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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ORLANDO McINTEE, Defendant and Appellant.	B280917 (Los Angeles County Super. Ct. No. BA444657)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne Harwood Egerton, Judge. Affirmed.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Richard McIntee took his two-year-old daughter, Z., from the arms of the babysitter her mother hired and drove her away in his van. For the next two weeks, defendant declined Z.'s mother's entreaties to return Z. or disclose her whereabouts. Law enforcement officers tracked defendant to Riverside County and arrested him; his girlfriend led the officers to a converted garage, from which Z. was recovered unharmed.

Defendant was charged with kidnapping Z., depriving Z.'s mother of child custody, making criminal threats, endangering a child, and vandalism. During his jury trial, the court granted the prosecution's motion to dismiss the child endangerment and vandalism charges as time-barred. The jury, which the court instructed with CALCRIM pattern instructions, convicted defendant of kidnapping Z. and depriving her mother of custody. It acquitted him of making criminal threats.

On appeal, defendant contends he lacked the requisite intent to support his convictions. He further contends the trial court erred in instructing the jury because it did not instruct sua sponte on mistake of law and improperly expanded the definition of "maliciously" in connection with the custody deprivation charge. Defendant also argues the court improperly revoked his right to self-representation, his counsel was ineffective for allowing the time-barred misdemeanor counts to proceed to trial, and the trial court abused its discretion by denying his *Romero*[1] motion to strike his prior strike.

We find no reversible error and affirm the judgment of the trial court.

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[1] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

PROCEDURAL HISTORY

An amended information filed on September 27, 2016 charged defendant with one count of kidnapping (Pen. Code, § 207, subd. (a)),[2] one count of child custody deprivation (§ 278.5, subd. (a)), one count of making criminal threats (§ 422, subd. (a)), two counts of endangering a child (§ 273a, subd. (b)), and one count of vandalism under $400 (§ 594, subd. (a)). The criminal threats, child endangerment, and vandalism charges stemmed from a July 2014 incident; the kidnapping and child custody deprivation charges arose from an incident beginning in February 2016.

In addition to the charges, the amended information alleged that the kidnapping victim, Z., was under the age of 14 and that defendant kidnapped her with the intent to permanently deprive her mother of custody within the meaning of section 667.85. It further alleged, in connection with the kidnapping and criminal threats charges, that defendant suffered two prior serious and/or violent felony convictions, for robbery (§ 211) and shooting at an occupied building or vehicle (§ 246), within the meaning of sections 667, subdivisions (a)(1), (d), and (b)-(j), 1170.12, subdivision (b), and 1192.7, subdivision (c). The prosecution later elected to proceed as a second rather than third strike case, dropping its allegations pertaining to defendant's prior shooting conviction.

After acting in propria persona for a portion of his pretrial proceedings, defendant proceeded to jury trial with the assistance of appointed counsel. After the presentation of evidence but prior to closing argument, defense counsel advised the court and the

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

prosecution that the misdemeanor child endangerment and vandalism charges were time-barred. The trial court granted the prosecution's subsequent motion to dismiss those counts. The jury acquitted defendant of the criminal threats charge but found him guilty of kidnapping and child custody deprivation. It found the allegation regarding defendant's intent to permanently deprive Z.'s mother of custody not true. At a bifurcated bench trial the court found true the allegations pertaining to defendant's prior conviction. The court denied defendant's *Romero* motion to strike that conviction.

The trial court sentenced defendant to the midterm of five years on the kidnapping conviction, doubled to 10 years due to the strike, and imposed an additional five years for the prior conviction pursuant to section 667, subdivision (a)(1). On the custody deprivation conviction, the court sentenced defendant to the midterm of two years, doubled to four years due to the strike. The court stayed that sentence pursuant to section 654. In addition, the court imposed a 10-year restraining order and ordered defendant to pay various fines and fees.

Defendant timely appealed.

FACTUAL BACKGROUND

I. Prosecution Evidence

A. Family Background

Defendant's ex-wife, Jacqueline R., testified that she and defendant married in 2001. Their first daughter, A., was born in 2005. Sometime thereafter, defendant became verbally abusive toward Jacqueline, and the couple separated in 2008. After defendant moved out of the couple's home, in 2009 or 2010, he and Jacqueline established an informal visitation arrangement pursuant to which defendant would call and ask to visit A. or

come pick her up. Defendant visited A. "[m]aybe a couple times a month," typically for "[a] couple hours" but occasionally overnight.

Jacqueline's and defendant's divorce was finalized in January 2011. Their custody agreement provided that A. would live with Jacqueline three days per week and with defendant two days per week, with the parents alternating custody of A. on the weekends. Jacqueline testified that defendant did not abide by the custody agreement. Instead, defendant visited A. "when he felt like it, or he would call to say, 'can I spend a couple hours?' but it was never on a regular basis."

In 2012, Jacqueline and defendant rekindled their relationship and defendant moved back into Jacqueline's home. Defendant verbally and physically abused Jacqueline, which prompted her to end the relationship while she was pregnant with the couple's second child. Defendant continued to live in the home, however, and the couple resumed their relationship later in Jacqueline's pregnancy. Their second daughter, Z., was born in May 2013. Jacqueline and defendant stayed together for a few months after Z.'s birth, but broke up for good in November 2013 due to defendant's "constant verbal abuse and belittling." Defendant moved out of the home in December 2013 and resumed his sporadic visitation with the children.

B. July 2014 Incident

Jacqueline testified that defendant requested to see the girls on July 27, 2014. She agreed to bring them to see defendant at a Los Angeles strip mall that afternoon. The visit began well but devolved into argument when defendant told Jacqueline he wanted to introduce the girls to a female friend of his. Defendant had Z. in his arms at the time and was holding A.'s hand.

Jacqueline tried to hold A.'s other hand "so he wouldn't take both of them away." Defendant let A. go but grabbed Jacqueline's wrist and shoved her to the ground.

A mall security guard approached and asked Jacqueline if she needed help. Jacqueline told him that defendant was trying to take the girls. The security guard called 911 on his cell phone. Meanwhile, defendant walked away with Z. Jacqueline followed, asking defendant to bring Z. back. Defendant ignored her and took Z. into a nearby park. Jacqueline went back to the mall when she heard police sirens approaching.

Jacqueline told the police what occurred. She gave the police defendant's cell phone number, but he did not respond when they called. The police sent a patrol car to look for defendant but were not successful in locating him. After two to three hours, Jacqueline reached defendant via text message. Jacqueline testified that defendant texted that he did not trust her and was not going to bring Z. back. Jacqueline then "took it upon [her]self to drive over there to the park," where she "just saw him sitting out there" with Z.

Defendant approached Jacqueline's car with Z. in his arms and asked Jacqueline to roll down the window so he could speak to A., who was in the back seat. Jacqueline did so, but declined defendant's request that she trade him A. for Z. Jacqueline asked defendant to put Z. in the car. Defendant stuck his hand in the open window, opened the door, "and basically threw Z[.] into the car seat." He then "ran back to the passenger side where A[.] was sitting and tried to open the door" by reaching inside the still-open window. Jacqueline tried to close the window, but defendant took "both his hands and he just broke the whole window down" by pushing his hands down forcibly. The window

"collapsed" and the glass shattered. A. and Z. screamed and cried as Jacqueline drove away; Jacqueline later found a small cut on A.'s arm.

While Jacqueline was driving home, she received a phone call from defendant. In a "[v]ery harsh" tone of voice, defendant told her "he would have someone dressed in black with a mask, and he knew everywhere I went and I wouldn't know when or where." Jacqueline understood this as a death threat. She took the threat seriously because she believed defendant could carry it out. Jacqueline hung up the phone, but defendant called her back and made similar threats to send a man in black after her. Jacqueline asked him why he was saying these things, and he responded that "he can do whatever he wanted to do." Jacqueline spent the night at her mother's house because she was concerned for her safety. The next day, Jacqueline sent defendant a text message expressing disbelief about his "aggressive & abusive" actions in front of the girls and suggesting that they attend family counseling. Defendant responded, "U r the worst female u never see ur fault so its one sided we r gonna hav mutual drop off pick up spot stay out of my life n business u lucky u were n public".

C. Deteriorating Relations

After the July 2014 incident, Jacqueline made two unsuccessful attempts to obtain a restraining order against defendant. In the meantime, however, Jacqueline tried "to put myself out of the equation" and allow defendant to visit the girls. Defendant's visits remained "sporadic," but Jacqueline never prevented him from seeing the girls when he wanted to. They proceeded in this fashion until mid-2015.

Between July 2015 and mid-November 2015, defendant had no contact with A. or Z. After not hearing from him for approximately two months, Jacqueline had A. call defendant and leave a message to make sure he was okay. Defendant called A. back a few days later and said he would call again. He did not.

In mid-November, around A.'s birthday, defendant asked Jacqueline if he could see A. Jacqueline agreed that defendant could pick A. up from school one day; instead, he took her out of school at lunch time and told Jacqueline "he's more important than school." On A.'s birthday, a Saturday, defendant came to Jacqueline's apartment and asked to visit with both girls for a few hours. She said yes and he took the girls with him. A few hours later, Jacqueline texted to see when he planned to return and he responded that he would bring the girls back the next day, on Sunday. Jacqueline texted defendant that day, and he responded that he was going to keep the girls another night. Jacqueline called him to object because she did not want A. to miss school. Defendant did not get A. to school in time for her to attend her field trip that Monday.

A few days later, on the day before Thanksgiving, defendant showed up at Jacqueline's apartment to take the girls, even though she told him beforehand that he could not visit that day. Jacqueline had taken the day off work and was home when defendant arrived. She testified that defendant was surprised when she opened the door: "He thought I would be at work and that they would be with a babysitter and that he was just going to come and take them." Defendant was accompanied by officers from the Culver City Police Department (CCPD). Jacqueline showed one of the officers the custody agreement, "and the police officer looked at it and said that it doesn't specify exactly who has

them when or whatever." The officer advised Jacqueline and defendant to go to court to clarify the agreement. The police allowed Jacqueline to keep the girls that day. She went to family court in San Bernardino in early December 2015 and filed paperwork seeking clarification of the custody arrangement. The court set a hearing date of February 24, 2016. Jacqueline also obtained a restraining order from the Santa Monica courthouse near her Culver City home.

At some point during the holiday season, defendant told Jacqueline he wanted to take the girls for a week. She said he could take the girls for three days, an offer defendant rejected. According to Jacqueline, "[h]e basically was, like, they're his girls, and he can take them for how long he wants to, and he can bring them back if and when he wants to."

On December 26, 2015, defendant texted Jacqueline: "Tired of your bitch ass play n me with my life n quality time. Keep playing with my life cuz ima warn you n court[.] NO MORE GAMES I GUARANTEE YOU OR ANY MUTHAFUCKER PIG OR NO PIG JUDGES FUCK ALL Y'ALL TIL DEATH OVER MY KIDS. Contacting ccpd one more time n file formal complaint if they don't step in keep it up n you think im scared of prison or death stupid broad." Jacqueline responded, "You need to pray, only GOD can help you!" Defendant texted back, "Take your own advice but never do until you forced[.] I'm gonna just go court Monday to file response at least then take both filings to ccpd."

In January 2016, defendant asked Jacqueline if he could see the girls. She agreed to let him visit on the condition that he apprise her of his latest address, which he refused to tell her because it did "'not pertain to the girls.'" Jacqueline wanted the address because she was concerned that defendant would take

the girls and she would not know where they were. Defendant refused to provide an address, so she did not let him see the girls.

D. February 2016 Incident

Defendant contacted Jacqueline "[m]aybe once" in February 2016 to request a visit with the girls. He did not provide an address, so no visit took place.

On February 22, 2016, Jacqueline dropped off A. at school and left Z. with her regular babysitter, Brenda Bullock, before going to work. Jacqueline had not had any contact with defendant about a visit that day.

Bullock testified that she had cared for Z. since Z. was an infant. She normally did so at Jacqueline's apartment, and often took Z. outside to walk around the apartment complex. On February 22, 2016, Bullock and Z. left the apartment for a walk around 11:00 a.m. Bullock held Z.'s hand as the two walked side by side. During the walk, Bullock saw defendant's van approaching. Bullock, a longtime friend of the family, recognized both the van and defendant, who was alone. Bullock crossed the street and walked toward the leasing office because she did not "know what he's going to do" and wanted to protect herself and Z.; defendant, who had her cell phone number, had not called her to tell her he would be coming by. Defendant got out of the van and followed Bullock and Z. on foot.

The leasing office was closed, so Bullock and Z. turned around to face defendant. Bullock was still holding Z.'s hand. Defendant walked slowly toward them. He had a camera in his hand. He told Bullock, "'Give me my daughter.'" Bullock testified that Z. grabbed onto her, screamed, and yelled "B.," her nickname for Bullock. Defendant then grabbed Z.'s hand and "snatched her away" from Bullock. Bullock watched from the

sidewalk as defendant carried Z. across the street to his van, got into the driver's seat with her on his lap, and drove away quickly. Defendant's video recording of the incident was played for the jury and admitted into evidence.

Bullock testified that she called Jacqueline immediately and told her what had happened. Jacqueline testified that she received a call from Bullock during the day on February 22, 2016. After receiving the call, Jacqueline called the police and reported that defendant had taken her daughter. Jacqueline also called defendant, who answered the phone and told her that "he was just trying to spend time with" Z. Jacqueline "plead[ed] with him to please bring her back." She called and texted defendant "at least half a dozen times" that day. One of those times, defendant answered the phone and said he would let Jacqueline speak to Z. if she let him speak with A. first. Jacqueline let defendant speak with A., but he hung up the phone when Jacqueline came back on the line. The CCPD officer she spoke to, Officer Houck, also was unsuccessful in reaching defendant by phone.

CCPD Detective Tobias Raya, who later obtained and executed a search warrant for defendant's cell phone, testified that Jacqueline texted defendant at 12:38 p.m. on February 22, 2016 and told him, "You need to bring Z[.] back to the CCPD." Five minutes later, defendant responded, "By what authority? Have no jurisdiction over me as a father. I am a god created natural human flesh n blood n fluids person. I have my god given birth right to preserve n protect my life and my children n travel freely." Later that day, in response to several more messages from Jacqueline, defendant texted, "Have you no idea of a Father's right and importance of fathering his children w/o your interference and police."

On February 23, 2016, Jacqueline consulted with an attorney who helped her "fill out paperwork to get a 3130 to get Z[.] back."[3] Jacqueline took the paperwork to court the same day, filed it, and obtained an order authorizing and directing the District Attorney of Los Angeles County "to conduct an investigation and to take all actions necessary to locate [defendant] and the minor child Z[.] . . . and to procure compliance with the custody order in the above-entitled matter by taking custody of the child Z[.] and turning her over to her mother, Petitioner Jacqueline R[.]."

The next day, February 24, 2016, was the hearing date for Jacqueline's pending motion to clarify the custody agreement. Jacqueline attended the hearing in San Bernardino with her cousin and sister. Defendant also attended the hearing; he did not bring Z. with him. Jacqueline's cousin personally served defendant with the Family Code section 3130 order, as well as "paternity paperwork" and a restraining order.

When the judge tried to speak with defendant about Z.'s whereabouts, "he ignored the judge and turned his back towards him." He also said, "Who are you to talk to me?" The court held

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[3] Family Code section 3130 states: "If a petition to determine custody of a child has been filed in a court of competent jurisdiction, . . . and the whereabouts of a party in possession of the child are not known, or there is reason to believe that the party may not appear in the proceedings although ordered to appear personally with the child pursuant to Section 3430, the district attorney shall take all actions necessary to locate the party and the child and to procure compliance with the order to appear with the child for purposes of adjudication of custody. The petition to determine custody may be filed by the district attorney."

defendant in contempt when he refused to disclose Z.'s whereabouts. Defendant was held for a few hours and was released after providing the court with an address. Jacqueline, who was later apprised of the address defendant disclosed, testified that it was an unfamiliar Los Angeles address. When defendant was released, Jacqueline and her family members tried to follow him but lost him on the freeway.

In the days following the court hearing, Jacqueline continued to call and text defendant "maybe every other day." He did not respond. Jacqueline also remained in contact with law enforcement and the District Attorney's office. The latter called her on March 7, 2016, to tell her that Z. had been found. Jacqueline testified that Z.'s clothes were dirty, her hair was matted, and she was very hungry, but she did not appear to have been abused during her time with defendant.

E. Law Enforcement Testimony

CCPD Officer Kyle Houck testified that he took a missing child report from Jacqueline around midday on February 22, 2016. He called defendant several times and left him a voicemail message "regarding an abducted child," but never received a return call.

CCPD Detective Tobias Raya testified that he began working on the case on February 22, 2016. He spoke with Jacqueline and made contact with various agencies, including the District Attorney's office and the National Center for Missing and Exploited Children. Raya ultimately decided against issuing an Amber Alert for Z., out of fear "that it would further drive [defendant] into hiding and us possibly never recovering the child." Instead, Raya obtained a search warrant to perform "a G.P.S. locate on [defendant's] phone." He explained that a

"G.P.S. locate" can pinpoint the location of a cell phone within a radius of anywhere from about three meters to three miles. Raya received location updates from defendant's phone every 15 minutes. He eventually deduced that defendant was probably in Banning, in Riverside County. Raya relayed his suspicions to Banning police officers, who used the cell phone location data to provide Raya with an address of a house at which they believed "squatters" were staying. A team of CCPD officers surveilled the house but did not see defendant or Z.; an arrest warrant was issued for defendant on March 4, 2016.

On March 7, 2016, a team of seven CCPD officers went to Banning and located defendant driving his van. CCPD Detective Mark Umutyan was among them. He testified that Banning police officers stopped defendant, who refused to get out of the van for "probably 20 minutes." Umutyan heard on the radio that defendant had called Banning police dispatch to report that the police had pulled him over. Eventually, Banning police officers used a beanbag gun to break a window in the van and shot "pepper balls" into the vehicle to force defendant out. Defendant exited the van and was taken into custody. Z. was not in the van.

At some point during the traffic stop, defendant's girlfriend arrived on the scene. Umutyan and the other officers "informed her of what was going on," and she led them back to the house they had surveilled earlier in the week. They walked past the house to a detatched garage surrounded by "a lot of vegetation." Umutyan testified that the garage was "crowded," with one light, a washer and dryer, and a few cots on the ground. There was no restroom, and the only source of heat was a small space heater. Z. was recovered from the garage. Tanya Newton, an investigator with the Los Angeles County District Attorney's

office, took custody of her. Newton called Jacqueline, and Jacqueline came to pick up Z.

II. Defense Evidence

A. Family Background

Defendant was the sole witness for the defense. He denied verbally harassing Jacqueline and testified that he "pushed for the original divorce" because Jacqueline "became very controlling." During the dissolution proceedings, defendant was "real adamant" about having joint legal and physical custody of A., which he understood to mean "50/50 equal rights." Defendant understood the resultant arrangement to be that A. would spend two days per week and alternating weekends with him, and the parents would share custody equally during school breaks. Defendant testified that Jacqueline was "pretty liberal with the visitation," and they did not really have any problems sharing custody of A.

Defendant and Jacqueline reconciled for about a year, during which Jacqueline became pregnant with Z. They broke up, but defendant started spending more time at Jacqueline's apartment to help out after Z. was born. That arrangement did not last long; defendant began to take issue with Bullock's care of Z., which led to arguments between him and Jacqueline. Defendant eventually moved out of Jacqueline's apartment. He and Jacqueline did not discuss visitation at that time. Defendant explained, "it was just kind of a natural understanding, as far as I wanted to care for her the way I cared for my older daughter. So it was the same amount of time and energy that, you know, I was focused on both of the girls." Defendant spent time with the girls "[e]very chance [he] got" and always brought food, clothing, or other items when he visited. The girls frequently stayed with

him overnight.

Defendant wanted to spend even more time with the girls, but he did not have a babysitter who could watch them while he was at work and school. At some point, defendant reunited with an ex-girlfriend, Laquinta, whom he trusted to babysit the girls. He provided Jacqueline with Laquinta's name, address, and telephone number, and allowed A. to spend time with her during visits. Defendant and Jacqueline did not argue about defendant's visitation. He testified that she "was always understanding and she was always supportive early on as far as even if my visitation was due to" his busy schedule of work, overtime hours, and school.

B. July 2014 Incident

In July 2014, defendant decided to introduce Jacqueline to Laquinta. He set up a meeting at a strip mall in Los Angeles. Defendant was holding Z. and "joyfully playing with her, and both girls were excited." When defendant mentioned to Jacqueline that he had found a potential babysitter, Laquinta, Jacqueline "had an explosive response." She reached for Z., who was still in defendant's arms, and tried to take her from him. Defendant tried to fend off Jacqueline, explaining that it was his weekend with the girls and repeating that he was entitled to take them. Jacqueline struck defendant near the back of his head and neck area, and her arm hit Z. in the face as it glanced off defendant. Defendant told Jacqueline it was not right for her to hit their daughter, which prompted her to become "more aggressive and more deliberate in her attempt to take" Z. from his arms.

Defendant was "kind of shocked and surprised and a little hurt by the incident." He was comforting A., who was crying,

when a security guard approached. After Jacqueline accepted the guard's offer of assistance, defendant "proceeded to kind of carry on to what I had planned as far as going to the park" by walking to the park alone with Z. Defendant met Laquinta and her daughters at the park, where the children played together. At some point, defendant and Jacqueline had a text message discussion about defendant returning Z. and taking A. for a weekend visit.

Jacqueline came over to the park in her car. Defendant put Z. in her car seat behind Jacqueline and walked over to the rear passenger side of the car to see A. Jacqueline rolled the window down so that defendant could help A. get out of the car. While defendant had his arms inside the vehicle, Jacqueline told him she had changed her mind and he could not take A. Jacqueline "became verbally combative" and started to roll up the window. Defendant told her that his arms were still inside, but Jacqueline kept rolling up the window. Defendant became fearful that he would be injured and tried to extract his arms from the window. As he was doing so, he lost his footing and grabbed the window, which broke. Defendant left the scene without either girl and went back to the park, where he spent more time with Laquinta before leaving.

Defendant did not call Jacqueline and say anything about a man in black or otherwise threaten her. Defendant declined Jacqueline's invitation to go to family counseling "because I wasn't doing anything outside of really being a model father."

C. Deteriorating Relations

Defendant resumed visiting with the girls within a week of the July 2014 incident. During the remainder of 2014, defendant visited the girls "several times," including at least one overnight

visit at Laquinta's house, where he was living at the time.

In 2015, when Z. was about two-and-a-half years old, defendant noticed a change in Jacqueline's attitude toward him. He explained, "She seemed to not be satisfied with the fact that I was moving on, that I did have another woman in my life." Jacqueline stopped responding to his inquiries about the girls and mentioned that she was not going to facilitate visits like she had in the past. She also "started to get in the way of my parenting and just my fathering them." Defendant began researching fathers' rights and decided to take the matter back to family court. Before he could file anything in court, he received some court papers that Jacqueline had filed. Defendant filed a response to those papers.

Defendant disputed Jacqueline's testimony that he had no contact with the girls between July and November 2015. He testified that he purchased a cell phone for A. and used it to communicate directly with her via phone calls and text messages. He explained that he brought CCPD officers to Jacqueline's apartment around Thanksgiving because she had been giving him a "runaround" on visitation.

D. February 2016 Incident

In February 2016, defendant realized that Jacqueline had not responded to his text messages in three months, and that he had not seen Z. during that time. On February 22, 2016, he decided to drive from his current residence in Banning to Jacqueline's apartment in Culver City. Defendant expected Jacqueline to be at work and Z. to be in the care of Bullock; he took his camcorder with him to gather evidence regarding what he believed was Bullock's inadequate care of Z.

As defendant neared the apartment complex, he saw Bullock and Z. walking down the street. He double-parked his van, grabbed his camcorder, and called out to Bullock to stop. Defendant walked across the street toward Bullock and told Bullock to give Z. to him. Defendant "grabbed" Z.'s hand while pointing the camcorder at Bullock and Z. Bullock let go of Z.'s other hand, and defendant, still filming, carried Z. to his van. Defendant got into the driver's seat with Z. on his lap. He transferred Z. to the passenger seat, and then "reached back and put her in her car seat," which was behind the passenger seat. Once Z. was buckled up, defendant drove away.

Defendant made no attempt to contact Jacqueline, and did not respond to her attempts to contact him because he "didn't feel the need after all the attempts" she had not answered in the past. He also believed that Bullock would "inform" Jacqueline that Z. was with him, and he "didn't think it would be a problem." Defendant explained on cross-examination that he "felt that was enough after three months of not seeing" Z. He drove Z. back to the garage in Banning where he was staying with his then-girlfriend and her daughter. Defendant later went to the store and bought clothes, shoes, food, blankets, and a potty chair for Z.

At some point defendant answered Jacqueline's text messages. He "just mentioned that Z[.] was with me and I was spending time with her." Defendant explained that he did not plan to keep Z. for very long; he just wanted to spend some time with her because he had missed her during the holidays. Defendant was in the "off-season" at work, so he had some free time that he wanted to spend with both girls. He only took Z., however, because he knew A. was back in school after winter break.

Defendant did not provide Jacqueline with an anticipated duration for the visit. Even though his longest visit with Z. had lasted only a few days, he testified that he had a "two-week window in mind" for this visit, which was based on his understanding that the custody agreement governing A. provided "a two-week window to where you would have to give your new address." Defendant assured Jacqueline that Z. was fine and that he was just spending time with her. Defendant did not tell Jacqueline that he and Z. were in Banning; Jacqueline did not text defendant that she had gone to the police or obtained a Family Code section 3130 order from the District Attorney. Defendant was aware the police left him a voicemail message but he did not call them back.

Defendant did not bring Z. to the February 24, 2016 custody hearing in San Bernardino because he did not think children could attend court proceedings. He agreed that Jacqueline's cousin served him with "papers regarding custody issues," which he later reviewed and mailed back to Jacqueline on February 27, 2016 because he "didn't agree with them."[4]

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[4] Defendant videotaped himself preparing to mail the packet of paperwork to Jacqueline. The eight-minute video was admitted into evidence and played for the jury. The documents shown in the video include Jacqueline's request for a child custody and visitation order and a temporary restraining order. On the outside of the envelope, defendant wrote a note indicating that the documents "were inadvertently received and opened by mistake," and that they "are not understandable, acknowledgeable or recognizable under the penalty of false personification and/or false post location, and must be returned." Defendant's note further stated, "The enclosed herein contains the aforementioned and misdirected documents, as there is not enough knowledge or information disclosed to form a responsive

Defendant denied turning his back on the family court judge but admitted that he was held in contempt until he provided the judge with an address. He thought the court had asked for—and he therefore provided—an address at which he could receive mail, not the address at which Z. was located.

During the week of March 7, defendant "was about to get in contact with" Jacqueline to return Z., because he was going to go back to work soon and had been with Z. for more than the two weeks he initially intended. He "never had the opportunity," however, because he was pulled over on March 7, 2016. Defendant thought it was a routine traffic stop and became confused when the officers instructed him to throw his keys out the window and exit the vehicle. He accordingly called 911 to find out what was happening. The dispatcher told defendant to follow the officers' instructions. He remained in the van, however, as officers shot pepper balls into his open driver's side window. He rolled the window up and asked the officers why they were firing on him. Eventually, officers broke the van's back window and fired more pepper balls into the vehicle. Defendant exited the van when the pepper balls began to aggravate his asthma.

Officers handcuffed defendant, told him he was being charged with kidnapping, and asked him where Z. was. Defendant was "very surprised" by the questions and charges.

DISCUSSION

I. Sufficiency of the Evidence

Defendant contends the evidence was insufficient to support his convictions. Specifically, he argues that the prosecution failed to prove that he acted with the "malicious"

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answer, said documents and materials are being returned forthwith."

intent necessary to the crime of child custody deprivation or the "illegal purpose" required to complete the crime of kidnapping. We disagree.

A. 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 doing so, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) We do not reweigh the evidence, resolve conflicts therein, or reassess the credibility of witnesses. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) We reverse only if we conclude "that upon no hypothesis whatever is there sufficient substantial evidence to support the jury's verdict." (*Ibid.*)

B. Child Custody Deprivation

The crime of child custody deprivation is completed when a defendant "takes, entices away, keeps, withholds, or conceals and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation." (§ 278.5, subd. (a).) The words "malice" and "maliciously," which we discuss more extensively in Section II.A, *infra*, "import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act." (§ 7, subd. (4);

see also *People v. Neidinger* (2006) 40 Cal.4th 67, 79.)

Defendant contends that such intent was not proven here. In his view, "the only established intent motivating [defendant's] conduct was McIntee's intent to spend time with his daughter." Relying exclusively on his own testimony regarding his intent, defendant asserts there was "no evidence that McIntee's taking of Z[.] was for the purpose of spiting" Jacqueline; "rather, the only established intent was his being able to spend more time with her." While defendant's testimony was the only direct evidence of his intent, the prosecution presented sufficient evidence from which a reasonable trier of fact could infer defendant acted maliciously.

The prosecution presented evidence from which the jury reasonably could conclude defendant did not respect Jacqueline or her wishes and accordingly sought to "vex, annoy, or injure" her by taking and concealing Z. Jacqueline testified that she and defendant had an antagonistic relationship, to the point that defendant verbally and physically abused her while she was pregnant with Z., his daughter. The jury saw strongly worded, volatile, and sometimes unprompted text messages defendant sent to Jacqueline. One such message accused Jacqueline of playing "games" and cautioned her, in capital letters, "FUCK ALL Y'ALL TIL DEATH OVER MY KIDS." The jury could reasonably infer from this alone that defendant intended to act on this vulgar threat to spite or "vex, annoy, or injure" Jacqueline by taking Z. and refusing to tell Jacqueline where she was. Indeed, one could infer both from the prosecution's evidence and defendant's testimony that defendant took Z. and kept her for an unprecedented length of time to get back at Jacqueline for her denial of his request to visit the girls for a week in December.

Further evidence from which a jury could infer defendant acted with the requisite intent included the delay with which defendant responded to Jacqueline's numerous calls and texts asking about Z., his refusal to speak with Jacqueline even when she complied with his request to speak to A., and his refusal to engage with the law enforcement officers and judge who asked him about Z. and her whereabouts at Jacqueline's prompting.

C. Kidnapping

Defendant also contends he lacked the requisite intent to kidnap Z., his biological child. The kidnapping statute, section 207, provides in subdivision (a) that "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." Subdivision (e) clarifies that "the amount of force required to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent." Thus, subdivision (e) adds the element of "an improper purpose or improper intent" when the victim of the alleged kidnapping "by reason of youth or mental incapacity can neither give nor withhold consent." (*In re Michele D.* (2002) 29 Cal.4th 600, 609, 612.) The prosecution also must prove a defendant acted with an "illegal purpose or . . . illegal intent" if he or she is a parent of the minor victim and has custodial rights to the child. (*People v. Senior* (1992) 3 Cal.App.4th 765, 780-781.)

Defendant argues that the prosecution impermissibly relied on the child custody deprivation charge to make this showing, which he contends "creates a potential loop of unlawful intent."

Defendant is correct that the prosecution relied on the custody deprivation charge to establish his illegal intent or purpose; the prosecutor argued during closing, "I submit that the illegal intent and the illegal purpose of the defendant regarding the kidnapping is in fact the child custody deprivation. His illegal purpose by taking the child Z[.] is to keep her from her mother. It's to keep her from her lawful, daily custodian. . . ." Likewise, the Attorney General now argues that the "illegal purpose" in the kidnapping statute "includes *any* illegal purpose," including child custody deprivation, which "our Legislature has criminalized. . . ." Defendant urges us to reject this position as improper bootstrapping, or double-counting of a single intent. We decline to do so.

In *People v. Jones* (2003) 108 Cal.App.4th 455 (*Jones*), the Court of Appeal considered and rejected a virtually identical argument. The defendant, convicted of kidnapping and murdering his four-month-old son, maintained "that '[t]o hold that the taking of a child for the purpose of a child abduction is kidnapping defeats the statutory distinction the Legislature has drawn between the offenses of kidnapping and child abduction. Such a result would improperly bootstrap the crime of child abduction into kidnapping in cases in which both the act and criminal purpose amount only to child abduction." (*Id.* at p. 465.) The court concluded that this position "is unsupported by any legal authority, and is inconsistent with the function of the 'illegal purpose or intent' element." (*Ibid.*) The court observed that the intent element was adopted "to ensure that an innocent carrying away of a very young victim would not result in a kidnapping conviction." (*Jones*, *supra*, 108 Cal.App.4th at p. 466, citing *In re Michele D.*, *supra*, 29 Cal.4th at p. 612.) That

problem is avoided, the court reasoned, "if the prosecution proves the purpose of the asportation of the victim was to detain or conceal the child from the lawful custodial parent." (*Jones*, *supra*, at p. 466) The court explained that the concept of bootstrapping or double-counting of intent "has no applicability here where the other crime's function is merely to eliminate the possibility of convicting an individual for moving a child with a 'proper' purpose." (*Ibid.*) We agree.

As the Supreme Court explained in *In re Michele D.*, *supra*, 29 Cal.4th at p. 614, child abduction (§ 278), a crime closely analogous to the child custody deprivation at issue here (§ 278.5), is a crime against a lawful custodian of the child. Kidnapping, on the other hand, is a crime against the person abducted. "If there is evidence that a defendant's conduct is aimed at both, there is no reason why he or she should not be prosecuted under both statutes. [fn. omitted] To hold otherwise would be to devalue the dignity and bodily integrity of child victims." (*In re Michele D.*, *supra*, 29 Cal.4th at p. 614.) There are two victims here, Jacqueline and Z., and there is no reason to conclude that defendant's intent "to vex, annoy, or injure" Jacqueline by abducting Z. was an insufficiently "illegal purpose" to support his conviction for kidnapping Z.

II. Jury Instructions

Defendant contends the court committed two errors in instructing the jury, one of commission and one of omission.

As to the alleged error of commission, he argues that one of the instructions the court delivered, CALCRIM No. 1251 (Child Abduction: By Depriving Right to Custody or Visitation (Pen. Code, §§ 277, 278.5)), impermissibly expanded the definition of "maliciously" to encompass intent not prohibited by section 278.5.

Even if defendant is correct, any such error was harmless in this case because the evidence did not permit a finding that defendant acted with an intent to defraud.

As to the alleged error of omission, defendant contends the court erred by failing to sua sponte instruct the jury on a mistake of law defense. In the alternative, he argues that his counsel was ineffective in failing to request a mistake of law instruction. We reject these arguments. The court did not have a sua sponte duty to instruct on the mistake of law defense, nor did counsel render ineffective assistance in failing to request the instruction.

A. Definition of "maliciously"

The court instructed the jury using CALCRIM pattern instructions. The CALCRIM instruction for child custody deprivation, No. 1251, to which neither defendant nor the prosecution objected at trial,[5] sets forth three elements the prosecution must prove beyond a reasonable doubt: "1. The defendant took, kept, withheld, or concealed a child; [¶] 2. The child was under the age of 18; [¶] AND [¶] 3. When the defendant acted, he maliciously deprived a lawful custodian of her right to custody." The instruction defines the term

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[5] The Attorney General contends that defendant's failure to object or request a clarifying instruction below forfeits his ability to challenge the given instruction here. We disagree. "When the trial court gives an incorrect or incomplete instruction that allegedly affects the substantial rights of a defendant, it is reviewable even if no objection was raised in the trial court." (*People v. Denman* (2013) 218 Cal.App.4th 800, 812; see also *People v. Hudson* (2006) 38 Cal.4th 1002, 1012; § 1259.) Because we conclude that the argument was preserved, we need not address defendant's contention that his counsel was ineffective for failing to present this issue below.

"maliciously" as follows: "Someone acts maliciously when he intentionally does a wrongful act or when he acts with the unlawful intent to disturb, defraud, annoy, or injure someone else." The instructional notes indicate that the authority supporting this definition of maliciously is section 7, subdivision (4), which provides, "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." Section 7 sets forth default definitions for several terms used in the Penal Code, and the Supreme Court has indicated that the definition of maliciously in section 7, subdivision (4) is the relevant one for purposes of section 278.5. (See *People v. Neidinger*, supra, 40 Cal.4th at p. 79; see also *People v. Casagranda* (1941) 43 Cal.App.2d 818, 822 [same].)

Defendant argues that CALCRIM No. 1251 impermissibly expands the definition of malicious intent by using the words "disturb, defraud, annoy, or injure" rather than the words "vex, annoy, or injure" that appear in section 7, subdivision (4). Focusing particularly on the word "defraud," he argues that the intent to defraud "is a separate and distinguishable intent from an intent to vex, annoy, or injure." In support of this position, defendant points to section 450, subdivision (e), which specifically defines the term "maliciously" as used in the arson chapter to "import[] a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." He contends that section 450, subdivision (e) would be redundant and unnecessary if the default definition of maliciously in section 7, subdivision (4) already included the intent to defraud. (See also *People v. Atkins* (2001) 25 Cal.4th 76, 85 [describing section 450, subdivision (e) as "the same definition

found in section 7, subdivision 4, except for the addition of 'defraud'"].)

Even if defendant is correct, he has not shown that the alleged error would require reversal. When a jury is misinstructed on an element of an offense, reversal is required unless the error was harmless beyond a reasonable doubt. (*People v. Hayes* (1990) 52 Cal.3d 577, 628; see also *People v. Merritt* (2017) 2 Cal.5th 819, 826.) An error is harmless under this standard where "it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt*, *supra*, 2 Cal.4th at p. 831.) That standard is met here.

The jury was not presented with any evidence that defendant intended to defraud or in fact defrauded Jacqueline, the victim of the child custody deprivation. All of the evidence demonstrated that defendant acted openly and made no effort to conceal his identity or intentions. Defendant abducted Z. in public, from her babysitter, without employing any sort of deception or trickery. Defendant readily admitted to Jacqueline that he had taken Z., and he did not make any false statements to her, such as misleading her as to Z.'s wellbeing or his whereabouts. Defendant contends that the jury could have inferred an intent to defraud (but not an intent to vex, annoy, or injure) from his lack of responsiveness to Jacqueline and law enforcement and the address he provided to the family court judge. We disagree.

Defendant's lack of responsiveness was not deceptive so much as vexing or annoying, and he provided the address to the court, not to Jacqueline, who testified that defendant refused to talk to her at the hearing. Moreover, the prosecution did not

argue that defendant intended to defraud Jacqueline by taking Z.; it argued, consistently with the definition of malice in section 7, subdivision (4) that defendant intended to "keep [Z.] from her mother . . . in retaliation for her trying to take the oldest." Because nothing in the record suggests the jury could or did convict defendant based on an intent to defraud, any instructional error regarding the definition of "maliciously" would not require reversal.

B. Mistake of law

Defendant contends the court had a sua sponte duty to instruct on a mistake of law defense with respect to the kidnapping charge. We disagree.

It has long been recognized that "ignorance or mistake of law can negate the existence of a specific intent," if "the evidence supports a reasonable inference that any such claimed belief was in good faith." (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137.)[6] The trial court has a sua sponte duty to instruct on this affirmative defense when it appears that a defendant is relying on it, or if substantial evidence supports the defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157; *People v. Salas* (2006) 37 Cal.4th 967, 982.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury,

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[6] While simple kidnapping is a general intent crime (*People v. Davis* (1995) 10 Cal.4th 463, 519), kidnapping an unresisting infant or child is a specific intent crime due to the additional element of moving the child "for an illegal purpose or with an illegal intent." (See *In re Michele D.*, *supra*, 29 Cal.4th at p. 612.)

was sufficient to raise a reasonable doubt.' [Citations.]" (*People v. Salas*, *supra*, 37 Cal.4th at p. 982.) We review de novo claims that a trial court failed to properly instruct the jury on applicable principles of law. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

Defendant contends that his conduct and testimony warranted a mistake of law instruction. He argues, "McIntee's admission to the act itself at trial, his description of his intention behind taking Z[.], his use of a camcorder to corroborate those intentions, his willingness to appear before a court two days after taking Z[.], and his calling 911 because he was confused as to why he was stopped by police, all demonstrated that McIntee believed . . . he was acting within his lawful rights as a parent when he took Z[.] . . . ." Defendant also points out that he and Jacqueline did not have a custody agreement governing Z., and asserts that Family Code section 3010[7] gave both parents equal custody of Z.

In addition, defendant argues that his trial counsel relied on a mistake of law defense by making the following three arguments at closing: (1) "And what [defendant] was doing, I believe, is he testified, in terms of what was going on in 2016 during the holiday season, he was getting very exasperated and really unable to say, I've got a right to visitation, but I'm not getting it. So he made the decision to come out and see what he could do about some self-help. Let's put it that way. [¶] And in doing so, he took that portable camera with him. Now, if he was

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[7] Family Code section 3010, subdivision (a) provides: "The mother of an unemancipated minor child and the father, if presumed to be the father under Section 7611, are equally entitled to the custody of the child."

intending to kidnap Z[.], his own daughter, there were other times when that could have happened in a much different and easier way. And if he really intended to commit a criminal act, why would he want to get a video of it? What's his purpose? He told us he wanted to do it because he felt it would help prove what he was trying to do and he felt it would corroborate what his intentions were." (2) "In [defendant's] mind, there was no kidnapping. There was no deprivation of custody. He had not committed a crime other than an unknown infraction that he didn't know he had committed." (3) "And without the court order, my client believed that he had an equal right to visitation and custody, and that's what he told us on the stand."

At bottom, defendant's position is that the evidence showed (and his defense was) that he did not believe he was "kidnapping" Z. or otherwise breaking the law. The first problem with this argument is that, even if supported by substantial evidence, it does not negate the specific intent required to complete the kidnapping alleged here. As explained by Witkin and Epstein, "[t]o constitute a good defense, the mistake must be one that negates the intent or other mental state that is an element of the crime." (1 Witkin & Epstein, California Criminal Law (4th ed. 2012) §45, p. 476.) The prosecution alleged and argued—and the evidence showed, as discussed, *ante*, in Part I.C—that defendant kidnapped Z. with the illegal purpose of vexing, annoying, or injuring Jacqueline by depriving her of her custody of Z. Even if defendant did not believe he was breaking the kidnapping law, and therefore did not intend to act illegally, the intent at issue was whether defendant maliciously deprived Jacqueline of custody of Z. Such intent or purpose was amply supported by the evidence.

The second problem with defendant's argument is that kidnapping is a continuing offense. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1159.) It was undisputed that law enforcement officers contacted defendant within hours of the kidnapping to speak with him "regarding an abducted child." Similarly, undisputed evidence showed that defendant was served with the Family Code section 3130 order indicating that Jacqueline was entitled to temporary custody of Z. a mere two days into the two-week-long incident. Thus, even if defendant initially had a good faith belief that he was entitled to take custody of Z., no reasonable jury could conclude that he *continued* to maintain that belief in good faith beyond the first few hours or days he continued to hold Z. Defendant was on notice that his conduct was potentially illegal, yet he did nothing to remedy the situation, such as returning law enforcement's phone calls, providing the family court judge with Z.'s location, or responding to the Family Code section 3130 order. A mistake of law instruction is not warranted where, as here, a defendant's claimed mistake was not made in good faith. (*People v. Vineberg*, *supra*, 125 Cal.App.3d at p. 137.) Neither the trial court nor defendant's counsel erred in omitting a mistake of law instruction.

III. Ineffective assistance of counsel

Defendant argues that his trial counsel was ineffective for another reason: he did not timely seek dismissal of the three misdemeanor charges. The trial court ultimately dismissed the single count of vandalism and two counts of child endangerment as time-barred, but did so only after evidence regarding those charges already had been presented to the jury. Defendant contends that this evidence, which concerned the July 2014

incident at the strip mall, was not relevant to the remaining charges and served only to prejudice him. We disagree.

"In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692 [].)" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.) "To demonstrate deficient performance, defendant bears the burden of showing that counsel's performance """"fell below an objective standard of reasonableness . . . under prevailing professional norms."""" [Citation.] To demonstrate prejudice, defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. [Citations.]" (*Ibid.*) "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.) "If it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Ibid.*) We follow this course here and conclude that defendant cannot show the requisite prejudice.

The three time-barred misdemeanor charges were not the only charges arising from the July 2014 incident: it also gave rise to the felony criminal threats charge, which was not time-barred. Defendant concedes that "some of the same evidence . . . would

still have been introduced in connection with the criminal threats charge," but argues that "much of the incident occurred before the alleged threat" and therefore was "not relevant to a determination of whether or not McIntee made a threat" to Jacqueline. He specifically points to evidence showing that he pushed Jacqueline to the ground, walked away with Z. and said he would not bring her back, ignored Jacqueline's phone calls, and broke the window of Jacqueline's car; he claims the evidence was unduly prejudicial because it suggested a pattern of McIntee's taking Z[.] without [Jacqueline's] agreement" and "portrayed McIntee as a temperamental and violent individual." This evidence, while unflattering to defendant, nevertheless was highly relevant to the criminal threats charge.

"[W]hether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific they [*sic*] conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.) Indeed, the statute under which defendant was charged, section 422, subdivision (a), specifically states that the alleged threat is to be considered "on its face and under the circumstances in which it was made." (See also *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1220.) Defendant's and Jacqueline's contentious relationship was relevant to the criminal threats charge, and defendant's statements and actions regarding Z. suggested a motive for the subsequent threats Jacqueline reported receiving. Evidence concerning defendant's behavior

with Z. and attitude toward Jacqueline also was relevant to defendant's intent on the kidnapping and child custody deprivation charges, as it demonstrated a long-simmering desire to vex, annoy, or injure Jacqueline and undermined defendant's testimony that he took Z. to make up for visitation he missed during the holidays.

The evidence regarding defendant's conduct during the July 2014 incident was relevant and would have been admitted into evidence even if the misdemeanor charges had been dismissed earlier. Defense counsel's delayed request for dismissal of the misdemeanor charges accordingly did not prejudice defendant and did not amount to ineffective assistance of counsel.

IV. Self-Representation

Defendant contends the court violated his right to self-representation when it revoked his right to proceed in propria persona during his arraignment hearing. We disagree.

A. Background

On March 23, 2016, prior to his preliminary hearing, defendant waived his right to counsel. The court approved $60 in pro. per. funds for defendant and continued the matter to enable him to review the discovery and prepare for the preliminary hearing. Defendant told the court he wanted the record to reflect that he rejected and returned a restraining order and visitation order because he objected to being served with them and "did not retain, acknowledge, nor understand the purpose and intent." The court told defendant it was "a little concerned with you saying you don't acknowledge a court order." The court ordered defendant to obey the orders unless and until he litigated them to get them changed. Defendant said he understood.

On the day of the continued preliminary hearing, April 15, 2016, defendant filed a handwritten demurrer to the felony complaint. The court did not rule on defendant's demurrer because it had received a letter from defendant's father expressing concern about defendant's mental health and competency. The court adjourned the criminal proceedings and ordered a competency hearing. The court appointed defense counsel for the competency hearing, but advised defendant that he could reassert his right to self-representation if and when the criminal proceedings were reinstated.

Defendant was found competent, and criminal proceedings were reinstated on May 6, 2016. Three days later, defendant elected to proceed with counsel, though he expressed reservations about "a bit of a conflict of interest" he perceived between himself and his counsel. The court continued the preliminary hearing again. That hearing was held on July 19, 2016, and an information was filed on August 2, 2016.

At his arraignment on August 2, 2016, defendant objected to his counsel's plea of not guilty and informed the court he wanted to exercise his right to self-representation. Because defendant's regular counsel was on vacation, the court continued defendant's request and trailed the arraignment to August 8, 2016 so that defendant could consult with his attorney before deciding to proceed in propria persona.

On August 8, 2016, defendant reiterated his request to represent himself. After advising defendant against doing so and reviewing a written *Faretta*[8] waiver with him, the trial court granted defendant's request. The court provided defendant with a copy of the information and asked for his plea. Defendant

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[8] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

responded with a request for a continuance, "[f]or time to look over the information, to catch up on the discovery I just received, and to consider filing a demurrer to the position." He did not request additional funds or supplies to undertake these activities. The court continued the arraignment to August 22, 2016 without objection from the prosecution. Defendant immediately filed a handwritten discovery motion.

At the August 22, 2016 arraignment, defendant informed the court that he did not have "the necessary supplies to assist me in filing a motion." The court responded, "Okay. Mr. McIntee-- well, let's do this. As to the arraignment, do you waive formal reading of the information, statement of charges; enter a plea of not guilty and denial of any and all special allegations?" Defendant responded that he was not prepared to enter a plea. The court reminded him that the arraignment had already been continued "out of respect" for defendant's pro. per. status and continuance request, and told him it would not grant another continuance absent good cause. The court asked if defendant understood that this was an arraignment. He said he did, but would need auxiliary funds before he could proceed. The court reminded defendant that he had to act as an attorney would, by being diligent and prepared when in court. Defendant again said he "didn't have the necessary supplies" to do so, and the court asked him what supplies he needed for an arraignment. Defendant explained that he needed supplies to file a demurrer to the information. He further explained that he "just received some documents this week," which "didn't allow me sufficient enough time to prepare."

The court remarked that it was "real troubled by this," and again stated that there was no good cause to continue the

arraignment. Defendant said he had objections, and the court told him he was welcome to make them. Defendant then asserted that there were "technical and procedural defects in the filing," specifically that he "never received the probable cause determination declaration." The court advised him, "That's not part of the arraignment, sir." Defendant disagreed: "I think that's an important document that states probable cause, where it verifies - - where you can be more clear as to the filing of the charges." Defendant also asserted that his substantial rights were violated at his preliminary hearing. The court responded, "That would be a 995, which is where you can do that. But we can't get to the 995 if we don't do an arraignment." Defendant said he understood. The court then continued, "It appears that you do not have any requisite knowledge to proceed with this. It appears to the court you are being dilatory. It appears to the court you are making no efforts to proceed directly."

The court then asked defendant what he wanted to do, and defendant said, "I wish to proceed." The court then asked defendant if he wished to acknowledge receipt of the information and enter a plea. Defendant responded, "I believe I'm not inclined to issue a plea at this time." When the court asked him why, defendant reiterated that he had "not received a probable cause declaration." The court told defendant again that he was being dilatory and did not appear to be acting in good faith. The court cautioned defendant his pro. per. status would be revoked if he did not proceed. The court then paused the proceedings to allow defendant to speak to his standby counsel.

When defendant returned to the courtroom, he told the court he was ready to proceed with the arraignment and requested a formal reading of the amended information. During

the formal reading, defendant corrected the birthdate on the amended information but acknowledged that the name on the amended information, Richard Orlando McIntee, was his true name. When the court asked him for his plea, however, defendant told the court that he felt a "need to correct and state my name for the record, please." The court allowed defendant to state and spell his name, which he did as follows: "Capital r, lower-case i, lower-case c, lower-case h, lower-case a, lower-case r, lower-case [d], space, capital o, lower-case r, lower-case l, lower-case a, lower-case n, lower-case d, lower-case o, space, capital m, lower-case c, capital i, lower-case n, lower-case t, as in Tom, lower-case e, lower-case e." The court observed, "That is exactly what's noted on the information," and again asked defendant for his plea.

Defendant asked if he "could be heard on one statement." The court responded, "Okay. I will indicate, just for the record, you are acting in dilatory matter [*sic*]. You are not, in any way, approaching these proceedings. You are not participating in the proceedings. You are doing everything you can to delay and obstruct them. I will warn you that I am about to revoke your pro per status." Defendant responded that he did not want to lose his status. The court asked him if he understood, and defendant again stated that he did not want to lose his status. The court then asked if he wished to enter a plea. Defendant responded, "Sir, I filed the discovery motion. I have not received documents from the delay regarding that. These are very serious allegations that I am innocent of and - - [¶] ... [¶] I did file - - you should have in the record - - demure [*sic*] to the original complaint, which I had asked defense of counsel [*sic*], Mr. Sullivan at the time, that I wanted it to be amended. And not

receiving the documents as of today, the probable cause declaration, arrest warrant, anything of that nature puts me at a bind to properly amend the demure [*sic*] to the information."

The court reiterated its request that defendant enter a plea. Defendant replied, "Again, I - - respectfully do not believe I should be inclined to answer." The court responded, "I find the defendant is not cooperating, does not understand the nature of the proceedings, is not capable of representing himself. His pro per status is revoked. Standby counsel is appointed." Standby counsel accepted the appointment, and the court asked him to enter a plea. Before standby counsel could do so, defendant sought to consult with him. The court remarked, "We're past that. I've given the gentleman a tremendous amount of leeway. This is a life sentence case. He does not seem to have any comprehension of the jeopardy he is in. He is not participating in any way to represent his own interests." The court then asked, again, if defense counsel wanted to enter a plea. Counsel entered a plea of not guilty. Defendant said, "I want to object." The court thanked defendant and proceeded to schedule the next hearing.

Defendant made no further requests to represent himself during the remainder of the proceedings.

B. Governing Principles

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to represent himself or herself. (*Faretta*, *supra*, 422 U.S. at p. 819.) A defendant who proceeds without the assistance of counsel is held to the same standards as an attorney (see *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985); "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and

substantive law." (*Faretta*, *supra*, at p. 834, fn. 46.) A trial court accordingly may deny a request for self-representation that is intended to delay or disrupt the proceedings, (*People v. Butler* (2009) 47 Cal.4th 814, 825), or revoke a defendant's right to proceed without counsel if he or she "deliberately engages in serious and obstructionist misconduct." (*Faretta*, *supra*, at p. 834, fn. 46.) "Whenever 'deliberate dilatory or obstructive behavior' threatens to subvert 'the core concept of a trial' [citation] or to compromise the court's ability to conduct a fair trial [citation], the defendant's *Faretta* rights are subject to forfeiture." (*People v. Carson* (2005) 35 Cal.4th 1, 10.)

Revocation of the right to self-representation "is a severe sanction and must not be imposed lightly." (*People v. Carson*, *supra*, at p. 7.) "Not every obstructive act will be so flagrant and inconsistent with the integrity and fairness of the trial that immediate termination is appropriate." (*Id.* at p. 10.) In addition to the nature and impact of the defendant's misconduct, the trial court should consider the availability and suitability of lesser, alternative sanctions, the likelihood that the integrity of the trial will be compromised, and whether the defendant has been warned that particular misconduct will result in the revocation of his or her in propria persona status. (*Ibid.*) The trial court also may consider whether the defendant has "'intentionally sought to disrupt and delay'" his or her trial. (*Ibid.*) Such intent, while not necessary, may be sufficient to warrant revocation. (*Ibid.*)

The trial court "possesses much discretion when it comes to terminating a defendant's right to self-representation." (*People v. Welch* (1999) 20 Cal.4th 701, 735.) We review the trial court's decision for abuse of this discretion. "[W]e accord 'due deference to the trial court's assessment of the defendant's motives and

sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial in determining whether termination of *Faretta* rights is necessary to maintain the fairness of the proceedings.' (*Carson*, *supra*, 35 Cal.4th at p. 12 [].)" (*People v. Becerra* (2016) 63 Cal.4th 511, 518.) In conducting our deferential review, we recognize that "the extent of a defendant's disruptive behavior may not be fully evident from the cold record," and that the trial court "is in the best position to judge defendant's demeanor." (*People v. Welch*, *supra*, 20 Cal.4th at p. 735.) Improper denial or revocation of a defendant's *Faretta* rights is per se reversible error. (*People v. Joseph* (1983) 34 Cal.3d 936, 946)

C. Analysis

Defendant argues that the trial court abused its discretion by revoking his right to represent himself. He contends his refusal to enter a plea after the court disallowed his request for a continuance so he could obtain supplies to file a demurrer "was not a valid ground for revoking" his pro. per. status. He points to his previous demurrer as evidence that he was making a genuine request rather than being dilatory. He also assets that his "manner of speaking with the court was respectful" and direct. We are not persuaded the trial court abused its discretion.

The trial court awarded defendant $60 for supplies when he initially asserted his right to self-representation, on March 23, 2016. Defendant presumably used some of those funds during his initial period of self-representation, to purchase the supplies necessary to file his nine-page demurrer on April 15, 2016, and the four-page discovery motion he filed immediately upon reinstatement of his pro. per. status on August 8, 2016. The court did not abuse its discretion in concluding that defendant

did not require additional funds to prepare another demurrer, particularly where defendant made no mention of financial restrictions when he asked to continue the arraignment on August 8, 2016. Moreover, the court explained to defendant that the argument he desired to make, that his arrest was not supported by probable cause, was not "part of the arraignment." The court further advised defendant that he could file a section 995 motion after the arraignment. Defendant nevertheless persisted in his refusal to plead, even after the court twice warned him that his pro. per. status was at stake. The court did not abuse its discretion by concluding that defendant was being dilatory and disruptive.

The cold record before us does not provide much insight into the manner in which defendant engaged with the court and the degree to which he was or was not "respectful." We accordingly defer to the trial court's wide discretion in assessing defendant's demeanor. The record here supports its conclusion that defendant was being dilatory and disrespectful. He challenged the court's observation that probable cause was not at issue in the arraignment and insisted upon spelling his name using capital and lower-case letters after he agreed that it was accurately spelled in the amended information. He also refused to enter a plea of not guilty despite telling the court he was innocent of the charges. Even if defendant was respectful during these exchanges, his intentions are not determinative; his behavior's disruptive effect on the proceedings, which is very apparent from the record, is the crucial concern.

Defendant attempts to minimize the disruptive nature of his conduct by pointing to several cases that "involve far more serious and intentionally obstructionist misconduct than the

conduct reflected in the instant case," including *People v. Fitzpatrick* (1998) 66 Cal.App.4th 86, *People v. Rudd* (1998) 63 Cal.App.4th 620, and *People v. Clark* (1992) 3 Cal.4th 41. Defendant emphasizes that all three of these cases involved repeated or extended incidents of misconduct that were "part of a series of actions . . . clearly intended to manipulate the trial." (*People v. Clark*, *supra*, 3 Cal.4th at p. 115.) These three cases indeed involved more serious and continuous disruptive conduct than occurred in this case; for instance, the defendant in *People v. Fitzpatrick* feigned mental illness for four months, delayed his trial by an additional seven months by escaping from custody, and told the court he would need over a year to get ready for trial. (*People v. Fitzpatrick*, *supra*, at p. 93.) Yet, as the Supreme Court noted in *People v. Carson*, *supra*, 35 Cal.4th at p. 10, "Each case must be evaluated in its own context, on its own facts . . . ." A finding of error in one situation does not mean error occurred in another. (Cf. *People v. Clark*, *supra*, 3 Cal.4th at p. 116 ["A finding of *no* error in one situation is not tantamount to the finding of error in another."].) Defendant's suggestion that misconduct must span several hearings before pro. per. status may be revoked is at odds with the case-by-case examination required here. Moreover, such a rule would enable self-represented defendants to engage in disruptive conduct without consequence, so long as they confined their misbehavior to one hearing. We decline to impose such a rule, or otherwise restrict the trial court's exercise of its discretion.

The trial court here granted defendant's initial request for a continuance; gave him several opportunities to explain his position; advised him of an alternative procedural vehicle, the section 995 motion; encouraged him to speak with his standby

counsel; and warned him that his continued refusal to enter a plea could result in revocation of his right to self-represent. Defendant responded by spelling his name and disregarding the court's warnings, dilatory behavior consistent with his previous disrespect of the family court's custody and restraining orders. The court did not abuse its discretion in terminating his right to represent himself.

V. Cumulative error

Defendant contends that all of the alleged errors discussed above resulted in cumulative error sufficient to deprive him of due process and warrant reversal of his convictions. We disagree. "To the extent there are a few instances in which we have found error or assumed its existence, no prejudice resulted. The same conclusion is appropriate after considering their cumulative effect." (*People v. Valdez* (2012) 55 Cal.4th 82, 181.) Similarly, the cumulative effect of any errors in this case was not prejudicial.

VI. *Romero* motion

Finally defendant contends that the trial court abused its discretion in denying his *Romero* motion to strike his prior strike offense. We disagree.

A. Background

Early in the case, defendant filed a *Romero* motion to strike the prior strike convictions for robbery (§ 211) and shooting into an occupied vehicle (§ 246) alleged in the amended information. Defendant argued that the convictions, which arose from a single case and dated to 1991, when he was a teenager, were remote in time. He further argued that "for the most part, he has lived a crime free existence after his release from the California Youth Authority." Defendant also emphasized that the current charges

"arose out of a domestic dispute [o]ver his visitation fight with his two natural daughters," placing him outside the "spirit" of the Three Strikes law.

While defendant's motion was pending, the prosecution elected to proceed as second strike rather than third strike case. It accordingly dropped its allegation pertaining to the shooting and proceeded only with its allegation pertaining to the robbery, which the court found to be true after a bifurcated bench trial.

The trial court denied defendant's *Romero* motion prior to sentencing. In doing so, the trial court acknowledged that the conviction occurred 25 years ago. However, the court stated that it had reviewed "exhibits showing how very serious those crimes were." The court remarked that the exhibits showed "there was a whole set of crimes in which he and a colleague, in about five different incidents with numerous victims, robbed people at gunpoint. He shot one person - - this is all in fairly short order - - in 1991. . . ." The court further noted that the crime spree resulted in charges for two counts of attempted murder, four counts of robbery, and one count of shooting at an occupied motor vehicle, but defendant resolved the matter by pleading only to one count of robbery and shooting at an occupied motor vehicle. The court further remarked that defendant was arrested and convicted in 1996 for being a felon in possession of a firearm, which it viewed as very serious. The court acknowledged that defendant "then managed to stay out of trouble between whenever he was paroled on that case and the current offenses." As to the current offense, the court emphasized defendant's refusal to talk to the police and the family court judge, and the need for law enforcement to send seven officers to recover Z. The court further remarked, "There are ways to do this and to simply

say, 'I'm a dad and I love my kids'" as opposed to saying, "'I'm going to do whatever I want, and I'm going to ignore the courts and all their processes, and I'm going to take this three-year-old, and I'm not going to tell anybody where she is.' That's serious." The court also observed that the prosecution already had dismissed one of its strike allegations, which it analogized to "a *Romero* motion . . . sort of granted in part already." The court concluded that striking both of defendant's strikes "is really just not justice," remarked that defendant did not "fall within the spirit or the letter of *Romero*" and exercised its discretion to deny the motion.

B. Standard of review

Under the Three Strikes law, the decision to dismiss or "strike" a prior felony conviction is consigned to the trial court's discretion. (*Romero*, *supra*, 13 Cal.4th at p. 504.) In exercising its discretion, the trial court must consider whether, "in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part. . . ." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) We review the court's decision for an abuse of its discretion. (*Romero*, *supra*, 13 Cal.4th at p. 530.) Where the court, aware of its discretion, "'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the . . . ruling, even if we might have ruled differently . . . .'" (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

C. Analysis

Defendant argues that the court abused its discretion despite the seriousness of his prior conviction and his failure to

lead "a crime free life in the interim," because "[e]very other factor . . . weighed in favor of striking the prior strike." He emphasizes the age of the conviction, his youthful age when it was sustained, the nonviolent nature of his current and felon-in-possession offenses, and the difference in kind between his current and prior crimes. Defendant further points out that the robbery conviction "already added an additional five years to [his] sentence under section 667, subdivision (a)(1)," and asserts that it was "improper" for the trial court to consider the prosecution's decision to proceed as a second rather than third strike case. None of these arguments persuades us that the court abused its discretion.

Generally, abuse of discretion in sentencing "is found only where [the trial court's] choice is 'arbitrary or capricious or "'exceeds the bounds of reason, all of the circumstances being considered.'" [Citations.]'" (*People v. Trausch* (1995) 36 Cal.App.4th 1239, 1247, quoting *People v. Welch* (1993) 5 Cal.4th 228, 234.) The trial court's decision here was well within the bounds of reason. The trial court thoughtfully and thoroughly considered the nature and circumstances of defendant's previous conviction, which were much more serious than the conviction itself indicated. The court also recognized that defendant's youth at the time of his robbery conviction and generally law-abiding life beyond offered some mitigation, but appropriately exercised its discretion by weighing those factors against aggravating ones, namely defendant's subsequent felon-in-possession conviction and disregard of authorities and legal processes. Although defendant is correct that his current offense and most recent prior offense were not violent, the Three Strikes law does not require "that a defendant's criminal career consist entirely or

principally of violent or serious felonies to bring a defendant within the spirit of the Three Strikes law." (*People v. Strong* (2001) 87 Cal.App.4th 328, 340.) Defendant has not pointed to any authority in support of his contention that it was improper for the trial court to consider the prosecution's decision to proceed as a second strike rather than third strike case, and we see no reason why such a consideration should not be among "all" of the circumstances a trial court may consider in deciding whether a defendant falls within the "spirit" of the Three Strikes law.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.