Filed 7/29/20 P. v. Klotz CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH GABRIEL KLOTZ, Defendant and Appellant.	H045825 (Monterey County Super. Ct. No. SS161511A)

I. INTRODUCTION

Defendant Joseph Gabriel Klotz appeals after a jury found him guilty of aggravated mayhem (Pen. Code, § 205; count 1),[1] criminal threats (§ 422; count 2), and two counts of stalking (§ 646.9, subd. (a); counts 3 & 4). Defendant admitted that he had previously been convicted of a strike offense (§ 1170.12, subd. (c)(1)). The trial court sentenced defendant to serve 14 years to life in prison consecutive to eight years eight months.

The convictions stemmed from defendant's conduct against C.D. (counts 1-3) and I.D. (count 4). Defendant's claims pertain solely to counts 1 through 3. Defendant contends the trial court erred when it denied his motion to dismiss the aggravated mayhem charge pursuant to section 995 after the magistrate did not hold defendant to

[1] All further statutory references are to the Penal Code.

answer on that offense; his trial counsel was ineffective for failing to raise certain arguments in the section 995 motion and in a writ petition filed in this court; there is insufficient evidence in the record to support defendant's convictions of aggravated mayhem and stalking C.D.; the trial court violated section 654 when it imposed an unstayed sentence for defendant's conviction of stalking C.D.; and the cumulative prejudice from the errors mandates reversal.

For reasons that we will explain, we will modify the judgment to stay the term imposed on count 3 and affirm the judgment as modified.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Trial Evidence*

1. Aggravated Mayhem, Criminal Threats, and Stalking C.D. (Counts 1-3)

C.D. dated defendant for about six months in 2013. C.D. broke up with him in October or November because he was very controlling. During their relationship, defendant never threatened or physically abused C.D.

On December 2, 2013, defendant reported to police that his residence had been burglarized. Defendant's door had been kicked in and his Xbox system and games were missing. Defendant told the police he thought C.D. or someone associated with her had done it.

After their breakup, C.D. began to hear from defendant again in early December when he started to send her about five to ten text messages a day. The text messages were not from defendant's phone number, but C.D. knew the messages were from defendant based on their content. While they were dating, C.D. had seen defendant use a text message application that generated different phone numbers allowing him to send messages without the messages being linked to his phone number. The text messages scared C.D. and she reported the activity to the Monterey County Sheriff's Department.

On December 3, 2013, a sheriff's deputy left a voicemail message for defendant telling him to stop calling and sending text messages to C.D. Defendant responded in a voicemail that indicated defendant had received the deputy's message.

Also in the beginning of December 2013, C.D. received a phone call from a woman named "Tracy." C.D. could hear defendant laughing in the background. Tracy observed that C.D. had not been at C.D.'s parenting class and asked where C.D. had been. C.D. wondered who Tracy was because C.D. was the only woman in her parenting class. The call, which occurred after C.D. had reported defendant to the sheriff's department, scared C.D.

On December 14, 2013, C.D. received several text messages that she knew were from defendant even though they were not from his phone number. Some of the text messages stated as follows: " 'We gonna catch you real soon, bitch' "; " 'Everybody looking for you and that white boy, bitch' "; " 'I'm not the one hiding, scared of all the people looking for me' "; and " 'You know we know, bitch.' " Another text message stated: " 'Ass should know that we know you and that white boy were the ones, and I'm going to split both your heads open when I catch you two.' " C.D. found this message confusing; she did not know what defendant was talking about. Another text message said: " 'Good night, you wrinkly saggy bitch. See you real soon.' " This led C.D. to believe defendant was looking for her. C.D. felt intimidated and scared. C.D. reported defendant to the sheriff's department, but the messages did not stop.

At some point that same month, C.D.'s boyfriend, J.W., encountered defendant at a local Home Depot. Defendant and "an associate" approached J.W. and asked him to step outside. J.W. went outside. Defendant asked J.W. if he had burglarized defendant's house. J.W. said, "No," and "[t]hey swung on [him]." The men wrestled to the ground. Store employees broke up the fight and defendant and his associate ran. J.W. resumed shopping.

The text messages sent to C.D. got "really bad." C.D. received numerous text messages from randomly generated phone numbers on December 25, 2013. For example, some of the text messages read: " 'On everything, I'm going to split all three of you open. If you keep hiding, we gonna run up in your houses and fuck off your kids and families, whoever's' "; " 'Home, stop calling 911, bitch' "; " 'Now it's my move, bitch' "; " 'It's only a matter of time now, bitch. My move' "; " 'We want you, bitch. . . . You can't hide' "; " 'Police can't save you' "; " 'We're coming to your house, bitch' "; " 'We're on the way, bitch. Don't call 911' "; " 'We're going to show you what happens when you steal from me, bitch' "; and " 'Nobody can save you, bitch. We gonna get you first.' " C.D. did not understand the reference to stealing. Another message stated: " 'On my cuz, RIP, I'm tear your face up.' " C.D. was also called a " 'snitch[].' " Two of the messages referenced C.D.'s son. C.D. felt defendant was getting angrier and was looking for her. Defendant knew where C.D. lived. C.D. was afraid and overwhelmed. She felt like something was going to happen.

The messages continued through the end of December. C.D. received a message on December 30 that stated: " 'We're gonna get you real soon . . . . Those crackers and police can't save your snitching ass.' " During this time period, C.D. did not receive threatening text messages or any other threats from anyone else. Although C.D. used drugs, she did not have any issues with anyone in the drug community.

Around New Year's Eve 2013, defendant called C.D. and threatened her. J.W. grabbed the phone and told defendant to stop the threatening text messages and phone calls. Defendant asked J.W. "to set [C.D.] up and bring her to the Burger King parking lot." J.W. also talked to another man during the phone call. J.W. "could tell" the other man was black. J.W. hung up because he was tired of being screamed at. J.W. did not report the call to the police.

The threats stopped on December 30, 2013, around when C.D. changed her phone number.

On January 8, 2014, C.D. went to her parenting class. She had been going to the class for about 10 weeks. The classes were normally held at the same time every week, but the schedule had been modified over the holidays. The normal schedule resumed on January 8. Defendant, C.D.'s father, and J.W. knew she attended the class. Defendant used to take C.D. to the class.

On January 8, J.W. took C.D. to the class in C.D.'s car. C.D. and J.W. had drugs in the car because they were drug addicts. C.D. would not have used drugs before going to class.

As C.D. walked out the door at the end of the class at 7:00 p.m., someone called her name. She turned around to see someone she did not recognize. The person was a very tall, thin, black man with dreadlocks. C.D. had never seen him before. The man grabbed C.D.'s wrist and punched C.D. in the face with his other hand. The punch was so hard it made C.D.'s ears ring. There was blood everywhere and C.D. was in pain. The man ran. C.D. never saw him again.

C.D. started yelling for her boyfriend. J.W. and several others rushed to her aid. It looked like someone had taken "a Samurai sword and hacked [C.D.'s] face," which was "filleted open" from the top of her head to the bottom of her jaw. One of the people who helped C.D. recalled that he had seen a fairly large black man with dreadlocks sitting outside of the building around 6:45 p.m.

J.W. asked C.D. where the assailant had gone and took off running. J.W. saw a black man with dreadlocks running up an alleyway, but J.W. could not catch up to him. J.W. had never seen the man before. J.W. went back to help C.D.

C.D. was taken to the hospital. She had three slices to her face, the major nerve to her mouth had been severed, and three of her mucous glands were cut. C.D. got 40 stitches to her face that night. About two weeks later, when the swelling subsided, C.D. had facial reconstructive surgery to connect the muscle and mucous bands back together, rebuild the nerve to her jaw, and repair the skin so C.D. would have one scar

instead of three. C.D. still has a scar to her face and is unable to smile fully because she can no longer control her left upper lip. She also has numbness in the area of her scar. Based on the nature of the lacerations, which were "exactly parallel, almost exactly the same length, almost exactly the same depth," the plastic surgeon who treated C.D. opined that the injuries were probably caused by three parallel razor blades attached to an instrument like brass knuckles. The plastic surgeon described the injuries as "horrible."

About two days after the attack, defendant filed a request for a domestic violence restraining order against C.D. The request was denied.

At some point when C.D.'s face was still bandaged from the reconstructive surgery, C.D. saw defendant. C.D. had been shopping at a 7-Eleven and defendant was parked in front of his bank some distance away. Defendant pointed at C.D. and laughed. C.D. did not report the encounter.

Monterey police executed a search warrant at defendant's residence and seized a phone. In the five to ten minutes it took to transport the phone to the police department, the phone had been "wiped clean," meaning there was no information contained on it.

Police later determined that defendant was the subscriber of the I.P. address associated with some of the phone numbers used to send text messages to C.D. All of the numbers used to send the messages were owned by a company called Pinger. Defendant had the Pinger application downloaded on his phone.

C.D. was convicted of misdemeanor assault with force likely to cause great bodily injury in 2006 for hitting a man in the head with a champagne bottle. The conviction was later "set aside." In 2013, C.D. was convicted of negligently discharging a firearm. The incident arose from an argument with defendant. C.D. was placed on home confinement and ordered to attend a parenting class.

J.W. was convicted of grand theft in 2011 and bringing drugs into jail in 2012. He also carried a concealed dirk or dagger in 2007.

2. Stalking I.D. (Count 4)

I.D. dated defendant on and off in 2012 and 2013. They stopped talking from 2014 through April 2016. On May 8, 2016, defendant sent I.D. a text message wishing her happy Mother's Day. I.D. was happy to hear from him. I.D. and defendant sent text messages back and forth "just like a friendship. . . . [E]verything was normal." A couple of days later I.D. went to defendant's home and defendant gave her a birthday present.

About a week later, defendant began sending I.D. text messages throughout the day. I.D. told defendant that she could not correspond with him while she was at work, but defendant continued to send messages, overwhelming I.D.

Around the end of May, defendant sent I.D. a text message that I.D. did not receive. Defendant became upset and accused I.D. of lying about not getting the message. After that, defendant sent text messages to I.D. at random times throughout the day. I.D.'s phone "kept ringing and ringing and ringing to where [she] didn't want to have [her] phone with [her] anymore because it was just that irritating." I.D. felt "stressed out, anxious."

I.D. told defendant that she did not have time for a relationship and she thought it would be better if they were just friends. Defendant "started to flip out." Defendant told I.D., " 'You're not going to leave me,' " and that he would give her space. I.D. said, " 'No, I don't want to do it.' " Defendant then "bl[ew] up" I.D.'s phone while she was in a meeting.

Defendant sent text messages to I.D. that he loved her. I.D found the messages "[s]uffocating." At the end of May or beginning of June, defendant sent I.D. a text message telling her he loved her and he was sorry and asking for " 'one last chance.' " The message also stated: " '[B]aby, what the fuck. You belong to me. Don't get it twisted.' " I.D. did not respond. Defendant continued to send I.D. messages. I.D. did not respond.

Defendant sent a text message to I.D. stating that he was coming to her house now. I.D. "freaked out," had a panic attack, and felt harassed. I.D. called defendant and told him to leave her alone. Defendant asked to " 'work it out,' " but I.D. refused and eventually hung up on him. Defendant continued to text I.D. I.D. was crying, anxious, nervous, frustrated, and angry. I.D. did not respond to defendant's text messages.

Later that night, I.D. found Facebook posts about her on defendant's Facebook page. Defendant stated in the posts that I.D. was " 'broke with no future. . . . And you ain't shit, bitch. And you'll never be. Now get to work and wait for your paycheck.' " I.D. was embarrassed and angry that defendant "put [her] name out there." Her "[a]nxiety [was] just going to burst." Defendant posted more messages that scared I.D. One posted message said: " 'Get at me and get whacked -- whacked out. Fuck you, bitch, and fuck your fake gang member family.' " I.D. reported defendant's posts.

In mid to late June, defendant left I.D. a couple of voicemail messages. I.D. felt anxious and harassed because she thought defendant was going to start bothering her again. I.D. did not respond to the messages. I.D. became paranoid that defendant would show up at her house or "pop out somewhere."

At the end of June or beginning of July, I.D. answered a phone call from a blocked number. It was defendant, who told her, " 'Don't ever get it fucked up. You belong to me. I don't care what you have to say. Don't ever let me catch you with somebody else.' " I.D. felt threatened.

Approximately an hour later, as I.D. drove to work, she saw defendant parked along her route. I.D. continued driving, believing her mind was playing tricks on her. Defendant began following I.D. I.D. recognized defendant's car and saw defendant in her rearview mirror. I.D. pulled into a parking garage at a hospital clinic and stayed in her car. Defendant drove off. I.D. was terrified. I.D. called defendant from inside the clinic and told him he should not be following her. Defendant denied following I.D. and told her she was crazy. I.D. repeated that defendant needed to stop and hung up.

Defendant later called I.D. and said, " 'Don't get it twisted. You belong [to] me.' " Defendant continued to send I.D. text messages.

Toward the end of July, defendant sent I.D. flowers at work. I.D. had not told defendant where she worked. I.D. was scared because now she knew defendant was following her. I.D. had someone walk her to her car at the end of the workday.

Defendant sent I.D. flowers again the first week of August. I.D. felt terrified, suffocated, and scared. I.D. called defendant and told him to stop sending her flowers and stop following her. Defendant denied that he followed I.D. and said he was just trying to be nice and work things out with her. I.D. told defendant that she would go to the police if he continued to bother her. Defendant said he would leave I.D. alone and asked her not to call the police.

I.D. contacted the police because she was scared for herself and her kids. That evening, defendant sent I.D. a text message calling her a "snitch" and stating, " 'Keep fucking around, and . . . we're going to keep fucking with you until we decide to hit.' " I.D. was scared. Each time she got a message she would "break down and cry and shake." Defendant continued to send I.D. threatening text messages.

I.D. again reported defendant to the police because she was terrified. I.D. called defendant while a police officer recorded the call, but defendant did not answer. Soon afterwards, defendant sent I.D. a text message telling her not to contact him again, denying that he was stalking or threatening her, and calling her a snitch. Defendant stopped contacting I.D.

From May 2016 through August 2016, I.D. was very depressed, anxious, scared, and paranoid. She cried herself to sleep and stopped eating. It was difficult for her to work and to parent.

The night before I.D. testified at trial, I.D. received a call from "a third party." The caller said, " 'Honey, I'm calling because your ex is incarcerated with my husband. And he wants me to relay a message to you.' " I.D. was very afraid and called the police.

I.D. admitted that in 2012, she pleaded guilty to theft for inadvertently taking nail polish from Target. The conviction was later "expunged."

B. *Charges, Verdicts, and Sentence*

Defendant was charged with aggravated mayhem (§ 205; count 1), criminal threats (§ 422, subd. (a); count 2), and stalking (§ 646.9, subd. (a); count 3) for his conduct against C.D. and one count of stalking I.D. (§ 646.9, subd. (a); count 4). It was also alleged that defendant had previously been convicted of a strike offense (§ 1170.12, subd. (c)(1)) and a serious felony offense (§ 667, subd. (a)(1)).

On February 1, 2018, a jury found defendant guilty of the charged offenses. On April 5, 2018, defendant admitted the prior strike allegation. The trial court dismissed the prior serious felony allegation at the prosecution's request.

On May 17, 2018, the trial court sentenced defendant to 14 years to life consecutive to eight years eight months.

III. DISCUSSION

A. *Denial of Section 995 Motion*

Defendant contends the trial court erred when it denied his motion to dismiss the aggravated mayhem charge pursuant to section 995, which mandates that an information be "set aside" if "the defendant had been committed without reasonable or probable cause." (§ 995, subd. (a)(2)(B).) Defendant asserts that it was unlawful to charge him with aggravated mayhem because the preliminary hearing magistrate made a factual finding of insufficient evidence. Defendant alternatively argues that the evidence presented on count 1 at the preliminary hearing was insufficient because "there was absolutely no evidence of any connection between [him] and the assailant, and any inference of such a connection could only have been based on guesswork, speculation, or conjecture." Defendant claims that because the trial court improperly denied his section 995 motion, his conviction of aggravated mayhem violated his due process rights.

1. Preliminary Hearing Evidence

C.D. testified that she dated defendant for about six months in 2013, from May to October. After their breakup, C.D. did not hear from defendant until December 2013, when defendant began sending her threatening text messages. Defendant sent C.D. approximately five to ten messages a day threatening her and her family. The messages did not mention C.D.'s family members by name, but some referenced that C.D. had a son. The messages made C.D. "[v]ery afraid."

C.D. stated that the text messages were not from defendant's phone number, but she had seen defendant use a "fake texting app" before. The text-message application allowed defendant to "generate a new number every time he used it." C.D. filed a report with the sheriff's department.

Also in December 2013, C.D. received a threatening phone call from someone named "Tracy." During the call, C.D. heard defendant laughing in the background. The call scared C.D.

C.D. testified that she received a text message on December 25, 2013, that stated: " 'Half of that shit was my son's shit. Bitch. Fuck your bitch-ass son, you nasty, disrespectful bitch. On my cuz RIP I will tear your face up.' " C.D. thought the message meant that defendant intended to hurt her. Another December 25, 2013 message stated: " 'My move, bitch. Time is on my side, you dope-fiend bitch.' " C.D. believed defendant was telling her that he wanted to do something to her. C.D. was afraid.

C.D. stated that on January 8, 2014, she went to a parenting class she had been attending for approximately 10 weeks. Defendant, C.D.'s father, and C.D.'s boyfriend, J.W., knew that she attended the class. J.W. took her to the class on January 8.

As C.D. walked back to her car after the class ended, a man called her name and asked what time it was. The man was "sitting under the stairs when [C.D.] walked out of the door," approximately five feet away from her. C.D. turned around to answer the man's question. She had never seen him before.

The man approached C.D., grabbed her wrist, and punched her left cheek with his other hand. C.D.'s ear was ringing and she felt "a lot of pain." There was blood everywhere. The man ran and C.D. yelled for J.W.

C.D. stated that "the major nerve to [her] mouth [had been] sliced, two muscles." She had two surgeries to repair the injury and she no longer has "complete control of [her] smile." She also has a scar and numbness.

C.D. testified that defendant was the only person during this time period who had threatened her. The threatening text messages stopped about a week before the attack when C.D. changed her phone number. Although C.D. was a drug user, she had no issues with anyone in the drug community that could have done this to her.

On cross-examination, C.D. admitted that she currently had two cases pending against her and had been convicted of misdemeanor battery with serious bodily injury. C.D. had a history of methamphetamine and opiate addiction. She used methamphetamine approximately once per week from December 1, 2013 to January 8, 2014. C.D. did not remember whether she was under the influence of narcotics on the evening of January 8, 2014, but she had used methamphetamine that week. There was methamphetamine in the car when J.W. drove C.D. to the parenting class, but it did not belong to C.D. C.D. only used methamphetamine with J.W. C.D. frequently used the opiate "Norcos" between December 1, 2013 and January 8, 2014. She could not recall whether she used Norcos or had Norcos in her possession on January 8, 2014. C.D. did not believe that she was under the influence of opiates at the time of the attack, but she did not know for certain. C.D. got the Norcos from J.W. or "someone else" who got them from his or her doctor. C.D. never had a payment dispute over the Norcos. She also did not have any disagreements with J.W. during this time period.

C.D.'s parenting classes were ordered as a result of her conviction for attempting to discharge a firearm at defendant. After the attack on C.D. in 2014, defendant tried to get a restraining order against her, but the request was denied.

C.D. testified that defendant had mentioned in text messages that his house had been broken into, but she did not know what he was talking about. C.D. believed that defendant thought she was involved.

C.D. received some text messages from defendant's phone number in December 2013, but none of them were threatening. C.D. had seen defendant use the "fake texting app" more than once. Defendant was the only person C.D. had seen use the application.

C.D. began her relationship with J.W. in November 2013 and they were still dating. She was aware J.W. had been convicted of two felonies. J.W. was convicted in 2015 for inflicting corporal injury on C.D. C.D. had been abused by J.W. a few times. J.W. did not use a weapon.

C.D. was separated from her husband, who abused her on multiple occasions. C.D.'s husband went to prison in 2011 or 2012 for abusing her. He was in prison in December 2013 and January 2014.

J.W. testified that approximately two weeks before January 8, 2014, he took C.D.'s phone from her during a threatening phone call from defendant. Defendant told J.W. that he wanted to "meet . . . at Super Max . . . and he wanted [J.W.] to bring [C.D.] with [him] to give her to them." J.W. hung up the phone when someone else got on the call and became "real mouthy."

About a week and a half before the attack on C.D., J.W. was "jumped" by defendant and an "associate of his." Defendant accused J.W. of breaking into his house.

J.W. stated that he did not see the attack on C.D., but he chased the perpetrator. The assailant was a black man with long hair. J.W. had never seen him before.

J.W. admitted on cross-examination that he had been convicted of grand theft, smuggling contraband into jail, and carrying a concealed dirk or dagger. J.W. stated that he had never had a physical altercation with C.D. during their relationship and he had never threatened her. J.W. was arrested for domestic violence involving C.D. but he was acquitted of the charges.

J.W. had a history of drug abuse and had used methamphetamine with C.D. J.W. was not using methamphetamine with C.D. in December 2013 or early January 2014 and had not observed her using methamphetamine during that time period. J.W. drove C.D. to the parenting class in her vehicle on January 8, 2014. Methamphetamine was found in the car, but J.W. did not know who it belonged to. J.W. was not under the influence of methamphetamine on January 8.

J.W. stated that the assault against him in December 2013 by defendant and another individual occurred in front of the entrance to Home Depot. J.W. was pushed into a pallet and tripped. When J.W. tried to get up, defendant and the other person attacked him, but no weapon was used. Security guards broke up the fight. J.W.'s shoulder was injured, but he did not immediately seek medical treatment or file a police report.

Monterey Police Detective Jeffrey Welch testified that he interviewed C.D. at the hospital on January 8, 2014. After the interview, Detective Welch downloaded the contents of C.D.'s phone, which had over 50 threatening text messages on it from various phone numbers. The first threatening text message was sent on December 3.

Detective Welch read some of the threatening text messages from C.D.'s phone into the record. A message sent on December 14, 2013 stated: " 'We're going to catch you real soon, bitch.' " Another December 14, 2013 text message said: " 'As[s] should know that we know you and that white boy were the ones, and I'm a split both you[r] head[s] open when I catch you two.' " Messages sent on December 25, 2013 stated: " 'Half that shit was my son's shit, bitch. Fuck your bitch-ass son, you nasty, disrespectful bitch, on my cuz, RIP, I'm a tear your face up' "; " 'On everything, I'm going to split all three of your head[s], all three of you open, if you keep hiding. We going to run up in your houses and fuck off your kids and family' "; " 'We want you, bitch' "; " 'We are going to show you what happens when you . . . steal from me, bitch' "; " 'Nobody can save you, bitch. We gonna get you first' "; and " 'We're coming

to your house, bitch.' " Other messages said "[m]y move" and that it was only a matter of time. One message stated: " 'I got paperwork on you, bitch,' " and another accused C.D. of "snitching." A text message sent on December 27, 2013 also used the term " '[w]e' " and another from the same date said: " 'You can't hide from us, bitch.' " A December 30, 2013 message stated: " 'We're going to get you real soon, dope fiend piece of shit. Those crackers and police can't save your snitching ass. You stole from me. You stole from the wrong person, bitch fuck.' "

Detective Welch stated that he called one of the phone numbers associated with the threatening messages and got an automated response from Pinger, which is a third party application that allows users to send messages and place phone calls from different phone numbers. The detective's investigation revealed an IP address for the phone numbers linked to the text messages. The IP address was registered to defendant.

On cross-examination, Detective Welch stated that he did not know if all of the text messages were sent by one person or "how many people inputted stuff on someone's phone." He also did not know how many people used the IP address registered to defendant during December 2013. Detective Welch did not know who sent the text messages.

2. Parties Arguments and the Magistrate's Determination

After responding to a question regarding the dates alleged for the criminal threats and stalking charges, the prosecution reserved additional argument. Defendant argued there was no evidence that he perpetrated aggravated mayhem on C.D. or aided and abetted its commission. Defendant also asserted that there was "no evidence of an agreement that would cause there to be a conspiracy here." The prosecution declined to make further argument.

The magistrate determined that despite the low evidentiary burden of "essentially a strong suspicion," there was "a fatal gap in the evidence. There's clearly evidence that a very serious attack and stabbing occurred, and that mayhem in fact occurred. There's

clearly evidence that the defendant harassed, and stalked, terrorized this victim by text for a month preceding the attack. However, there is no tie in to the defendant and the unidentified assailant the elements of aiding and abetting require." The prosecution asked to be heard, but the magistrate denied the request.

The magistrate continued: "Count 1, the elements of aiding and abetting include that the defendant specifically intends and does in fact aid, facilitate, promote, or encourage, or instigate the perpetrator's commission of the crime. That is where the gap is. There's no evidence that that was done. There's certainly evidence that that may have been done, and there's certainly evidence that the harm inflicted on the victim was exactly what the defendant threatened. But without any evidence of any connection between the perpetrator and the defendant, I can't find that the evidence is sufficient, or that he was a principal in that offense." The magistrate discharged defendant on count 1, but held him to answer on counts 2 and 3.

3. Subsequent Procedural History

The prosecution filed an information that mirrored the complaint, charging defendant with the same offenses and alleging that the crimes were committed on or about the same dates claimed in the complaint. Defendant moved to dismiss the aggravated mayhem charge pursuant to section 995. In his written motion, defendant argued that the magistrate's factual findings barred the charge. The prosecution filed written opposition, arguing that the charge was not barred because the magistrate's findings constituted legal conclusions and that substantial evidence demonstrated that defendant was involved in a conspiracy to commit aggravated mayhem against C.D.

At the hearing on the section 995 motion, defendant argued that the magistrate's findings encompassed conspiracy liability and barred the aggravated mayhem charge because the magistrate made a factual finding that there was no connection between defendant and the perpetrator. Defendant also argued that it violated his due process rights for the prosecution to rely on conspiracy liability post-preliminary hearing.

Alternatively, defendant argued that there was no evidence in the record that he had an agreement with someone to conduct the January 2014 attack on C.D.

The prosecution argued that it was not abandoning an aiding and abetting theory but was presenting an additional theory of liability for count 1 that the magistrate did not consider. The prosecution asserted that conspiracy liability did not require proof of a connection between coconspirators and that based on the text messages there was adequate evidence of a conspiracy to commit count 1.

The trial court found that the magistrate's findings were based on aiding and abetting liability and that the magistrate did not consider conspiracy liability. The court determined that the magistrate's findings were legal conclusions and thus not binding on the court. The court found there were "multiple ways for the defendant to be found responsible for a mayhem in this case," including aiding and abetting and conspiracy liability. The court concluded that there was sufficient evidence presented at the preliminary hearing to charge defendant with aggravated mayhem and denied defendant's motion.

Defendant filed a petition for writ of prohibition or other appropriate relief in this court. This court summarily denied the petition.

4. The Magistrate's Findings Did Not Bar the Charge

Defendant contends the magistrate made factual findings that barred the prosecution from charging him with aggravated mayhem. Defendant asserts that the magistrate's determination that " 'without any evidence of any connection between the perpetrator and the defendant, I can't find that the evidence is sufficient, or that he was a principal in that offense,' " is "more than just a legal conclusion - it is a factual finding." The Attorney General counters that the trial court was not bound by the magistrate's determination, which constituted a legal conclusion.

"An information may allege an offense not included in the magistrate's commitment order if the unnamed offense (1) arises from the transaction that was the

basis for the commitment on the related crime and (2) is 'shown by the evidence taken before the magistrate to have been committed.' (Pen. Code, § 739; [citation].)" (*People v. Superior Court* (*Day*) (1985) 174 Cal.App.3d 1008, 1015 (*Day*).) However, "if the magistrate has determined as a matter of fact that the unnamed offense did not occur, then the offense is not 'shown by the evidence to have been committed.' [Citation.] Thus, if the magistrate makes 'material factual findings' which prove fatal to the offense by negating any possibility that it occurred, the prosecution may not ignore those findings and refile the charge. [Citations.]" (*Ibid.*; see also *Jones v. Superior Court* (1971) 4 Cal.3d 660, 666 (*Jones*) [the prosecution may not "ignore the magistrate's findings of *fact* and charge the defendant with an offense or offenses which the magistrate has expressly found never took place"].)

A magistrate makes a factual finding that bars the filing of a charge when he or she "determines as a matter of fact there is no possible evidentiary support for the charge." (*Day*, *supra*, 174 Cal.App.3d at p. 1015.) "A clear example of this would be when the magistrate expresses disbelief of a witness whose testimony is essential to the establishment of some element of the corpus delicti." (*Pizano v. Superior Court* (1978) 21 Cal.3d 128, 133 (*Pizano*).) In contrast, a legal finding is made when "the magistrate accepts and considers the evidence amassed by the prosecution, but concludes that it is insufficient to establish the probable cause required to justify inclusion of the offense in the holding order." (*Day*, *supra*, at p. 1015; see also *Pizano*, *supra*, at p. 133 [a magistrate makes a legal finding when he or she "expressly or impliedly accepts the evidence and simply reaches the ultimate *legal conclusion* that it does not provide probable cause to believe the offense was committed"].)

In *Jones*, the magistrate disbelieved the alleged victim's testimony that she was handcuffed and sexually assaulted by the defendants against her will. (*Jones*, *supra*, 4 Cal.3d at pp. 663-664.) The magistrate found that the alleged victim consented to intercourse and that no sodomy or oral copulation had occurred. (*Id.* at pp. 663-664.)

The California Supreme Court held that the magistrate's factual findings barred the prosecution from charging the defendants with rape, sodomy, and oral copulation. (*Id.* at pp. 664, 668.)

In *Pizano*, on the other hand, the magistrate found that the evidence presented did not establish malice and declined to hold the defendants to answer on murder charges. (*Pizano*, *supra*, 21 Cal.3d at p. 133.) The California Supreme Court determined that the magistrate's finding was a legal conclusion and the prosecution could lawfully charge the defendants with murder. (*Id.* at pp. 133-134.)

Here, the magistrate found there was "a fatal gap in the evidence"; "no tie in to the defendant and the unidentified assailant the elements of aiding and abetting require"; and that "without any evidence of any connection between the perpetrator and the defendant, [she could not] find that the evidence is sufficient, or that he was a principal in that offense." These comments demonstrate that the magistrate "accepted the evidence presented as true but found it legally insufficient." (*Day*, *supra*, at 174 Cal.App.3d at p. 1016.) "The magistrate did not indicate that [s]he thought the testimony of [the witnesses] was incredulous or improbable. Instead, the magistrate voiced a personal opinion that there was insufficient evidence to charge [defendant] with [aggravated mayhem]. . . . [S]uch a determination is a legal conclusion." (*Ondarza v. Superior Court* (1980) 106 Cal.App.3d 195, 201 (*Ondarza*).) Because the magistrate's finding of insufficient evidence constituted a legal conclusion, the prosecution was not barred from including the aggravated mayhem charge in the information despite the lack of a commitment order on the offense. (See *Day*, *supra*, at p. 1015.)

For these reasons, we conclude the trial court did not err when it determined that the aggravated mayhem charge was not barred by the magistrate's findings.

5. Sufficient Record Evidence Supported the Aggravated Mayhem Charge

Defendant contends the trial court erred when it denied his section 995 motion to dismiss the aggravated mayhem charge because there was insufficient evidence presented at the preliminary hearing to connect him with the perpetrator of the offense.

"[S]ection 995 allows a defendant to challenge an information based on the sufficiency of the record made before the magistrate at the preliminary hearing. [Citation.] In reviewing the denial of a . . . section 995 motion to set aside an information, we 'in effect disregard[ ] the ruling of the superior court and directly review[ ] the determination of the magistrate holding the defendant to answer.' [Citations.] Insofar as the . . . section 995 motion rests on issues of statutory interpretation, our review is de novo. [Citation.] Insofar as it rests on consideration of the evidence adduced, we must draw all reasonable inferences in favor of the information [citations] and decide whether there is probable cause to hold the defendant[] to answer." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1071-1072.) In determining whether there is probable cause, "we ask only 'whether the evidence is such that "a reasonable person could harbor a strong suspicion of the defendant's guilt." ' [Citation.] This is an 'exceedingly low' standard [citation]." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 245 (*Sahlolbei*).)

A defendant challenging the denial of a section 995 motion on appeal must show "not only that the denial of the[] section 995 motion[] was erroneous, but also that [he or she was] prejudiced by such error." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 140.) This is because a section 995 motion "cannot be considered as raising a challenge to the trial court's fundamental jurisdiction over the case." (*Ibid.*, citing *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 990-991 ["Errors in the denial of a section 995 motion claiming insufficiency of the evidence are not jurisdictional in the fundamental sense"].) Thus, "an erroneous denial of a section 995 motion justifies reversal of a judgment of

conviction only when a defendant is able to demonstrate prejudice at trial flowing from the purportedly inadequate evidentiary showing at the preliminary hearing." (*People v. Crittenden* (1994) 9 Cal.4th 83, 136-137 (*Crittenden*).)

Section 205 provides that "[a] person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body." The same criminal liability attaches to those who directly perpetrate a felony offense, aid and abet in the offense's commission, or conspire to commit the offense. (§ 31; *People v. Montoya* (1994) 7 Cal.4th 1027, 1038-1039 [aiding and abetting liability]; *People v. Maciel* (2013) 57 Cal.4th 482, 515 (*Maciel*) [conspiracy liability].)

We determine that the trial court properly denied defendant's section 995 motion because there was sufficient evidence presented at the preliminary hearing to charge defendant with aggravated mayhem under a conspiracy theory. Moreover, because defendant's conviction of aggravated mayhem is supported by substantial evidence, defendant has failed to establish he was prejudiced by the alleged error. (See *Crittenden*, *supra*, 9 Cal.4th at p. 137.)

" ' "Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act, by at least one of these parties, in furtherance of the conspiracy." ' [Citation.]" (*People v. Dalton* (2019) 7 Cal.5th 166, 244 (*Dalton*).) " ' " 'Each member of the conspiracy is liable for the acts of any of the others in carrying out the *common* purpose.' " ' " (*Maciel*, *supra*, 57 Cal.4th at p. 515.)

Circumstantial evidence is often used to establish the existence of a conspiracy. (*People v. Homick* (2012) 55 Cal.4th 816, 870.) " 'Evidence is sufficient to prove a conspiracy to commit a crime "if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.]" ' " (*Maciel*,

supra, 57 Cal.4th at p. 515; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999 (*Nathaniel C.*) [the evidence need not establish that the parties "met and expressly agreed to commit a crime"].) "The inference can arise from the actions of the parties, as they bear on the common design, before, during, and after the alleged conspiracy." (*Nathaniel C.*, *supra*, at p. 999.) A defendant may be prosecuted for conspiring with unknown coconspirators. (*People v. Richards* (1885) 67 Cal. 412, 413-414; *People v. Roy* (1967) 251 Cal.App.2d 459, 463.)

Here, it is reasonable to infer from the preliminary hearing evidence that in the month leading up to the attack, defendant sent numerous threatening text messages to C.D. Defendant threatened to " 'split [C.D.'s and her family's] head[s]' " or " 'tear [C.D.'s] face up' " in three of the messages sent just a few weeks before the aggravated mayhem occurred. Defendant used the term "we" in at least 10 of the text messages admitted into evidence. For example, defendant threatened C.D., " 'We going to run up in your houses and fuck off your kids and family.' " Messages sent just over a week before the attack stated, " 'We're going to get you real soon,' " and, " 'You can't hide from us, bitch.' " Two of defendant's messages evinced a motive, stating, " 'We are going to show you what happens when you . . . steal from me, bitch,' " and, " 'Those crackers and police can't save your snitching ass. You stole from me. You stole from the wrong person, bitch fuck.' " C.D. testified that defendant was the only person who threatened her during this time period, and there were no other threatening text messages found on C.D.'s phone. The threatening messages stopped when C.D. changed her phone number about a week before the attack.

In addition, J.W. testified that defendant told him during a phone call in December 2013 that he wanted to "meet . . . at Super Max . . . and he wanted [J.W.] to bring [C.D.] with [him] to give her to them." About a week and a half before the attack on C.D., J.W. was "jumped" by defendant and an "associate of his." Also in December 2013, C.D. received a call that she perceived as threatening from an unknown woman

while defendant laughed in the background. The evidence of defendant's words and conduct demonstrated that he intended to assault C.D. in the face or head, had a motive for doing so, and worked with others.

The circumstances of the attack against C.D. were also unusual. A man waiting outside of C.D.'s class whom C.D. did not know called her name and immediately struck her in the face when she turned around. After slicing C.D's face open, the man ran off. C.D. had been attending the class for approximately 10 weeks and defendant was one of the three people in her life who knew she attended the class.

Given the evidence of defendant's motive based on his belief that C.D. had stolen from him, the specificity of defendant's text messages threatening to inflict a splitting or tearing injury to C.D.'s face or head, defendant's use of the pronouns "we" and "us" in the text messages threatening C.D., his aggression against J.W. with a cohort, his involvement of an unknown woman in his threatening conduct against C.D., and the fact that the unknown perpetrator was waiting for C.D., knew C.D.'s name, and sliced C.D.'s face before running off without committing any other offense against her, we determine the preliminary hearing evidence " ' "support[ed] an inference that the parties positively or tacitly came to a mutual understanding to commit [aggravated mayhem on C.D.]" ' " (*Maciel, supra,* 57 Cal.4th at p. 515), such that " ' "a reasonable person could harbor a strong suspicion of the defendant's guilt" ' " as a coconspirator in the offense (*Sahlolbei, supra,* 3 Cal.5th at p. 245).

Although defendant argues that evidence of motive alone is insufficient to establish that he was "responsible" for the offense, there is evidence beyond motive in the record here—namely, as detailed above, defendant's conduct before the offense and the perpetrator's conduct during the offense. Moreover, the cases cited by defendant in support of his argument are inapposite, as they involve the evidentiary requirements to present the *defense* of third party culpability. (See *People v. Blankenship* (1985) 167 Cal.App.3d 840, 848 [observing that third party motive evidence offered by a

defendant to establish that a third party committed the offense "is not admissible unless coupled with substantial evidence tending to directly connect that person with the actual commission of the offense"]; *People v. Green* (1980) 27 Cal.3d 1, 22 ["It is settled . . . that evidence that a third person had a motive to commit the crime with which the defendant is charged is inadmissible if it simply affords a possible ground of suspicion against such person; rather, it must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense"], abrogated on a different ground by *People v. Martinez* (1999) 20 Cal.4th 225, 239-241; *People v. Yeoman* (2003) 31 Cal.4th 93, 140-141 [" 'evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime' "].)[2]

In addition, defendant has not established that he was prejudiced by the trial court's allegedly erroneous denial of his section 995 motion. As we explain below, defendant's conviction of aggravated mayhem is supported by sufficient evidence. "Where the evidence produced at trial amply supports the jury's finding, any question whether the evidence produced at the preliminary hearing supported the finding of probable cause is rendered moot." (*Crittenden, supra*, 9 Cal.4th at p. 137.) "Even ' " '[i]f there is insufficient evidence to support the commitment, the defendant cannot be said to be prejudiced where sufficient evidence has been introduced at . . . trial' " ' to support the jury's finding as to the charge or as to the truth of the allegation." (*Ibid.*)

---

[2] Defendant also cites *People v. Blakeslee* (1969) 2 Cal.App.3d 831 (*Blakeslee*) and *People v. Lara* (2017) 9 Cal.App.5th 296 (*Lara*). The Court of Appeal in *Blakeslee* determined that evidence of defendant's presence at the scene of the crime around the time the crime was committed, past history of friction with the victim, who was the defendant's mother, and false statements to the police was insufficient to support the murder conviction. (*Blakeslee, supra,* at pp. 838-839.) *Lara* involved aiding and abetting liability. (*Lara, supra,* at p. 319.) Neither case addressed conspiracy liability.

For these reasons, we reject defendant's claim that the trial court improperly denied his section 995 motion based on insufficient evidence.

6. Due Process Violation

Defendant contends the trial court violated his due process rights because it " 'proceed[ed] on [a] defective information' " and entered judgment in excess of its jurisdiction, given the magistrate's findings and the lack of sufficient evidence adduced at the preliminary hearing on the aggravated mayhem charge.

Because we have found no error in the superior court's denial of the section 995 motion, defendant's due process claim fails. (See *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 990, fn. 5.)

B. *Ineffective Assistance of Counsel on the Section 995 Motion and Petition for Writ Relief*

Defendant contends his counsel provided him with constitutionally ineffective assistance on the section 995 motion and the writ petition filed in this court because he failed to claim that: (1) the January 8, 2014 stalking charge was barred based on the magistrate's findings, (2) there was insufficient evidence that defendant committed stalking on or about January 8, 2014, and (3) the aggravated mayhem charge was barred because it did not arise from the same transaction as an offense on which the magistrate held defendant to answer. We are not persuaded.

1. Legal Principles

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that his or her trial counsel's performance was deficient and that he or she suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The deficient performance component of an ineffective assistance claim requires a showing that "counsel's representation fell below an objective standard of reasonableness" under prevailing professional norms. (*Id.* at p. 688.) Regarding prejudice, a "defendant must show that there is a reasonable probability"—meaning

"a probability sufficient to undermine confidence in the outcome"—"that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) Prejudice requires a showing of "a ' "demonstrable reality," not simply speculation.' " (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

We are mindful that "[i]n determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216) and that " '[i]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.' " (*People v. Gray* (2005) 37 Cal.4th 168, 207).

2. Counsel's Failure to Challenge the January 8, 2014 Stalking Charge Based on the Magistrate's Findings

Defendant argues that his counsel was ineffective for failing to claim in the section 995 motion and in the writ petition filed in this court that the prosecution was barred from charging defendant with stalking C.D. on January 8, 2014, because the magistrate made a factual finding that the stalking did not occur on that date.

a. Background

The complaint alleged in count 3 that defendant committed the crime of stalking C.D. "[o]n or about January 8, 2014."

At the conclusion of the preliminary hearing, the magistrate asked the prosecution why it had alleged that the stalking occurred on or about January 8, 2014. The prosecution responded that defendant's stalking of C.D. was a continuous course of conduct that started in December 2013 and ended with the January 8, 2014 attack. Defendant argued there was a lack of evidence that stalking occurred on or about January 8, 2014.

The magistrate determined there was sufficient evidence to hold defendant to answer on the stalking charge, but that "the date is more appropriately . . . focus[ed] on the harassment by text during the month of December." The magistrate continued, "I'm not tying this holding order to the assault that occurred on January 8th. I think the evidence is sufficient for [a] holding order based on the malicious harassment via text, which clearly based on [C.D.'s] testimony was to her a credible threat with intent to place her in reasonable fear for her safety."

The information alleged that defendant stalked C.D. "[o]n or about January 8, 2014." Defendant did not move to dismiss the stalking charge in his section 995 motion.

b. Analysis

As we stated above, a magistrate makes a factual finding that bars the filing of a charge in an information when he or she "determines as a matter of fact there is no possible evidentiary support for the charge" (*Day*, *supra*, 174 Cal.App.3d at p. 1015), such as when the magistrate disbelieves an essential witness's testimony (*Pizano*, *supra*, 21 Cal.3d at p. 133). That did not occur here. The magistrate gave no indication that she disbelieved C.D.'s or any other witness's testimony or that she found the crime of stalking did not happen. Rather, the magistrate made a legal determination that "the evidence [was] sufficient for [a] holding order based on the malicious harassment via text," but the date was "more appropriately . . . focus[ed] on the harassment . . . during the month of December," rather than the January 8 attack. (See *ibid.*) Because the magistrate's findings did not bar the stalking charge, counsel was not ineffective for failing to claim in the section 995 motion and in the writ petition that the stalking charge must be dismissed. (See *People v. Price* (1991) 1 Cal.4th 324, 387 [counsel is not required to raise baseless claims], superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1162.)

Moreover, even if the claim were viable, defendant cannot establish prejudice. As the Attorney General points out, the prosecution could have refiled the stalking charge by

alleging that the offense occurred in December 2013, based on the evidence presented at the preliminary hearing and the magistrate's findings. (See §§ 739, 1009; *People v. Farrow* (1982) 133 Cal.App.3d 147, 152 [an information can be "amended at any time, including up to the time of trial, to include additional offenses shown by the evidence at the preliminary hearing"].)

For these reasons, we conclude that defendant's counsel did not provide ineffective assistance when he failed to claim in the section 995 motion or in the writ petition that the January 8, 2014 stalking charge was barred by the magistrate's findings. (See *Strickland*, *supra*, 466 U.S. at p. 687.)

3. Sufficient Evidence of Stalking on or about January 8, 2014

Defendant also contends that his counsel was ineffective for failing to claim in the section 995 motion and in the writ petition that there was insufficient evidence presented at the preliminary hearing that "any act of stalking occurred on January 8, 2014," because there was no evidence that defendant was "anywhere near [C.D.]" or communicated with C.D. that day. (Bold omitted.)

The information alleged that defendant stalked C.D. "[o]n or about January 8, 2014." The crime of stalking requires a continuous course of conduct. (§ 646.9, subds. (a), (e); *People v. Chilelli* (2014) 225 Cal.App.4th 581, 586 (*Chilelli*).) To establish the offense, the prosecution must prove that the defendant "(1) repeatedly follow[ed] or harass[ed] another person, and (2) ma[de] a credible threat (3) with the intent to place that person in reasonable fear of death or great bodily injury." (*People v. Ewing* (1999) 76 Cal.App.4th 199, 210 (*Ewing*).) Someone "harasses" another person when he or she "engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose." (§ 646.9, subd. (e).) A "credible threat" is "a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination [there]of . . . , made with the

intent to place the [targeted] person . . . in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the [targeted] person . . . to reasonably fear for his or her safety or the safety of his or her family." (§ 646.9, subd. (g).)

Here, it is reasonable to infer from the evidence presented at the preliminary hearing that defendant sent C.D. numerous threatening text messages in December 2013 and that the threatening messages and defendant's conduct constituted "a credible threat." (§ 646.9, subds. (a), (g).) A reasonable person could also find from the record evidence that defendant's conduct constituted harassment under section 646.9, subdivision (e), in that it was a "course of conduct . . . that seriously alarm[ed], annoy[ed], torment[ed], or terrorize[d] [C.D.]." Moreover, as we explained above, it is reasonable to infer from the preliminary hearing evidence that defendant conspired with C.D.'s attacker to commit aggravated mayhem on her on January 8, 2014. The aggravated mayhem was part of the "course of conduct . . . that seriously alarm[ed], annoy[ed], torment[ed], or terrorize[d] [C.D.]." (§ 646.9, subd. (e).) Thus, " ' "a reasonable person could harbor a strong suspicion of . . . defendant's guilt" ' " of stalking on or about January 8, 2014. (*Sahlolbei*, *supra*, 3 Cal.5th at p. 245.)

Further, even if there is not sufficient preliminary hearing evidence that defendant's course of stalking conduct included the January 8, 2014 attack, "[t]he law is clear that, when it is charged that an offense was committed 'on or about' a named date, the exact date need not be proved unless the time 'is a material ingredient in the offense' (Pen. Code[,] § 955), and the evidence is not insufficient merely because it shows that the offense was committed on another date." (*People v. Starkey* (1965) 234 Cal.App.2d 822, 827; accord, *People v. Peyton* (2009) 176 Cal.App.4th 642, 660 (*Peyton*).) "[A] variance [in date] is not . . . material unless it is of such a substantive character as to mislead the accused in preparing his defense, or is likely to place him in second jeopardy for the same offense." (*People v. Williams* (1945) 27 Cal.2d 220, 226.) Defendant makes no claim

that the alleged date of the offense misled him or was likely to place him in double jeopardy.

For these reasons, counsel's failure to assert in the section 995 motion and in the writ petition that insufficient evidence supported the charge that defendant stalked C.D. on or about January 8, 2014, did not fall "below an objective standard of reasonableness." (*Strickland*, *supra*, 466 U.S. at p. 688.) We therefore reject defendant's ineffective assistance of counsel claim. (*Id.* at p. 687.)

4. Transactional Relationship Between the Aggravated Mayhem and the Criminal Threats and/or Stalking

Defendant contends his counsel rendered ineffective assistance when he failed to assert in the section 995 motion and in the writ petition that the prosecution was barred from filing the aggravated mayhem charge because it did not arise from the same transaction as an offense on which the magistrate held defendant to answer, namely, criminal threats against C.D. and stalking C.D.

As we stated above, "[a]n information may allege an offense not included in the magistrate's commitment order if the unnamed offense (1) arises from the transaction that was the basis for the commitment on the related crime and (2) is 'shown by the evidence taken before the magistrate to have been committed.' (Pen. Code, § 739; [citation].)" (*Day*, *supra*, 174 Cal.App.3d at p. 1015.) Thus, to properly charge a defendant in an information with a crime for which there was no commitment order, there must be "some 'transactional relationship' between the added charge and the crime or crimes for which the defendant has been held to answer." (*People v. Bartlett* (1967) 256 Cal.App.2d 787, 791 (*Bartlett*).) More than "a common scheme or plan for the commission of a series of similar transactions" must be shown; "the[] transactions" must be "related or connected." (*Parks v. Superior Court* (1952) 38 Cal.2d 609, 613.)

A defendant's course of conduct may establish a transactional relationship between offenses. For example, the prosecution initially charged the defendant in

People v. Downer (1962) 57 Cal.2d 800, 808 (*Downer*) with one count of incest and one count of rape occurring on December 5, 1959. At the preliminary hearing, the defendant's daughter testified to similar occurrences over a two-year period, including an incident on December 16, 1959, where the defendant went to his daughter's bedroom as he had on December 5. (*Ibid.*) The defendant and his daughter had a fight about sex, and the defendant left without having sexual intercourse with her. (*Ibid.*) After the preliminary hearing, the prosecution filed an information charging defendant with attempted incest on December 16. (*Id.* at p. 809.)

The California Supreme Court determined that the attempted incest charge "was related to and connected with the transaction which formed the basis of the commitment order. It was a part of [the] defendant's course of conduct which he had engaged in with his daughter over a long period of time; and there was sufficient evidence adduced at the preliminary examination, considering the proceedings as a whole, to permit the district attorney to add the count of attempted incest and to support the filing of the information." (*Downer*, *supra*, 57 Cal.2d at pp. 809-810.) "The count added to the information charged a different but related crime bearing on the same transaction involved in the commitment order." (*Id.* at p. 812.)

In *Bartlett*, on the other hand, the Court of Appeal determined there was no transactional relationship between the added burglary charge and the burglaries on which the defendants were held to answer. (*Bartlett*, *supra*, 256 Cal.App.2d at pp. 791-792.) The defendants were initially charged with two burglaries, one of which occurred at a garage owned by Frank Paz on June 23, 1965. (*Id.* at p. 789.) Based on the preliminary hearing evidence, the prosecution added a burglary charge to the information that involved a burglary by the defendants on Paz on November 2, 1965. (*Ibid.*) Despite that the added charge was also a burglary and was perpetrated on one of the same victims, the Court of Appeal determined there was no transactional relationship between the added offense and the offenses on which the defendants were committed because "the evidence

[did] not disclose a continuity of a course of criminal conduct between [the] defendants and the victim." (*Id.* at p. 791.)

Here, the prosecution charged defendant with committing aggravated mayhem on or about January 8, 2014, criminal threats on or about December 3, 2013, and stalking on or about January 8, 2014, after the magistrate held defendant to answer on the criminal threats and stalking charges.[3] The prosecution's theory of the criminal threats and stalking offenses was that both were established by defendant's continuing course of conduct. The prosecution also argued that the conduct forming the basis of the stalking charge included the January 8, 2014 attack on C.D.

The evidence presented at the preliminary hearing showed that defendant began sending C.D. threatening text messages on December 3, 2013. Defendant sent C.D. five to ten messages a day. In a message sent on December 14, 2013, defendant threatened to split C.D.'s and J.W.'s heads open. On December 25, 2013, defendant sent C.D. a text message that said he was going to tear her face up and another message that stated he would split C.D.'s and her family's heads. The threatening messages continued until about a week before the attack, when C.D. changed her phone number. On January 8, 2014, C.D.'s face was sliced open by a stranger who was waiting for her and knew her name. For the reasons we explained above, it is reasonable to infer from the preliminary hearing evidence that defendant conspired with C.D.'s attacker to commit aggravated mayhem on C.D. Taken together, the preliminary hearing evidence, like that presented in *Downer* and unlike that in *Bartlett*, "disclose[d] a continuity of a course of criminal conduct between defendant[] and the victim," that arguably established the requisite transactional relationship between the aggravated mayhem and the criminal threats and stalking charges. (*Bartlett*, *supra*, 256 Cal.App.2d at p. 791.)

---

[3] The prosecution later amended the information to allege that the criminal threats offense occurred on or about December 25, 2013.

Defendant primarily relies on *Ondarza*, *supra*, 106 Cal.App.3d 195 and *People v. Saldana* (1965) 233 Cal.App.2d 24 (*Saldana*) to establish his ineffectiveness claim. In *Ondarza*, the defendant was charged in an information with soliciting another to receive stolen property, attempting to receive stolen property, and selling and furnishing cocaine. (*Ondarza*, *supra*, at p. 199.) The preliminary hearing evidence showed that the defendant solicited and attempted to receive stolen property from an undercover officer in Fresno. (*Ibid.*) During the same conversation, the undercover officer told defendant that he wanted to buy some cocaine. (*Ibid.*) The following morning, the defendant gave the officer a person's phone number in San Jose and the officer later bought cocaine from that person. (*Id.* at p. 200.)

The magistrate did not hold the defendant to answer on narcotics sales, and the defendant moved to dismiss the charge after the prosecution included it in the information. (*Ondarza*, *supra*, 233 Cal.App.3d at p. 199.) The trial court denied the motion, finding that "a transactional relationship was established from the fact that [the undercover officer and the defendant] discussed cocaine and the purchase of stolen property *at the same time*." (*Id.* at p. 203.) The Court of Appeal reversed, ruling that "[t]his coincidental connection between the two offenses does not establish the requisite causality under the transactional test." (*Ibid.*) The court held there was no transactional relationship between the defendant's aiding and abetting the sale of cocaine to an undercover officer and his solicitation of and attempt to receive stolen property from the officer "[g]iven both the dissimilarity between the . . . offenses and the disparate nature of the individuals involved in each instance." (*Ibid.*)

In *Saldana*, the defendant was charged by complaint with rape. (*Saldana*, *supra*, 233 Cal.App.2d at p. 25.) The preliminary hearing included evidence that a criminalist found a marijuana cigarette in the shirt worn by the defendant on the evening of the offense. (*Id.* at pp. 26-27.) The prosecution added a marijuana possession charge to the information. (*Id.* at p. 28.) The Court of Appeal concluded that the addition of the

marijuana possession charge was improper because "the clear inference that [the defendant] was in possession of marijuana at the time he committed the rape falls far short of establishing any causal connection or 'transactional' relationship between the two crimes." (*Id.* at p. 29.)

Unlike *Downer*, neither *Ondarza* nor *Saldana* involved an added charge stemming from a defendant's continuing course of conduct against the victim. Here, the preliminary hearing evidence showed that defendant's conduct against C.D. was continuing and culminated in the attack on her on January 8, 2014.

Thus, based on the California Supreme Court's analysis in *Downer* and the evidence presented at the preliminary hearing that demonstrated defendant's continuing course of conduct against C.D., we conclude defendant has not established his counsel's performance fell "below an objective standard of reasonableness" by failing to argue in the section 995 motion and in the writ petition that the aggravated mayhem charge could not be included in the information because there was no transactional relationship between the offense and defendant's commission of criminal threats and stalking. (*Strickland*, *supra*, 466 U.S. at p. 688.) Accordingly, we deny defendant's ineffective assistance of counsel claim. (*Id.* at p. 687.)

C. *Sufficiency of the Evidence to Uphold Defendant's Aggravated Mayhem and Stalking Convictions*

Defendant contends there is insufficient evidence to sustain his convictions of aggravated mayhem and stalking. We determine otherwise.

1. Standard of Review

" ' "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after

viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.]' " (*Dalton*, *supra*, 7 Cal.5th at pp. 243-244.) The standard of review is the same when the prosecution relies on circumstantial evidence. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

2. Aggravated Mayhem

The prosecution proceeded on alternate theories of conspiracy and aiding and abetting to prove defendant's guilt of aggravated mayhem. A person commits aggravated mayhem "when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body." (§ 205.) Defendant contends his aggravated mayhem conviction must be reversed because there is insufficient evidence in the record that he was associated with C.D.'s attacker, as required for conspiracy liability, and there is insufficient evidence that he committed, directed, or assisted in the attack against C.D., as required for aiding and abetting.

We conclude there is substantial evidence in the record from which a reasonable trier of fact could find defendant guilty of aggravated mayhem as a coconspirator. (See *Dalton*, *supra*, 7 Cal.5th at pp. 243-244.)

As we stated above, " 'One who conspires with others to commit a felony is guilty as a principal. [Citation.]' " (*Maciel*, *supra*, 57 Cal.4th at p. 515.) " ' "Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act, by at least one of these parties, in furtherance of the conspiracy." ' [Citation.]" (*Dalton*, *supra*, 7 Cal.5th at p. 244.) However, "[t]here is no need to show that the parties met and expressly agreed to commit a crime." (*Nathaniel C.*, *supra*,

228 Cal.App.3d at p. 999.) " 'Evidence is sufficient to prove a conspiracy to commit a crime "if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.]" ' " (*Maciel*, *supra*, at p. 515.) "The inference can arise from the actions of the parties, as they bear on the common design, before, during, and after the alleged conspiracy." (*Nathaniel C.*, *supra*, at p. 999.)

Here, the evidence established that around the same time defendant reported to police that he believed C.D. burglarized his residence, defendant began to send C.D. threatening text messages. Defendant's threats were unusually specific. Defendant stated he was " 'going to split [C.D's and J.W.'s] heads open' " and he would " 'tear [C.D.'s] face up.' " In many of the text messages defendant used the pronoun "we," such as, " 'We're going to show you what happens when you steal from me, bitch.' " A little over a week before the offense, defendant texted C.D., " 'We're gonna get you real soon.' "

There was also evidence of defendant's willingness to involve others in his criminal activity. For example, defendant called C.D. and threatened her about a week before the attack. When C.D.'s boyfriend J.W. grabbed the phone from C.D. to tell defendant to stop, defendant "told [J.W.] to set [C.D.] up and bring her to the Burger King parking lot." Defendant and another man had previously approached J.W. and "swung on [him]" after defendant asked J.W. whether he had stolen from him.

The offense occurred at a place defendant knew C.D. would likely be, her regularly scheduled parenting class, and there was evidence that only two other people in C.D.'s life knew she attended the class. About a month before the attack, C.D. heard defendant laughing in the background when she received a call from an unknown woman observing that C.D. had not been at her parenting class in early December.

The perpetrator of the offense, a man C.D. had never seen before, called out C.D.'s name before he assaulted her by slashing her face open, which was the same kind of attack defendant had threatened to commit against C.D. The perpetrator ran

immediately after the attack; he did not attempt to rob C.D. or commit any other offense against her. There was circumstantial evidence that the perpetrator had been waiting for C.D. outside of her class for approximately 15 minutes before the attack occurred. The injury inflicted on C.D. was unusual. Neither the district attorney investigator, formerly a police officer and gang sergeant for 19 years, nor C.D.'s plastic surgeon had seen a similar facial injury.

Sometime after the attack, when C.D.'s face was bandaged from reconstructive surgery, defendant pointed at C.D. and laughed when he saw her.

C.D. testified that only defendant sent her threatening text messages. It was later determined by the district attorney investigator that all of the threatening texts on C.D.'s phone were from phone numbers associated with defendant.

Defendant asserts that his aggravated mayhem conviction must be reversed because there is insufficient evidence that he "was associated with [C.D.'s] assailant," but he provides no authority on conspiracy liability to support his argument. While case law instructs that "mere association" between individuals is an insufficient basis to establish a conspiracy (*Nathaniel C.*, *supra*, 228 Cal.App.3d at p. 999), "it is unnecessary that the various members of a conspiracy meet or even know each other in order for circumstantial evidence to establish the existence of an agreement" (*People v. Towery* (1985) 174 Cal.App.3d 1114, 1131). "The agreement may be inferred from the conduct of [individuals] mutually carrying out a common purpose in violation of a penal statute." (*People v. Cockrell* (1965) 63 Cal.2d 659, 667.)

We determine that the evidence of motive, defendant's conduct before and after the attack, the perpetrator's actions, and the location of the attack " ' "supports an inference that [defendant and C.D.'s attacker] positively or tacitly came to a mutual understanding to commit" ' " aggravated mayhem on C.D. (*Maciel*, *supra*, 57 Cal.4th at p. 515.)

For these reasons, we reject defendant's claim that there is insufficient evidence in the record to uphold his conviction of aggravated mayhem.

3. Stalking of C.D.

Defendant contends there is insufficient evidence to uphold his conviction of stalking C.D. based on the date of the offense alleged in the information, namely, "on or about January 8, 2014." Defendant argues that "[t]here was evidence that [he] had stalked [C.D.] in December of 2013, but there was no evidence that he had communicated with her on January 8, 2014, or was anywhere near her on that day" and that "[t]he stalking conviction could only have been based on a theory that [he] either directed or aided and abetted the January 8, 201[4] assault on [C.D.]"

However, for reasons that we have explained, there is sufficient evidence in the record that defendant conspired with C.D.'s attacker to commit aggravated mayhem on C.D. on January 8, 2014. Moreover, the offense of stalking involves a continuous course of conduct. (*Chilelli*, *supra*, 225 Cal.App.4th at p. 586; § 646.9, subds. (a), (e).) To establish stalking, the prosecution must prove that the defendant "(1) repeatedly follow[ed] or harass[ed] another person, and (2) ma[de] a credible threat (3) with the intent to place that person in reasonable fear of death or great bodily injury." (*Ewing*, *supra*, 76 Cal.App.4th at p. 210.) Someone "harasses" another person when he or she "engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose." (§ 646.9, subds. (e).)

The record evidence showed that during December 2013, C.D. received a multitude of threatening text messages from defendant and experienced defendant engage in other threatening and harassing conduct. On January 8, 2014, C.D.'s face was slashed open, an injury C.D.'s surgeon described as "horrible" and one that left C.D. permanently scarred. C.D. testified that she remains fearful. Given the substantial evidence of defendant's involvement in that attack, it was reasonable for the jury to

determine that defendant's harassing behavior that formed the basis of the stalking conviction continued through January 8, 2014, when the attack was perpetrated, in that the assault "seriously . . . torment[ed], or terrorize[d] [her], and . . . serve[d] no legitimate purpose." (§ 646.9, subd. (e).)

Further, "when a crime is alleged to have occurred 'on or about' a certain date, it is not necessary for the prosecution to prove the offense was committed on that precise date, but only that it happened reasonably close to that date." (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304.) Thus, even if the evidence had not established defendant's guilt of aggravated mayhem on January 8, 2014, defendant's conduct during the month of December 2013, which defendant concedes "was evidence that [he] had stalked [C.D.]" and which continued through December 30, was "reasonably close" to the January 8, 2014 offense date alleged in the information for the stalking count, such that there is sufficient evidence in the record for the charge. (*Ibid.*; see also *Peyton*, *supra*, 176 Cal.App.4th at p. 660 ["[t]he precise date on which an offense was committed need not be stated in an accusatory pleading unless the date is material to the offense (§ 955), and the evidence is not insufficient merely because it shows the offense was committed on another date"].)

We therefore reject defendant's claim that there is insufficient evidence in the record to support his conviction of stalking C.D. based on the offense date alleged in the information.

D. *Section 654*

Defendant contends the trial court erred under section 654 when it imposed an unstayed consecutive sentence for his commission of stalking C.D. because the conviction was based on the same conduct that supported defendant's conviction of

aggravated mayhem and criminal threats. The Attorney General counters that defendant's conduct warranted separate punishment.[4]

1. Background

As relevant here, the second amended information charged defendant with committing aggravated mayhem on C.D. on or about January 8, 2014 (count 1), making criminal threats to C.D. on or about December 25, 2013 (count 2), and stalking C.D. on or about January 8, 2014 (count 3).

In arguments to the jury, the prosecution asserted that defendant's intent to commit aggravated mayhem was clear from "[h]is words [in the text messages]. [¶] He said, 'I'm going to tear up your face.' " Regarding the criminal threats charge, the prosecution quoted several of defendant's threatening text messages, including his threats to " 'tear [C.D.'s] face up' " and " '[s]plit your heads open.' " To prove stalking, the prosecution relied on the threatening text messages sent by defendant on December 14, 25, 27, and 30, 2013, and the phone call from "Tracy" while defendant laughed in the background.

At the sentencing hearing, the prosecution asked the trial court to impose 14 years to life on count 1 with consecutive sentences imposed on counts 2 and 3 because "the threats and the stalking are separate acts. And [defendant] continues it for a long period of time." Defendant argued that concurrent sentences on counts 2 and 3 were mandated because the conduct that supported those convictions "were part and parcel with [the prosecution's] argument that [defendant], through what amounted to be a conspiracy theory, was responsible for the aggravated mayhem."

---

[4] The Attorney General observes that defendant failed to provide supporting authority for his section 654 claim and asserts that we may treat the claim as waived. (continued)
(See *People v. Stanley* (1995) 10 Cal.4th 764, 793.) We exercise our discretion to review the claim because a violation of section 654 results in an unauthorized sentence. (See *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)

The trial court imposed unstayed consecutive sentences on all counts. The court explained that its decision to impose consecutive sentences was based on "a number of reasons." The court stated that the aggravated mayhem "occurred on February [*sic*] the 8th of 2014" and the offense "was completely independent and separate . . . in occasion, in location, in date. The way it . . . occurred was completely different than any of the other counts." The court found that the criminal threats, charged as occurring on December 25, 2013, was based on "a specific call [*sic*], one out of a series of calls [*sic*], that included a threat to the life and safety of [C.D.]. It was at a separate time, separate location, separate set of operative facts." The court stated that stalking "was alleged on January the 1st [*sic*] of 2014" and was "separate from the December 25th time period" and "certainly was several weeks separated from the ultimate attack on February [*sic*] the 8th. [¶] So a different occasion, different set of operative facts, appears to clearly be kind of a separate opportunity for the defendant to . . . consider [not] going through with the plan or threats that were made earlier in December, and separate from the February [*sic*] attack itself."

The trial court found multiple factors in aggravation and no factors in mitigation. The court summarized its sentencing decision: "I do find that the crimes and their objectives were predominantly independent of one another. They involved separate acts of violence and threats of violence. They were committed at different times, at separate places, and not committed close in time and in a place as to indicate a single period of aberrant behavior."

The trial court sentenced defendant to seven years to life for aggravated mayhem, which the court doubled to 14 years to life based on defendant's prior strike conviction. The court imposed an unstayed upper term of three years for the criminal threats conviction, which it doubled based on defendant's strike, and unstayed terms of eight months each for defendant's stalking convictions, also doubled, for a total determinate sentence of eight years eight months.

Neither the parties nor the court explicitly referenced section 654 or discussed whether any of the terms should be stayed.

2. Legal Principles

Section 654, subdivision (a) provides that "[a]n 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." The California Supreme Court has long applied section 654 " ' "not only where there was but one " 'act' " in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654." ' " (*People v. Beamon* (1973) 8 Cal.3d 625, 637; see also *People v. Deloza* (1998) 18 Cal.4th 585, 591 ["[s]ection 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct"].)

" '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.' " (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208 (*Latimer*), italics omitted; see also *People v. Pearson* (1986) 42 Cal.3d 351, 359 [section 654 "appl[ies] not only to individual criminal acts, but also to courses of conduct that are motivated by a single intent or objective"], disapproved on another ground by *People v. Vidana* (2016) 1 Cal.5th 632, 650.) "[S]entences must be stayed to the extent that section 654 prohibits multiple punishment," regardless of whether the sentences are imposed concurrently or consecutively. (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

A trial court's finding of separate intents or objectives is "a factual determination that must be sustained on appeal if supported by substantial evidence." (*People v.*

Osband (1996) 13 Cal.4th 622, 730.) This deferential standard of review applies whether the trial court's findings are explicit or implicit. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717.) "Thus, '[w]e review the trial court's finding "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." ' " (*Ibid.*)

3. Analysis

Defendant's guilt of the offenses against C.D. was proved through defendant's continuing course of conduct against her. The prosecution relied, at least in part, on defendant's threatening text messages during December 2013 to prove defendant's commission of aggravated mayhem, criminal threats, and stalking, and quoted some of the same text messages when arguing the offenses to the jury. Thus, in order for the imposition of an unstayed sentence for defendant's commission of stalking C.D. to be lawful under section 654, there must be substantial evidence in the record that defendant harbored an objective for that offense separate from the objective behind his commission of aggravated mayhem and criminal threats. (See *Latimer, supra*, 5 Cal.4th at p. 1208.)

Based on the record evidence, we discern no distinct objective behind defendant's commission of stalking C.D. from that behind his commission of making criminal threats against her. (See *People v. Roles* (2020) 44 Cal.App.5th 935, 947.) The prosecution argued as much to the jury when it relied in part on defendant's threats to prove his commission of stalking and asserted that "[e]very single threat that . . . defendant makes goes towards his purpose, his plan" and that defendant "wanted [C.D.] to be afraid. That was his whole goal this entire time." Because there is not substantial evidence in the record that defendant harbored a separate intent when he stalked C.D. from the intent he harbored when he made criminal threats against C.D., the trial court erred under section 654 in its imposition of an unstayed sentence for defendant's commission of stalking. (See *Latimer, supra*, 5 Cal.4th at p. 1208.)

For these reasons, we will modify defendant's sentence on count 3 to stay the imposed term of 16 months.

E. *Cumulative Error*

Defendant contends that the cumulative effect of the alleged errors denied him due process and a fair trial. We have found only one error, however, a violation of section 654 at sentencing. Because there are not multiple errors to cumulate, defendant's claim fails. (See *In re Reno* (2012) 55 Cal.4th 428, 483; *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.)

IV. DISPOSITION

The judgment is modified to stay the 16-month term imposed on defendant's conviction of stalking C.D. (count 3). As modified, the judgment is affirmed.

The trial court is directed to prepare and forward to the California Department of Corrections and Rehabilitation a certified copy of an amended abstract of judgment-determinate reflecting this modification. The abstract of judgment for the determinate term shall reflect that the term imposed on count 3 is stayed. Box 8 on the abstract of judgment-determinate shall reflect that the "TOTAL TIME" for the determinate term is 7 years 4 months.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

GREENWOOD, P.J.

GROVER, J.

People v. Koltz
H045825