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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ASHLEY MILES DELALLO,

Defendant and Appellant.

H043603

(Santa Clara County

Super. Ct. No. C1487279)

Appellant Ashley Miles Delallo was convicted by jury trial of assault by force likely to cause great bodily injury (count 1, Pen. Code § 245, subd. (a)(4)),¹ corporal injury on a spouse (count 2, § 273.5, subd. (a)), stalking in violation of a restraining order (count 3, § 646.9, subd. (b)), dissuading a witness (count 4, § 136.1, subd. (a)(2)), misdemeanor battery on a spouse (count 5, § 243, subd. (e)), and misdemeanor violation of a protective order (counts 6-13, § 273.6). The trial court sentenced Delallo to a total prison term of four years.

On appeal, Delallo argues that: (1) the trial court prejudicially erred in instructing the jury on stalking; (2) the trial court prejudicially erred in instructing the jury on violation of a protective order; (3) trial counsel was prejudicially ineffective for not objecting to challenged instructions or the prosecutor's description of those charges; (4) cumulative error warrants reversal; (5) punishment for some counts must be stayed under section 654; and (6) this court should review the confidential record of the victim's

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

California State Bar (State Bar) record to determine if the trial court properly excluded some materials as nondiscoverable.

As explained in more detail below, we find no reversible error and affirm the judgment.

I. BACKGROUND

A. *Prosecution's Case*

1. *Victim's Testimony*

Anne Doe testified that she met Delallo in 2009 and married him four or five months later. Anne filed for divorce in 2012, and the divorce became final in 2014. During the marriage, Anne and Delallo had two children together, a boy and a girl. Anne attended law school from 2011 to 2014. She testified that during the marriage, Delallo was physically and verbally abusive.

In September 2009, Anne tried to wake Delallo from an afternoon nap by splashing water on his face in a joking manner. Delallo became “enraged” and “went crazy screaming.” “He was out of control. He picked [Anne’s] kitten up and threw it against the wall.” Anne locked herself “in the bedroom,” but Delallo “broke down the door.” Anne ended up on the ground, where Delallo “held [her] down by [her] neck and was trying to rip off [her] engagement ring.” Anne called the police. Delallo left. When he returned he had scratch marks on his arms. Both Anne and Delallo were arrested and went to jail. Delallo later admitted that he had used his car keys to scratch his own arms.

By spring of 2012, Anne and Delallo moved into separate bedrooms and rarely saw each other. The two “were proceeding to dissolution.” In the summer of 2012, Anne became involved with another law student, which Delallo soon learned about after reading Anne’s text messages.

In September 2012, “[t]here was an incident that made” Anne decide she needed to seek a restraining order. Delallo began a fight in which he smashed Anne’s phone and punched a hole in a wall while Anne stood nearby. According to Anne, this was typical

behavior: “That’s what he did. His anger outburst, he would act out in manners like that, break stuff.” In addition, he tried to “rip apart” Anne’s driver’s license and law school ID card. Soon after, while at school, Anne received a series of text messages from Delallo accusing her of “being out . . . of doing . . . graphic disgusting sexual acts and degrading me that way.” Receiving those text messages made Anne feel “[v]ery distraught,” [u]pset and fearful.”

Anne later went home and gave her son a bath. While bathing him, she saw “what appeared to be hand print bruises on his back.” Anne did not know how he got those bruises, but did know “that [her son] was home with his father who was very angry that day.” The next morning Anne applied for a restraining order. Based on the application, Anne obtained a temporary restraining order. The order required Delallo to have no contact with Anne and the children, to stay away from Anne and the children, and to move out of the residence.

After being served with the temporary restraining order and notice of hearing for a permanent restraining order, Delallo called Anne and threatened suicide. The call was “frightening” to Anne because Delallo appeared to be “out of control.” Anne called the police to report the suicide threat. She also later received a text message from Delallo, in which Delallo admitted he had gone “over the edge,” that he was “truly sorry,” and that he would “get my family back and make it happy.” Anne felt fearful based on the text message. Anne also received an email from Delallo, who used a fake name, in which he admitted to having “crazy thoughts in my head” and taking methamphetamine. He apologized for “let[ting] you down” and asked Anne for help. Anne replied by text, telling him she could not help him. She urged him to seek professional help.

Delallo later emailed Anne to admit “it makes me sick to myself I acted that way to you around the kids.” He proposed that the children live with Anne for six months, and that they attempt to reconcile. He stressed that “we will survive and get thru this crazy part in [our lives],” and “I know months from now . . . we are going to be laughing

at all of this.” He stated that he “need[ed] to know if you are going to file a motion to dismiss. By this Saturday October, 6th, 2012.” Anne took this message as a threat. Because of these emails, she moved to a hotel with her children because she did not feel safe.

In another series of text messages, Delallo stated to Anne: “You need to go into court, drop this restraining order and work this out.” Anne eventually told Delallo to “[l]eave me alone you are only making this worse for yourself, goodbye[.]” Delallo replied, “We both are going to [lose] them. Go to hell.” Anne replied, “I have done nothing to lose my children,” and she stated Delallo was being “irrational once again.” Delallo replied that he was rational, and he told Anne he would “show the judge all the text messages,” which showed that “you and I have been both . . . breaking the court order.” He warned Anne “[t]his will also look bad when you try to apply for your bar license.”

In October 2012, there was a hearing on the permanent restraining order. Delallo was late, appeared “disheveled,” and was “disrespectful toward the judge and to [Anne’s] attorney.” Anne was granted a five-year permanent restraining order. In light of Delallo’s erratic behavior, a bailiff escorted Anne to her car. As Anne drove out of the parking garage, she rolled down her window to put her parking ticket in the machine. Delallo ran up to Anne’s window, bent into her car, and screamed at her, yelling “something along the lines of how could you do this to me and fuck you.” He then “sucked in and pulled back his face and spit” on Anne.

That evening, Delallo sent an email to Anne with the subject line, “Checking out.” In it, Delallo implied that he planned to kill himself, stating that “the pain is unlivable [sic],” that he was “sorry for everything,” and that he wanted “[n]othing fancy. Put me next to Ainsley.” Anne responded to the email, telling him “not to do it, and [she] tried to find him.” She also tried to call him “a lot”—she “just kept trying to call over and

over”—because “he was the father of [her] children and” she “did not want harm to become of him.”

In the period after the permanent restraining order was issued, Anne described a recurrent pattern of events. Specifically, Delallo would threaten suicide or make other threats, Anne would respond “very delicate[ly]” by telling him she “still had hope and faith that things could resolve,” but that “there would be something that would spur anger again. And then it would go back to that crazy threatening things and then it would—then [Anne] would stop responding”

Later, Delallo sent Anne a request “to have . . . a tracking app on [her] phone,” which would allow Delallo to know her location. She replied, “Stop it right now,” and noted this was his fourth such request. Delallo sent at least four more emails over the course of several days. On one occasion, he sent Anne a video of him “swallowing pills or playing to be swallowing pills.” Every one of these incidents increased her fear of Delallo. Anne changed her phone number and moved to a new residence to avoid contact with Delallo. In November 2012, Delallo sent a number of emails to convince Anne to drop the restraining order and fire her attorney. Delallo was worried about a pending criminal case against him based on the spitting incident at the courthouse. One email included a copy of the admissions standards for the State Bar, including the moral character requirements, which Anne took as a threat. Delallo began emailing Anne at her new email address, which frightened her because she did not know how he found it.

He continued sending Anne emails throughout December 2012 and January 2013; a number of the emails were profane, abusive, and threatening. In March 2013, Delallo sent an email that included Anne’s new phone number and new home address. Because of this email, Anne installed heavy duty locks on her doors and bars on her windows. In June 2013, Delallo emailed Anne to tell her he was “in the Bay Area” and asked if she “want[ed] to meet and talk?” This scared Anne, so she asked her boyfriend to come over.

She then received another email from Delallo indicating that he knew her boyfriend had come to her house. Anne was “[v]ery scared” and called 911.

In June 2013, Anne began to receive phone calls from blocked numbers. She would pick up the phone, and “then there was just silence, and then it kept going. It was like every 15 minutes from there.” After she took her phone off the hook, the calls started going to her boyfriend’s phone. Anne and her boyfriend unblocked the phone number and discovered it was Delallo. In July 2013, Anne received an email. In it, Delallo told her to have a “good 4th of July,” and then told her: “Now go fuck yourself. And tell that Jew fuck[,] I will put him in a wheelchair for the rest of life. [¶] Later whore bag.” Anne took this as a “direct physical threat” against her and her boyfriend, and called 911.

Anne’s father maintained a relationship with Delallo for the sake of Anne’s children. In February 2014, Anne’s father received a text stating, “It’s my time. My time to strike And I’m coming, with a fucking vengeance[.] [¶] Oh and I’ll see her Friday. Or maybe sooner.” Although the text came from an unknown number, Anne believed it to be Delallo, based on the content and writing style. She took it as a threat and “drove directly to the police station.” She then packed up and moved with her children to a friend’s house. In March 2014, Anne received an email with a photograph of a map showing the area around Anne’s apartment, with a dot right outside of her apartment. The map was from “a smart phone,” with the “dot represent[ing] where you are located” at the time. Anne understood the photograph as showing Delallo’s physical location as being outside her apartment. Anne was “[v]ery scared.”

In June 2014, Delallo hired a lawyer and began acting more reasonably. Anne’s attorney told her that if Delallo cooperated he “most likely” would be granted visitation rights. At that time, Anne had graduated law school and was preparing for the State Bar exam. Anne wrote Delallo to ask him to comply with his child support obligations. In the email, she also talked about future visitation. Delallo called her and they continued to

discuss possible visitation in the future. Anne was “shocked” when Delallo texted her the next day that he had arrived in San Jose and wanted to meet. Although “a little scared,” Anne felt she “had to address it at this point” and decided to go forward with allowing Delallo to see their children. Delallo stayed in town for four days, visiting the children, sometimes on his own, while Anne prepared for the State Bar exam. Anne became uneasy about the visit because Delallo began talking about her romantic relationships.

At one point, Delallo asked if he could come over to Anne’s apartment to do laundry. At her apartment, the two drank beer together. After the children went to bed, at around 8:30 or 9:00 p.m., Anne and Delallo continued “drinking and talking,” mostly in the kitchen. The conversation turned “combative” as the two “started to argue” about how their marriage ended. Delallo became “increasingly agitated” and displayed flashes of anger. Anne was scared and asked Delallo to leave. At some point, Delallo “lunged” towards Anne and pressed her against the refrigerator with his hands around her throat. Anne “could not breathe” and began feeling “[s]lightly” dizzy. Anne then reached over her head where there was a knife block above the refrigerator. She grabbed a knife and pulled it down, making contact with Delallo’s hand. Delallo began walking around kitchen, while Anne held the knife and told him to leave. Delallo pulled out his cell phone and began recording the encounter. In the recording, which was played at trial, Delallo repeatedly accuses Anne of stabbing him, and she repeatedly tells him to leave.

Anne called the police around 4:00 or 5:00 a.m. In the 911 call, Anne reported that she had been choked and pushed against a wall. Delallo’s mother later posted the recording from Delallo’s cell phone to social media, with the headline, “ ‘Anne [Doe], attorney to be, goes on drunken stabbing spree.’ ” The next day Anne received a message asking to “talk ‘nice’ about the police that you called today.” It also said, “I’m under so much pressure to destroy you. . . . Please call me. We went a mile backwards in two hours. It doesn’t justify four weeks of us getting along with [our] kids.” Anne’s father also received text messages, which said “Anne is going to be arrested and going to jail.

Let me know . . . do not ignore me or the kids will be going to child services. I do not want that to happen[.]” Anne took these messages to be threats. Delallo was arrested soon after the choking incident.

Anne was contacted by Delallo’s father, who told her that Delallo has a plan to “get out of both your troubles” and that “[Delallo] and his attorney [have] a plan B.” Anne took this as a reaffirmation of “the previous threats, either don’t cooperate or something is going to happen to you . . .” Delallo’s girlfriend contacted Anne on behalf of Delallo, telling her that Delallo “wanted me to tell you that uh, you guys had a conversation on Tuesday before Court, and he plans on sticking to it. I don’t really know what that means.”

In July 2015, Anne testified at the preliminary examination in the days leading up to the State Bar exam.

2. Other Prosecution Evidence

In 2009, Anne’s mother received a call from Anne who was hysterical and told her that Delallo “was trying to kill her,” and that he “was trying to grab the diamond engagement ring off her finger and they were fighting.”

Anne’s attorney for the permanent restraining order hearing, who was one or two cars behind Anne when she was at the parking machine, testified that she heard Delallo yelling and saw him spit on Anne.

Morgan Hill Police Officer Johannes Kuhlen responded to the June 2014 choking incident. He saw a slight redness on Anne’s neck. He saw “a drop of blood” on the floor and “a blood smear on the wall.” Anne showed no signs of intoxication.

Angela Rodriguez, a forensic nurse examiner and expert on strangulation, reported that there are visual injuries in only 20 percent of strangulation cases. She reported that another 35 percent have “very, very minor injuries, maybe just one bruise or just a little bit of . . . hemorrhaging or redness to the face or eyes.” A victim will lose consciousness after about 10 seconds of strangulation. Rodriguez explained that it was a common

misconception that if a person does not lose consciousness then the strangulation incident must not be serious.

San Jose Police Officer Carl Purnell responded to Anne's and Delallo's home in September 2012, and saw a fist-sized hole in the wall. He also saw "a bent driver's license and credit card, [which] looked like somebody had tried to rip it in half," and a shattered iPhone. Anne told Purnell that "[s]he felt it was just an angry outburst," "that [Delallo] didn't mean it," and that "she did not want him arrested."

San Jose Police Officer Eugene Gaines responded to Anne's apartment in October 2012, after a report of a violation of a domestic violence restraining order. During Gaines's investigation, Anne received an email from Delallo.

Richard Ferry, a licensed marriage and family therapist, testified as an expert on intimate partner violence. He stated that violence in a relationship is different than stranger violence because "the perpetrator may know particular ways to get at or dominate or humiliate the victim." Among the behaviors associated with intimate partner violence are harassment and stalking, threats, verbal and emotional abuse, and physical abuse. Victims of intimate partner violence often fail to act on their own behalf. Stalking is particularly scary to the victim, and often forces "the victim to reconcile or to at least return to the control of the abuser." Suicide threats "can be terrorizing in at least two ways." First, if it is a credible threat, it "includes by implication the threat to murder the abused partner." Second, even if it does not include the implied threat of murder, it "still presents a terrible dilemma" for the abused partner, who may feel "it will be my fault" and thus "has a controlling effect on the range of choices available" to the abused partner.

The prosecutor introduced recorded telephone calls made by Delallo from jail. In one call between Delallo and his father in July 2014, Delallo talked about "damning . . . evidence" that he could use in family court to have "our kids taken away from her." Delallo stated that he had a recording of Anne when she was drunk. He characterized it as "my leverage." Delallo stated that he needed someone to relay this news "to them."

Delallo's father told Delallo that if "you have the damning evidence, use it. It's no good if you don't use it okay?" Delallo asked his father to contact Anne's parents about the evidence.

In another phone call, Delallo told his girlfriend to call Anne and tell her he had "an hour-and-a-half recording" in which Anne admitted "she's an alcohol[ic] and can't take care of the kids" Delallo explained that he could not use the recording in criminal court because it was made without Anne's consent, but that he could use it to show "child services" that she was endangering the children. Delallo's girlfriend asked, "isn't that kind of like . . . ," and Delallo completed the sentence: "Blackmail? Yeah." Delallo instructed her, "you don't text that and don't leave a message with that. You verbally have to say that [to Anne]." Delallo stated that if Anne did not show up to the preliminary hearing, "I walk – uh, I walk. I'm done. I walk out of here."

In another phone call, Delallo again tells his father about the recording, stating that Anne was drunk and admitted she was a bad mother. Delallo stated that if Anne shows up in court then the tape "goes right to child services." Delallo expressed distress about staying in jail. Delallo told his father "make the goddamn phone call and tell them" that "if she shows up" then "that fucking tape[] goes straight to child services." Delallo's father replied: "I will tell—I will make sure. I'll tell [Anne's father] okay? I'll call—I'm calling tomorrow from work."

B. *Defense Case*

In August 2012, Delallo learned that Anne was having an affair. Delallo was "devastated" and spent the night at a hotel. Delallo moved to the downstairs bedroom.

In September 2012, Anne stayed out late and Delallo was at home. Delallo awoke when Anne returned home. He found her in the bathroom throwing up. He went in and found her cleaning herself. They argued and she threw a used tissue at Delallo. In response, Delallo threw apple juice at her. Delallo explained that the driver's license and school ID became bent when they got "stuck in the seat rail underneath [a car] seat." He

also explained that the hole in the wall was made the previous Easter by accident, and Anne's phone shattered when she threw it at Delallo. Delallo denied having anything to do with the mark on his son.

Delallo had no desire to continue in a relationship with Anne. However, they were "stuck in a lease" for a year and so "were just trying to figure out what to do with the house." When Delallo learned about the temporary restraining order, he felt "[b]etrayed" and "devastated." He communicated with Anne's parents and "texted something stupid" that was taken "as a suicide threat." Delallo was placed on an involuntary hold at a hospital. After he was released, he stayed at a hotel and then slept in his car. Anne contacted him by text or phone call "three, four times a day" to discuss "the lease, money, and the children, vacation."

At the October 2012 hearing on the permanent restraining order, Delallo was at the courthouse on time but was too "terrified" to walk into the courtroom. Delallo was "in shock" and "didn't really understand what was going on," though he did know that "the judge granted a five year restraining order." After the hearing, Delallo was upset and crying. He went up to Anne's car and said, "what the fuck did you just do to me, and [he] put his hands on the window and said it." He "[p]ossibly" spit on her. He was arrested about 30 minutes later.

Delallo addressed the 2009 water incident. He stated that Anne "woke me up by throwing water, hot water, warm water on my face." Delallo was "stunned" and "in shock." Anne was intoxicated, and they got into an argument. Anne then "threw a couple of punches" and "scratched [his] face, [his] back." Delallo wanted to leave and take his dog, but the dog was locked in the bedroom with Anne. "[W]ith a little bit of force" Delallo "popped the door" open. He grabbed his phone but left without his dog. Delallo and Anne were arrested. Delallo did not self-inflict the injuries, but told the police he did so after Anne threatened she would abort their child. Because of that, he told the police he had self-inflicted his wounds.

In June 2014, Anne and Delallo reconciled. On the day of the choking incident, Anne and Delallo went out to dinner and consumed alcohol. After dinner, Anne bought some beer, which they shared. Delallo later went to Anne's apartment to do laundry. Anne bought more beer. At the apartment, they shared the beer and a bottle of champagne. At some point, Anne saw a message on Delallo's dating "app," which made her upset and caused the two to fight. As Delallo started to grab his laundry so he could leave, Anne came over and pushed him.

Delallo proceeded to look for his car keys. He saw what he thought were his keys on the counter in the kitchen and he reached for it. As he did so, Anne turned and stabbed him. The wound was "gushing blood." When Delallo realized she was "coming at [him] again," he "pushed her back into the kitchen sink." He "[a]bsolutely" did not choke her. He then picked up his cell phone and began to record what happened. In the recording, Anne pushes and punches Delallo in the head, while holding the knife in her hand. Delallo tells her, "'You are assaulting me.'" He does not hit her back.

On cross examination, Delallo admitted that he "didn't want [Anne] to show up to the [preliminary] hearing" and that he "thought if she didn't show up to the hearing, [the] charges would be dropped" According to Delallo, Anne explained to him "what a speedy trial was," and based on what she told him, he understood that if he invoked his speedy trial rights then the preliminary hearing would occur right before the State Bar exam. Delallo testified that Anne suggested he do this so that she would have an excuse to not testify, which would result in the case being dropped. Delallo admitted, however, that in a recorded jail phone call to his girlfriend, he asked his girlfriend to look up the speedy trial rules and read the details to him over the phone.

II. DISCUSSION

A. Instructional Error: Dissuading a Witness

Delallo argues that the trial court misinstructed on count 4, dissuading a witness. Delallo contends that the "instruction misstated the law because it did not state that 'a

person is not guilty of [dissuading a witness] if his conduct is constitutionally protected activity’ or statutorily protected activity.” Delallo asserts that there was evidence presented that Delallo exercised his speedy trial right in an attempt to make sure the preliminary hearing was held around the time Anne would be taking the State Bar exam.² Delallo contends that the prosecutor argued at closing that this was a valid basis for convicting Delallo of dissuading a witness.

1. Procedural Background

The court instructed the jury on dissuading a witness as follows: “The defendant is charged in Count 4 with intimidating a witness or victim. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant maliciously tried to prevent or discourage Anne . . . from attending or giving testimony at [a] preliminary hearing; [¶] 2. Anne . . . was a crime witness or victim; [¶] AND [¶] 3. The defendant knew he was trying to prevent or discourage Anne . . . from attending or giving testimony at a preliminary hearing and intended to do so.”

At closing, the prosecutor argued: “Moving on to Penal Code section 136, dissuading a victim. . . . [¶] So this is I think by far the easiest charge, the one that should require the least amount of discussion because you actually have it. You heard it yourself. You know what he did. You know what his intent was. You heard multiple calls where the defendant talked about if the victim doesn’t come to the hearing, my charges will be dropped. If she doesn’t show, it will all be dropped. Just so many calls about this. [¶] *And then secondly you heard testimony that at the beginning he tried to make it just inconvenient for her to show up. I’m going to set my trial at the time of the bar so she can’t show.* [¶] When he realizes that she actually is going to appear, he then

² We note that in his briefing Delallo conflates the constitutional right to a speedy trial with the statutory right to a speedy preliminary examination. Delallo was exercising his statutory right to a speedy preliminary examination, which is a statutory but not constitutionally protected right. Although we refer to the right to a speedy preliminary examination, the distinction makes no difference in our analysis here.

goes and makes the explicit threat where he attempts to dissuade her. And you heard this in the calls between him and [his girlfriend] and as well as him [and] his father There were two individuals that he said to pass on this explicit threat. [¶] And that was, I have a video saying that she is drunk and can't take of the kids. You tell her if she shows, that goes to Child Protective Services. If she doesn't show, it gets deleted. [¶] This is an obvious and explicit 136. There is not even a jump that needs to be made. You have two calls where he explicitly attempts to dissuade her. And the interesting thing about that is he uses the thing that he knows will get to her, which is her children.”³ (Italics added.)

The prosecutor later concluded: “He knows that a threat to take her children away is the thing that could get to her. Because he knows her and he uses that. [¶] So you have this very explicit 136, dissuading of a victim, on these jail calls. [¶] You also have other evidence from her father, from her mother, and from her as well about calls that they were getting from jail. Other evidence that corroborates that he was attempting to get in touch with her to get her this message. [¶] But those two jail calls are the most explicit. And those show that he's guilty of the 136.” After noting that the jury could deliberate in any order that they wished, the prosecutor suggested they “take the easiest counts first, which means this one goes first, because you all heard those jail calls.”

2. Analysis

Delallo did not object to the instruction in the trial court, and thus Delallo's challenge to the instruction is forfeited on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) Nevertheless, “[a] reviewing court may review an instruction even absent an objection ‘if the substantial rights of the defendant were affected thereby.’ [Citation.]”

³ Although Delallo does not explicitly identify the part of the prosecutor's argument he finds objectionable, the italicized language is apparently what Delallo characterizes as an argument that his invocation of the right to a speedy preliminary examination was a valid basis of conviction.

(*People v. Hardy* (2018) 5 Cal.5th 56, 91.) “ ‘Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.’ [Citation.]” (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.)

Delallo asserts that the purported error should be reviewed under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), because the claim implicates his federal constitutional rights. The Attorney General contends that *People v. Watson* (1956) 46 Cal.2d 818 applies.

We need not decide whether the instruction was erroneous because even if the trial court erred when it instructed the jury without the additional language suggested by Delallo, the error was not prejudicial under any standard. Under the more stringent *Chapman* standard, the Attorney General has the burden of proving “the error was harmless beyond a reasonable doubt.” (*People v. Reese* (2017) 2 Cal.5th 660, 671.) To determine whether the Attorney General has carried his burden, “we examine the entire record and must reverse if there is a ‘ ‘ ‘reasonable probability’ ’ ’ that the error contributed to the verdict.” (*Ibid.*)

On this record, we are convinced beyond a reasonable doubt that any error in the instruction did not contribute to the verdict. Here, the prosecutor’s central argument as to why Delallo was guilty of dissuading a witness was clearly based on Delallo’s attempts to threaten Anne’s custody of her children. Indeed, Delallo was recorded on jail calls repeatedly instructing his girlfriend and father to make sure Anne understood that if she showed up at the preliminary hearing, he would attempt to have her lose custody of her children. The prosecutor repeatedly reminded the jury that it had listened to recordings of these explicit threats in Delallo’s own voice. In concluding his argument on dissuading a witness, the prosecutor reminded the jury that Delallo “knows that a threat to take her children away is the thing that could get to her. . . . [¶] *So you have this very*

explicit 136, dissuading of a victim, on these jail calls.” (Italics added.) The prosecutor’s argument was plainly based on Delallo’s threat to have Anne’s children taken away from her.

Under the facts of this case, assuming instructional error, there is no reasonable probability that the error contributed to the verdict. Delallo would have been convicted of dissuading a witness even if the jury had been told that Delallo’s invocation of his right to a speedy preliminary examination was statutorily protected and Delallo could not be found guilty if his conduct constituted constitutionally or statutorily protected activity.

B. Instructional Error: Stalking and Violating a Restraining Order

Delallo argues that the jury instructions on stalking and violating a restraining order were erroneous because they did not inform the jury that his behavior in contacting Anne could be excused by her actions in contacting him. He contends that the restraining order “did not prevent him from responding to her requests to contact him, so long as he responded appropriately.”

1. Procedural Background

The trial court instructed the jury on violation of a restraining order as follows: “The defendant is charged in Counts 6 through 13 with violating a court order. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. A court issued a written order that the defendant stay away from Anne . . . and [her children]; [¶] 2. The court order was a protective order, issued under Family Code §6218; [¶] The defendant knew of the court order; [¶] 4. The defendant had the ability to follow the court order; [¶] AND [¶] 5. The defendant willfully violated the court order.”

The trial court instructed the jury on stalking as follows: “The defendant is charged in Count 3 with stalking. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person; [¶] 2. The defendant

made a credible threat with the intent to place the other person in reasonable fear for her safety or the safety of her immediate family; [¶] AND [¶] 3. A restraining order prohibiting the defendant from engaging in this conduct against the threatened person was in effect at the time of the conduct.” In defining “harassing,” the instruction stated: “Harassing means engaging in a knowing and willful course of conduct directed at a specific person that seriously annoys, alarms, torments, or terrorizes that person and serves no legitimate purpose.” The instruction defined “maliciously” as when the perpetrator “unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.” The instruction also explained, “The terms and conditions of a restraining order remain enforceable despite the parties’ actions, and may only be changed by court order.”

In pertinent part, the permanent restraining order required that Delallo “must not do the following things” to Anne: “Harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, molest, destroy personal property, disturb the peace, keep under surveillance, or block movements.” It also prohibited “[c]ontact, either directly or indirectly, by any means, including, but not limited to, by telephone, mail, e-mail or other electronic means.” And it prevented Delallo from taking “any action, directly or through others, to obtain the addresses or locations of any protected persons.” The permanent order required that Delallo “must stay at least . . . 300 yards away from” Anne and her children. (Bold omitted.) The substance of the temporary restraining order was essentially identical to the permanent order.

2. Analysis

“A claim of instructional error is reviewed de novo. [Citation.] An appellate court reviews the wording of a jury instruction de novo and assesses whether the instruction accurately states the law. [Citation.] In reviewing a claim of instructional error, the court must consider whether there is a reasonable likelihood that the trial court’s instructions caused the jury to misapply the law in violation of the Constitution. [Citations.] The

challenged instruction is viewed ‘in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner.’ [Citation.]” (*People v. Mitchell* (2019) 7 Cal.5th 561, 579.)

Here, we conclude there was no error in the instruction for violation of a restraining order. The gravamen of Delallo’s argument is that the permanent and temporary restraining orders allowed Delallo to contact Anne when she initiated contact. This argument, however, is contrary to the text of the temporary and permanent restraining orders. The permanent restraining order was unambiguous; it barred Delallo from “[c]ontact, either directly or indirectly, by any means, including but not limited to, by telephone, mail, e-mail or other electronic means.” There is no exception for mutual contact in this text or in any other portion of the permanent restraining order. It is no defense to a restraining order that Delallo reasonably believed that Anne invited his contact. (*People v. Gams* (1997) 52 Cal.App.4th 147, 153-154.) “There are procedures in effect for dissolving protective orders if the subsequent behavior of the protected party casts doubt in the mind of the restrained party as to whether the former has had a change of heart prior to the expiration of the order.” (*Id.* at p. 154.) In this case, the restraining order made clear that the order “can be changed only by another court order.” In short, there was no exception for invited conduct and thus there was no error in the jury instructions.

We also conclude that there was no error in the stalking instruction. Delallo complains that the stalking instruction allowed for conviction “whenever [he] [was] in contact with the protected party, even if he simply [was] respond[ing] to her requests.” Not so. The stalking instruction required the prosecution to prove that Delallo “willfully or maliciously harassed” Anne. “Maliciously” was defined as “unlawfully intend[ing] to annoy, harm, or injure someone else in any way, or intend[ing] to interfere in any way with the orderly administration of justice.” Similarly, “harassing” was specifically

defined as “engaging in a knowing and willful course of conduct directed at a specific person that seriously annoys, alarms, torments, or terrorizes that person *and serves no legitimate purpose.*” (Italics added.) Thus, by definition, the stalking instruction only applied to intentional conduct that annoyed, alarmed, tormented, or terrorized the victim *and served no legitimate purpose.* Put another way, conduct that amounted to a simple response to the protected party’s requests would not fall within the ambit of stalking because it served a legitimate purpose. “Jurors are presumed to understand and follow the court’s instructions.” (*People v. Holt* (1997) 15 Cal.4th 619, 662) Since the challenged jury instruction already included language establishing the limitations on conduct that Delallo now claims should have been reflected therein, we reject his claim of error.

C. Ineffective Assistance

Delallo argues that his trial counsel was ineffective for not objecting to the challenged instructions. He also argues that trial counsel was ineffective for not objecting to the prosecutor’s description of the law regarding dissuading a witness, stalking, and violation of a restraining order. These descriptions essentially mirrored the trial court’s instructions.

To establish ineffective assistance of counsel, Delallo must show that counsel’s performance was deficient and that he was prejudiced by the deficiency. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) To prove prejudice, Delallo bears the burden to show a reasonable probability that, but for his trial counsel’s errors, the result would have been different. (*Id.* at pp. 217-218.) A reasonable probability is one “ ‘sufficient to undermine confidence in the outcome.’ ” (*Id.* at p. 218.)

As we explained previously, assuming that the dissuading a witness instruction was erroneous, the error was not prejudicial. Had counsel objected to the instruction or the prosecutor’s comments and had the trial court clarified the instruction or struck the comments, we see no reasonable probability that the result would have been different.

Thus, Delallo cannot establish prejudice. In addition, as to the stalking and violation of the restraining order instructions or the prosecutor's comments, as we have explained, there was no error in these instructions. Because the instructions and the prosecutor's description of the instructions were correct statements of the law, his trial counsel's failure to object to the instructions was not deficient.

D. *Cumulative Error*

Delallo contends that the cumulative effect of the asserted errors requires reversal even if the errors are individually harmless. We have rejected each of Delallo's individual claims of error, except for his claim regarding the instruction for dissuading a witness. There, we assumed error and found it harmless. Accordingly, Delallo's cumulative error claim fails.

E. *Section 654*

Delallo argues that counts 6 through 13, violation of a restraining order, "were part of the same act that constituted stalking" under count 3. He also argues that the count 6 conviction punished the same conduct that was charged in count 5, misdemeanor battery on a spouse.

1. *Procedural Background*

For count 3 stalking, the prosecutor alleged that Delallo engaged in a knowing and willful course of conduct of two or more acts intended to seriously annoy or terrorize Anne. The prosecutor identified "[e]mails, phone calls and text messages" "[t]owards [Anne], towards her family, and toward [her boyfriend]" as the types of conduct covered by the stalking count.

The prosecutor later discussed the violation of a restraining order counts, 6-13. For count 6, the prosecutor alleged that Delallo approached Anne outside of family court, after the permanent restraining order was issued, and "said something to her. I think it was 'Why the fuck are you doing this to me.' "

For count 7, the prosecutor alleged that Delallo sent text messages prior to the hearing, where Delallo “says things like, ‘LOL. Game on.’ He says, ‘We’re both going to loose [*sic*] them’ ” and “he tells her to go to hell.”

For count 8, the prosecutor alleged that Delallo sent an email in March 2013, in which he said, “ ‘You are not as smart as you think you are,’ and then discloses that he knows about her address.”

For count 9, the prosecutor alleged that Delallo sent an email in June 2013, in which he told Anne that he was “ ‘in the Bay Area’ ” and that he knew she had “ ‘called [her boyfriend] to stay over.’ ”

For count 10, the prosecutor alleged that Delallo sent an email on “October 22 or 23” from a fake email address to Anne.

For count 11, the prosecutor alleged that Delallo sent an email in July 2013, in which Delallo told Anne, “ ‘And tell that Jew fuck I will put him in a wheelchair for the rest of his life.’ And then calls [Anne] a whore bag.”

For count 12, the prosecutor alleged that in November 2013, Delallo called Anne from a “spoofed [telephone] number” that “came up as being from [the] San Jose Police Department,” but that Anne heard Delallo’s voice on the call.

For count 13, the prosecutor alleged that in February 2013, Delallo sent a text message that said, “ ‘it’s my time, my time to strike,’ ” which was sent to Anne’s father.

The prosecutor told the jury that it “might be a little confusing why some emails are charged with restraining order violations and some aren’t,” given the sheer volume of them. The prosecutor noted that while “[i]t seems I could have just charged many” more restraining order violations, “[d]on’t speculate about that” and “[j]ust look at each count and determine if it’s proven beyond a reasonable doubt that the [Delallo] did that.”

For count 5, battery on a spouse, the prosecutor alleged that Delallo willfully and unlawfully touched Anne in a harmful or offensive manner by spitting on her while she was in her car after the permanent restraining order hearing.

2. *Analysis*

Section 654 provides in relevant part: “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.” (§ 654, subd. (a).) Thus, “[s]ection 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute.” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267.) “Whether a course of conduct is divisible and therefore gives rise to more than one act . . . depends on the ‘intent and objective’ of the actor.” (*Ibid.*) “If . . . the defendant had multiple or simultaneous objectives, independent of . . . each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct.” (*Id.* at pp. 267-268.)

A trial court’s express or implied findings in support of its determination that section 654 does not apply will be upheld on appeal if substantial evidence supports them. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.) “We review the trial court’s findings ‘in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]’ [Citation.]” (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

Here, substantial evidence supports the trial court’s implied finding that Delallo’s objective and intent in stalking the victim was separate from his objective in committing numerous violations of a restraining order. Delallo sent a number of messages to Anne and her family. The various messages included threats of suicide, threats to Anne’s custody of her children, attempts to reconcile, threats of physical harm, threats to Anne’s attempt to obtain a State Bar license, and threats to her boyfriend. From this evidence the court could reasonably find that Delallo stalked Anne with an intent and objective of preventing Anne from starting a new relationship, and that he committed violations of a

restraining order with the separate intent and objective of expressing frustration or anger. Evaluating the evidence in the light most favorable to the verdict, as we must, we find that substantial evidence supports the trial court's determination that separate punishment was warranted.

Delallo also challenges the imposition of separate punishment for counts 5 and 6, both of which arose out of the incident in the parking lot after the permanent restraining order was issued. Delallo contends that his battery of Anne, by spitting on her, was part of the same act as his violation of the restraining order, which was accomplished by approaching Anne and yelling at her. We find this contention unpersuasive. By imposing separate punishment for violation of the restraining order and battery, the trial court impliedly found that Delallo harbored a separate intent and objective for each offense. Substantial evidence supports this finding. Delallo approached Anne's car and screamed at her, yelling "something along the lines of how could you do this to me and fuck you." Then, after he yelled, he "sucked in and pulled back his face and spit" on Anne. From this evidence, the court could reasonably find that Delallo violated the restraining order with the intent to upbraid her because he would suffer a negative impact from her successful pursuit of the permanent order, and that he willfully touched her in a harmful or offensive manner with the separate intent and objective of causing her distress. Further, the trial court could have also reasonably concluded that the act of spitting was a gratuitous act of violence separate from the violation of a restraining order. Section 654 "cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.) We therefore find no error in the trial court's application of section 654.

F. Record Review

Delallo requests that this court conduct a review of documents relating to the investigation by the State Bar into the moral fitness of Anne as part of her licensing application. The Attorney General does not object to such a review.

In the trial court, Delallo served a subpoena duces tecum on the State Bar. The State Bar opposed the subpoena. The court conducted an in camera review of the requested materials and determined it would release some documents and withhold others. The court stated it would release statements made by Anne. However, the court indicated it would not release emails from Delallo to the State Bar, as he already had those in his possession. The court also stated it would not release “any conclusions or summations or analysis” by the State Bar, or any materials that were already available from other sources through discovery, such as police records.

“Parties who challenge on appeal trial court orders withholding information as privileged or otherwise nondiscoverable ‘must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record.’ [Citation.]” (*People v. Price* (1991) 1 Cal.4th 324, 493.) We review a trial court’s decision to withhold documents as privileged or otherwise nondiscoverable for abuse of discretion. (*People v. Landry* (2016) 2 Cal.5th 52, 74.)

We have reviewed the list of items contained in the subject State Bar record. As the trial court observed, much of it was comprised of materials available to the parties from other sources (e.g., court records, phone records, text messages, police reports, credit card statements). Other material, including school records, were of no apparent relevance. Of the items that were relevant to the case, such as Anne’s statements to the State Bar, the court ordered those items disclosed. The State Bar record also included a DVD recording of Anne during the incident in which she held a knife; however, that was introduced by the prosecution at trial. Having reviewed the list of items in the State Bar

record, we conclude that the trial court did not abuse its discretion in declining to disclose certain materials from that record.

III. DISPOSITION

The judgment is affirmed.

Greenwood, P.J.

WE CONCUR:

Grover, J.

Danner, J.

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