified she lied when she told the officer that Gambina slapped her and pulled her hair. The officer who responded to the call, however, testified Leslie told him Gambina slapped her and pulled her hair before telling her to leave.

Salvatore testified Gambina’s voicemail message frightened his mother. He said she was “shaking a little bit” and she put her head in her hands. He described her as “on edge and rattled.” Salvatore admitted he stole from Wal-Mart, Ralphs, and his father’s liquor store. He confirmed Gambina had guns.

At the close of the prosecutor’s case-in-chief, the trial court denied Gambina’s motion to dismiss counts 1 and 2 pursuant to section 1118.1.

Gambina testified on his own behalf. With regard to the first prior uncharged offense incident, Gambina testified that when he came home, he noticed money and items were missing from his safe. He suspected Leslie took the items and grabbed her nightgown to make her sit up in bed. He found a large amount of cash in Leslie's purse. He denied scratching her. As to the second prior uncharged offense incident, Gambina testified he asked Leslie to drive him to the store but she refused. Gambina said they argued, and he told her to leave.

Gambina explained he and his brother John went to the motel to return the motel room key he had accidentally bent and broken. Gambina went to the office window, gave the key to Wijesekara, and offered to pay for the key. Gambina claimed Wijesekara got angry and "call[ed] [him] names." Gambina threw the key, walked back to his car, and started the car. Gambina claimed Wijesekara followed him to his car, bent his car antenna, and hit the car window with a tape dispenser. Gambina grabbed a pocket knife and got out of the car to fix the antenna. Gambina claimed Wijesekara threw something at his head. Gambina walked towards Wijesekara with the open pocket knife down by his side. Gambina stated Wijesekara's wife came outside and tried to restrain Wijesekara. As Gambina walked back to his car, he pushed over a potted plant, got into his car, and left.

Gambina testified he was at a bar when Leslie called him and asked if he could take her to the grocery store. Gambina drove to her apartment and let Leslie and Salvatore use his car. Gambina noticed Leslie had taken some of his personal property without his permission. When they returned from the store, Gambina drove home, prepared dinner, and drank more alcohol. Gambina stated two different bail agents called him and demanded money. Gambina called Leslie and asked to borrow money; he also inquired about food that was missing from his refrigerator. They argued and Leslie hung up on Gambina. Gambina was "shit-faced and . . . fuming." Gambina called Leslie and left her a message. Gambina was embarrassed by the message. He testified he did not

mean the words he used. Gambina denied telling Salvatore that he was going to kill Leslie.

John testified for his brother. John explained he went to the motel with Gambina to return a key he broke and pay for it. John stated that when Gambina walked out of the office, Wijesekara was following him. John said Wijesekara bent the car's antenna and hit the passenger side window with a tape dispenser. He stated Gambina retrieved a folding knife from the car's center console, he walked to the back of the car, and tried to fix the antenna. John claimed it appeared Wijesekara was going to throw the tape dispenser at Gambina. He stated Wijesekara's wife was trying to restrain Wijesekara because he was agitated and "using profanity, calling [Gambina] everything but a Christian." John conceded Gambina kicked a flower pot as he walked back to the car. John testified he loved Gambina "to death," but he was telling the truth. On cross-examination, when defense counsel repeated John's statement about his love for his brother, John replied, "I love everybody; all the women and half the men."

Gambina offered the testimony of his daughter Dorothy, and his son, Johnny. They both testified Salvatore stole money and personal property from family members and was dishonest.

The court reporter was not present when the trial court and counsel discussed the jury instructions. As relevant here, the trial court instructed the jury with CALCRIM No. 852, "Evidence of Uncharged Domestic Violence."

The jury acquitted Gambina of count 4 but convicted him of counts 1, 2, and the lesser included offense of simple assault as to count 3. After the trial court dismissed the on-bail allegations pursuant to the prosecutor's motion, the court sentenced Gambina to two years in prison on count 1. The court imposed a concurrent two-year prison sentence on count 2 and a six-month jail sentence on count 3.

DISCUSSION

I. Sufficiency of the Evidence

Gambina argues insufficient evidence supports his convictions on counts 1 and 2 because the threats were not immediate and Leslie was not in sustained fear. Neither of his contentions has merit.

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]’ [Citation.]” (*People v. Wilson* (2010) 186 Cal.App.4th 789, 805 (*Wilson*).)

“[T]o prove a violation of section 422, the prosecution must establish all of the following: (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; § 422.)

A. *Immediacy*

The third element's four enumerated statutory elements, unequivocality, unconditionality, immediacy and specificity, are factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim. "While the third element of section 422 also requires the threat to convey "a gravity of purpose and an immediate prospect of execution of the threat," it 'does not require an immediate ability to carry out the threat. [Citation.]' [Citations.] '... [Citations.]' [Citation.] 'How are we to understand the requirement that the prospect of execution be immediate, when, as we have seen, threats often have by their very nature some aspect of conditionality: A threat is made to convince the victim to do something "or else." ... [W]e understand the word "immediate" to mean that degree of seriousness and imminence which is understood by the victim to be attached to the future prospect of the threat being carried out, should the conditions not be met.' [Citation.] [¶] 'It is clear that the nature of the threat cannot be determined only at face value. Section 422 demands that the purported threat be examined "on its face and under the circumstances in which it was made." The surrounding circumstances must be examined to determine if the threat is real and genuine, a true threat,' and such threats must be 'judged in their context.' [Citations]." (*Wilson, supra*, 186 Cal.App.4th at p. 807.)

People v. Gaut (2002) 95 Cal.App.4th 1425 (*Gaut*), is instructive here. In that case, defendant was physically abusive toward his girlfriend and was arrested and incarcerated. (*Id.* at pp. 1427-1428.) While in jail, defendant called and threatened the woman. (*Id.* at pp. 1428-1429.) Defendant was subsequently convicted of making criminal threats. (*Id.* at p. 1427.) On appeal, defendant argued that "because he was incarcerated and unable to carry out the threats there was no immediate prospect of execution." (*Id.* at p. 1431.) The court affirmed the conviction, explaining whether threatening words are "sufficiently . . . immediate and specific [that] they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat

can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances. [Citation.]" (*Ibid.*) Because defendant "had a lengthy history of not only threatening but also physically assaulting" his victim (*ibid.*), and because the victim feared defendant soon would be released from jail or would "send someone to get her" (*id.* at p. 1432), the court concluded it was reasonable for the victim to fear defendant would follow through on his threats, notwithstanding his incarceration. (*Id.* at p. 1431.)

Like *Gaut*, the record here includes sufficient evidence from which the jury could reasonably conclude Leslie understood that if she did not return the check to Gambina, Gambina would go to her apartment and kill her. During the first call, Gambina told Leslie that "[she] better give his check back or else." A few minutes later, Gambina left Leslie a voicemail message stating he was going to go to her apartment and "show [her] some fucking hell." He added that, "And if I go back to jail, I'm going back on a fucking murder charge." The jury also heard evidence Gambina told Salvatore that "he was going to tear [Leslie's] head off." This was evidence Leslie understood Gambina's statements to mean that if she did not return the check, Gambina was going to kill her. We recognize Gambina was not incarcerated like the defendant in *Gaut*, but that fact only makes the threat more immediate here. Additionally, the record includes evidence demonstrating a history of violence between the parties. Leslie testified that on at least two occasions, Gambina assaulted her. Therefore, Gambina's threats were specific and immediate.

Gambina argues his threats were not accompanied by any physical violence and he did not act to follow through on his threats. Of course his threats were not accompanied by any physical violence. He threatened to kill Leslie over the telephone. Additionally, Gambina was charged with making a criminal *threat*, and not a criminal

battery. Had he acted to follow through on his threats, he would have faced additional charges.

Gambina next asserts he made the statements over the telephone and thus there was no immediate prospect of execution. Section 422, subdivision (a), permits the threat to be made using an electronic communication device. As we explain above, there is no statutory requirement a defendant have the immediate ability to carry out the threat. Thus, there was sufficient evidence to reasonably conclude Leslie understood there was a degree of seriousness and imminence that if she did not return Gambina's check, he would kill her.

B. Sustained Fear

“The fourth and fifth elements of section 422 require the victim ‘reasonably to be in sustained fear’ for his or her own safety or the safety of his or her family. [Citation.] As used in the statute, ‘sustained’ has been defined to mean ‘a period of time that extends beyond what is momentary, fleeting, or transitory. . . . The victim’s knowledge of defendant’s prior conduct is relevant in establishing that the victim was in a state of sustained fear. [Citation.]’ [Citation.]” (*Wilson, supra*, 186 Cal.App.4th at p. 808.)

Here, there was overwhelming evidence Leslie was in fear for her life after Gambina threatened her. Salvatore said after Gambina called Leslie she was shaking and rattled. When Leslie called 911, she said Gambina threatened to kill her and he had guns. Had Leslie truly not been frightened, she had no reason to call 911. Guffey, who knew Leslie from prior encounters, described Leslie as scared. Based on all this evidence, the jury could certainly conclude Leslie experienced sustained fear for her life.

Gambina cites to the following evidence in the record to support his claim Leslie was not in sustained fear: Leslie testified she was not afraid; she was calm when she called 911; she allowed the temporary restraining orders to expire; Salvatore was not concerned for his mother's safety; and Gambina's family communicates by yelling and

cussing at each other. As to Leslie's testimony, it is clear from the record that she did not want to testify against her ex-husband and on the stand professed her love for him. But with respect to this testimony and the other evidence Gambina cites to, this does not prove Leslie was not in sustained fear for her life. Gambina highlights the evidence that tends to favor him and ignores the damaging evidence. As stated above, our role is a limited one. We determine whether there is sufficient evidence in the record to support Gambina's conviction. It is not our role to reweigh the evidence and substitute our judgment for that of the jury's.

Finally, Gambina's reliance on *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136-1137 (*Ricky*), is misplaced. In that case, a 16-year-old student pounded on the classroom door and the teacher opened the door outwardly, accidentally hitting the student. The student became angry, cursed the teacher and threatened to "get" him, but made no physical movements or gestures. The teacher felt threatened and responded by sending the student to the school office. (*Id.* at pp. 1135–1136.) The *Ricky* court found the teacher's fear to be fleeting, in the absence of evidence showing that he felt fear beyond the moment of the angry utterances. (*Id.* at p. 1140.) The court noted the police were not called until the next day, there was no history of disagreements between the student and the teacher, and there was no accompanying show of force or violence. (*Id.* at pp. 1138, 1140.) The *Ricky* court concluded the student's "statement was an emotional response to an accident rather than a death threat that induced sustained fear." (*Id.* at p. 1141.) Gambina's statements, however, were not an emotional response to an accident. To the contrary, he twice called Leslie and threatened to kill her if she did not return his check. There was also evidence Gambina called his son and threatened to kill Leslie. And his threats frightened Leslie. Thus, there was sufficient evidence supporting Gambina's convictions for counts 1 and 2.

II. Consolidation

Gambina contends the trial court erroneously consolidated unrelated charges. Alternatively, he claims joinder actually resulted in gross unfairness amounting to a denial of due process. Neither contention has merit.

Section 954 provides in relevant part: “An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts” The statute also provides that “the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.” Because consolidation or joinder of charged offenses ordinarily promotes efficiency, that ““is the course of action preferred by the law.”” (*People v. Soper* (2009) 45 Cal.4th 759, 772 (*Soper*).)

“[P]ursuant to section 954 an accusatory pleading may charge two or more different offenses so long as at least one of two conditions is met: The offenses are (1) ‘connected together in their commission,’ or (2) ‘of the same class.’” (*Soper, supra*, 45 Cal.4th at p. 772.) Although we agree with Gambina’s claim the criminal threats of Leslie were not connected together with the criminal threat and aggravated assault of Wijesekara, three of the four charges were of the same class. Indeed three of the four charges were *identical*, criminal threats. Thus, the trial court properly joined the June 26, 2010, and August 2, 2010, offenses because three of the four offenses were of the same class.

“A defendant, to establish error in a trial court’s ruling declining to sever properly joined charges, must make a “‘clear showing of prejudice to establish that the trial court *abused its discretion*” [Citation.] A trial court’s denial of a motion to sever properly joined charged offenses amounts to a prejudicial abuse of discretion only if that ruling “““falls outside the bounds of reason.””” [Citation.] We have observed that ‘in the context of properly joined offenses, “a party seeking severance must make a

stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial.” [Citations.] [¶] . . . [¶] In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, ‘we consider the record before the trial court when it made its ruling.’ [Citation.] Although our assessment ‘is necessarily dependent on the particular circumstances of each individual case, . . . certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.’ [Citation.]” (*Soper, supra*, 45 Cal.4th at p. 774.) A defendant’s claim he has separate defenses and wants to testify as to one incident but not the other does not establish prejudice. (*People v. Sandoval* (1992) 4 Cal.4th 155, 173.)

“First, we consider the cross-admissibility of the evidence in hypothetical separate trials. [Citation.] If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court’s refusal to sever properly joined charges. [Citation.] Moreover, even if the evidence underlying these charges would *not* be cross-admissible in hypothetical separate trials, that determination would not itself establish prejudice or an abuse of discretion by the trial court in declining to sever properly joined charges. [Citation.] Indeed, section 954.1 [citation] codifies this rule—it provides that when, as here, properly joined charges are of the same class, the circumstance that the evidence underlying those charges would not be cross-admissible at hypothetical separate trials is, standing alone, insufficient to establish that a trial court abused its discretion in refusing to sever those charges.” (*Soper, supra*, 45 Cal.4th at pp. 774-775.)

“If we determine that evidence underlying properly joined charges would not be cross-admissible, we proceed to consider ‘whether the benefits of joinder were sufficiently substantial to outweigh the possible “spill-over” effect of the “other-crimes” evidence on the jury in its consideration of the evidence of defendant’s guilt of each set of offenses.’ [Citations.] In making *that* assessment, we consider three additional factors, any of which—combined with our earlier determination of absence of

cross-admissibility—might establish an abuse of the trial court’s discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citations.] We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state.” (*Soper, supra*, 45 Cal.4th at p. 775.)

Applying these principles, and observing the statutory requirements for joinder under section 954 have been met in the present case, we proceed to examine Gambina’s claim the trial court abused its discretion in denying his motion to sever. We conclude he was not prejudiced.

With respect to cross-admissibility of evidence, the Attorney General now argues evidence Gambina possessed a knife during the June 26, 2010, incident may have been admissible during a separate trial on the August 2, 2010, incident pursuant to Evidence Code section 1101, subdivision (b), to prove his ability to carry out the threats against Leslie.⁴ The Attorney General does not cite to any place in the record, and we found none, where the prosecutor advanced this theory of admissibility. Indeed, the prosecutor conceded the opposite. In its motion to consolidate and at the hearing on the motion, the prosecutor assumed for purposes of argument the evidence was not cross-admissible. At the hearing on the motion to sever, the prosecutor essentially conceded the evidence was not cross-admissible and stated the only civilian witness who would be testifying in both trials would be “potentially the defense witnesses.” The

⁴ We recognize the Attorney General is responding to Gambina’s claim the evidence was not cross-admissible pursuant to Evidence Code section 1101, subdivision (b), but as the moving party on the consolidation motion, the prosecutor carried the burden of identifying *all* possible theories of admissibility.

Attorney General may not on appeal advance a new theory of admissibility. (*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640 [party may not raise for first time on appeal a new theory to support or contest admissibility].) Thus, the likelihood evidence would not be cross-admissible in both trials weighs against joinder but as we explain above, the absence of cross-admissibility does not by itself establish prejudice. We must address the other elements.

First, the offenses at issue in the Wijesekara and Leslie cases are similar in nature and likely would not inflame the jury against Gambina. Before trial, the evidence tended to demonstrate the following: Gambina threatened to kill Wijesekara and was armed when he approached Wijesekara over money owed; and Gambina twice called Leslie and threatened to kill her over a check he claimed was missing from his safe. Because the offenses “are similar in nature and equally egregious . . . neither, when compared to the other, was likely to unduly inflame a jury against defendant.” (*Soper, supra*, 45 Cal.4th at p. 780.)

Second, based upon the information before the trial judges at the time they ruled on the consolidation and severance motion, there were three witnesses, Wijesekara and his wife and son who would all testify concerning what happened at the motel. And although there was some indication Leslie might not testify against Gambina, the jury would hear the recorded telephone voicemail message where Gambina threatened to kill his wife. “[A]s between any two charges, it always is possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial ‘spillover effect,’ militating against the benefits of joinder and warranting severance of properly joined charges. [Citations.]” (*Soper, supra*, 45 Cal.4th at p. 781.) Thus, the proffered evidence was sufficiently strong in both cases.

Third, neither of the charges was a capital case nor did joinder of the charges convert the matter into a capital case. Therefore, although it was unlikely

evidence would be cross-admissible, the offenses were largely of the same class, the likelihood of spill-over was minimal, and the evidence was sufficiently strong in both cases. Based on the public policy considerations favoring joinder and Gambina's failure to carry his burden of establishing prejudice, we conclude the cases were properly joined.

Finally, we will address Gambina's federal due process claim. "[E]ven if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law. [Citations.]' [Citations.]" (*Soper, supra*, 45 Cal.4th at p. 783.) On a due process challenge to a joinder of counts, the defendant shoulders a "high burden" of showing the court's "gross unfairness depriv[ed] the defendant of due process of law. [Citations.]' [Citations.]" (*Ibid.*)

In *Soper, supra*, 45 Cal.4th at page 784, the California Supreme Court found no due process violation where the evidence as to each crime, even if not cross-admissible, was "simple and distinct" and "independently ample to support" each conviction. Here, the evidence linking Gambina to each incident was "straightforward and distinct." It concerned only four charges arising from two incidents separated by approximately five weeks. Contrary to Gambina's claim, the jury was not confronted with evidence of a crime spree with a multitude of offenses over a prolonged period of time. Moreover, the evidence as to each incident, as discussed above, provided ample and independent basis for the convictions.

Finally, as in *Soper*, the trial court instructed the jury it must consider each charge separately (CALCRIM No. 3515). That the jury acquitted defendant of one of the counts and convicted him of the lesser included offense in another indicates it "was able to follow the instructions and to compartmentalize the evidence presented in the two cases" and that no "prejudicial spillover" occurred. (*Soper, supra*, 45 Cal.4th at p. 784.)

Accordingly, the proceedings were not grossly unfair and did not violate Gambina's due process rights.

III. Evidence Code section 1109

Gambina claims the trial court erroneously admitted evidence of prior uncharged domestic violence pursuant to Evidence Code section 1109. We disagree.

Evidence Code section 1101, subdivision (a), prohibits the use of disposition or propensity evidence to prove a defendant's conduct on a specific occasion. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) However, Evidence Code section 1109, subdivision (a)(1), provides, "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by [Evidence Code] [s]ection 1101 if the evidence is not inadmissible pursuant to [Evidence Code] [s]ection 352."

Evidence Code section 352, however, authorizes a trial court to exclude prior sexual offenses evidence. Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review a trial court's ruling for an abuse of discretion. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313-1314 (*Jennings*).)

Probative Value

The enactment of "section[] . . . 1109 dramatically revised the law of evidence in . . . domestic violence cases by making prior offenses admissible to prove the defendant's propensity to commit a charged offense." (*People v. James* (2000) 81 Cal.App.4th 1343, 1346.) Thus, when a defendant is charged with "an offense involving domestic violence," evidence of past domestic violence is admissible to establish the defendant's propensity to commit the charged offense. (§ 1109, subd. (a)(1).)

Gambina does not dispute the charges of making a criminal threat against Leslie, the mother of his children, falls within the definition of domestic violence. He does argue, however, the prior uncharged domestic violence evidence was dissimilar to the charged offenses. But the charged and uncharged crimes need not be sufficiently similar, otherwise Evidence Code section 1109 would serve no purpose. It is enough that the charged and uncharged domestic violence involve the conduct defined in those sections. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.) Thus, Evidence Code section 1109 makes evidence of prior acts of domestic violence admissible on those counts, unless the court finds that the probative value of the evidence is outweighed by concerns of undue prejudice.

Evidence Code section 352

“Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s).” (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) “The weighing process under section 352 depends upon the trial court’s consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.” (*Jennings, supra*, 81 Cal.App.4th at p. 1314.)

Gambina focuses on the first factor and argues the prior uncharged domestic violence was inflammatory because both incidents involved physical violence but the charged offenses did not. Although we agree the prior uncharged domestic violence did involve physical violence, we are disturbed by Gambina’s minimizing his conduct here. There was evidence Gambina threatened to kill his wife three times. We cannot conclude scratching, slapping, or pulling hair were so inflammatory compared to death threats as to render the prior uncharged domestic violence evidence unduly prejudicial. As to the other facts, it is unlikely the jury would confuse the issues as the

testimony was short as the prior uncharged evidence consisted of two isolated incidents. And the prior uncharged domestic violence occurred just two months before the criminal threats. Finally, there was no risk the jury would misuse the evidence as Evidence Code section 1109 expressly authorizes the admission of propensity evidence concerning domestic violence.

Prejudice

Even if the trial court had abused its discretion, it is not reasonably probable Gambina would have obtained a more favorable result had the prior domestic violence evidence been excluded. (*People v. Scott* (2011) 52 Cal.4th 452, 492.) There was substantial, essentially uncontested evidence Gambina twice threatened to kill Leslie. Leslie testified Gambina called and told her that she better return his check or else. He then left her a voicemail message threatening to kill her. Gambina did not dispute he left the voicemail message; he couldn't—it was played for the jury. Additionally, Salvatore testified his father threatened to kill his mother. This was overwhelming evidence supporting Gambina's convictions for counts 1 and 2.

Constitutional Claims

Recognizing California courts have repeatedly rejected his claims but to preserve the issue for federal review, Gambina also contends admission of the prior domestic violence evidence under Evidence Code section 1109 violated his due process, equal protection, and fair trial rights under the United States Constitution. He did not raise this argument in the trial court, but the argument is cognizable on appeal. (*People v. Moore* (2011) 51 Cal.4th 386, 407, fn. 6 [Evidence Code section 352 preserves constitutional arguments].) In any event, having found no abuse of discretion, we also find no constitutional violation. Moreover, our Supreme Court has held Evidence Code section 1108 does not offend due process. (*People v. Falsetta* (1999) 21 Cal.4th 903, 912-922.) That reasoning extends to Evidence Code section 1109. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 529-530 [Evidence Code section 1109 does not offend due

process; cases cited therein]; *People v. Price* (2004) 120 Cal.App.4th 224, 240 [Evidence Code section 1109 does not violate due process or equal protections]; see *People v. Reyes* (2008) 160 Cal.App.4th 246, 251-252 [rejecting due process challenge to CALCRIM No. 852].) We are bound by Supreme Court authority. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 197-198; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Thus, the prior uncharged domestic violence evidence was admissible pursuant to Evidence Code section 1109. But we wish to address one final point.

At the hearing, Judge King noted the prosecutor was not seeking to admit the prior uncharged domestic violence evidence pursuant to Evidence Code section 1109 but instead for another purpose. Judge King, however, stated he thought the evidence was admissible pursuant to that section. Near the end of his ruling though Judge King indicated he would give the jury a limiting instruction prohibiting the jury from using the evidence for “disposition” if the defense requested such an instruction. Unfortunately, the discussion of the jury instructions is unreported. As we state above, Judge King instructed the jury with CALCRIM No. 852 on the use of prior uncharged domestic violence evidence, which permitted the jury to use the prior uncharged domestic violence evidence as disposition evidence.⁵ All this confusion could have been avoided had the trial court admitted the evidence solely on the theory advanced by the prosecutor instead of providing his own theory of admissibility. We recognize a trial court has broad discretion in assessing the admissibility of evidence but when the court advances its own theory it results in confusion and an undeveloped record, as we are faced with here. Nevertheless, the evidence was admissible pursuant to Evidence Code section 1109, and Gambina was not prejudiced by its admission.

⁵ Gambina does not argue CALCRIM No. 852 as given was erroneous.

IV. Cumulative Error

Gambina claims the cumulative effect of the errors requires reversal. We have concluded there were no errors, and therefore, his claim has no merit.

V. Section 654

Relying on section 654, Gambina argues the trial court should have stayed the sentence on count 2 because counts 1 and 2 were part of an indivisible course of conduct. We agree.

In pertinent part, section 654, subdivision (a), provides, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Section 654 applies where a defendant suffers multiple convictions as a result of a single course of conduct pursuant to a single intent or objective.

“Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.) Multiple punishment for more than one offense arising from the same act or from a series of acts constituting an indivisible course of conduct is prohibited. (*People v. Lewis* (2008) 43 Cal.4th 415, 519.)

“[M]ultiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm. [Citations.] ‘Separate sentencing is permitted for offenses that are divisible in time’ [Citation.]” (*People v. Felix* (2001) 92 Cal.App.4th 905, 915 (*Felix*).

“The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making

this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them.’ [Citation.] The court’s findings may be either express or implied from the court’s ruling. [Citation.] In the absence of any reference to . . . section 654 during sentencing, the fact that the court did not stay the sentence on any count is generally deemed to reflect an implicit determination that each crime had a separate objective. [Citations.]” (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626-627.)

Here, the trial court did not refer to section 654 when it sentenced Gambina to two years in prison on count 1 and imposed a concurrent two-year prison sentence on count 2. Thus, we must conclude the court implicitly found counts 1 and 2 had separate objectives, and we must affirm the court’s implicit findings if there is any substantial evidence to support the court’s findings. There is not substantial evidence to support the court’s implicit findings.

Gambina had one objective, to get back his check. The jury could rely on the following evidence to reasonably conclude Gambina threatened to kill Leslie three times: (1) Gambina called Leslie and threatened to kill her; (2) he then called Salvatore and threatened to “tear [Leslie’s] head off[;]” and he then called Leslie and left her a voicemail message threatening to kill her. The objective of these threats was to recover his missing check so he could pay his bail bondsman.

Relying on *People v. Trotter* (1992) 7 Cal.App.4th 363 (*Trotter*), the Attorney General argues Gambina had time to reflect in between each threat, and thus the concurrent sentence on count 2 was proper. His reliance on *Trotter* is misplaced.

In *Trotter, supra*, 7 Cal.App.4th at pages 365-366, defendant, while fleeing in a taxi from a police officer, fired three shots at the police car pursuing him. The first two shots were a minute apart, while the third came moments after the second. The appellate court held the trial court did not err in separately punishing defendant for the first two shots, and not the third. The court reasoned each successive shot by defendant

made his conduct more egregious, and each shot posed a “separate and distinct risk” to the officer and the freeway drivers. (*Id.* at p. 368.) It explained further “this was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull.” (*Ibid.*)

Here, there is no evidence counts 1 and 2 were committed by separate, independent acts that became more “egregious” as they were committed or that they posed “separate and distinct risk[s]” in the escalating manner envisioned in *Trotter*. Gambina’s threats were separated by just minutes and nothing in the record supports the conclusion he had separate intents when he made the threats. Again the purpose of the threats was to recover his check. The trial court’s apparent attempt to apportion the acts of the threats between the two offenses is simply not supported by the record.

Nor is *Felix, supra*, 92 Cal.App.4th 905, the one published case we found concerning the application of section 654 to multiple convictions for making criminal threats, helpful. In that case, defendant threatened to kill his ex-girlfriend and her fiancée. Two hours later, defendant called his ex-girlfriend and again threatened to kill her. (*Id.* at p. 909.) The court concluded multiple punishments were proper because defendant had time to reflect before making the second threat. The court reasoned defendant made the threats at different times and different places. *Felix* is inapposite because as we explain above, Gambina’s threats were directed at one victim, from the same place, at essentially the same time. Gambina did not reflect for two hours before making his subsequent threats.

“If a trial court violates section 654, the proper remedy on appeal is not reversal of the counts involved, but elimination of the penalty for all but one of them (the one carrying the greatest penalty, if the penalties are disparate), by staying execution of, or simply striking, the terms of imprisonment for all but one of them. [Citations.]” (*People v. Davis* (1989) 211 Cal.App.3d 317, 323.) In this case, the trial court sentenced

Gambina to two years in prison on count 1 and imposed a concurrent two-year prison term on count 2. Thus, we will stay the two-year prison term on count 2.

DISPOSITION

The judgment is modified to stay the two-year prison term on count 2, criminal threats, pursuant to section 654. In all other respects, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment consistent with this opinion and forward it to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.