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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. THOMAS JAMES RITCHIE, Defendant and Appellant.	B271324 (Los Angeles County Super. Ct. No. TA137015)

APPEAL from judgment of the Superior Court of Los Angeles County. Allen J. Webster, Jr., Judge. Modified and affirmed with directions.

Janet Uson, 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, Senior Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

Thomas Ritchie appeals the judgment entered following a jury trial in which he was convicted of one count of stalking (Pen. Code,[1] § 646.9; count 4), two counts of criminal threats[2] (§ 422, subd. (a); counts 8–9), and three misdemeanor counts of disobeying a court order (§ 166, subd. (a)(4); counts 5–7). The trial court imposed an aggregate sentence of two years eight months in state prison.[3]

Appellant contends: (1) the convictions for stalking, criminal threats, and one count of disobeying a court order lack substantial evidentiary support; (2) the evidence established only one period of sustained fear sufficient to support one conviction for criminal threats; and (3) the trial court improperly instructed the jury that this case did not involve a life sentence, thereby advising the jury to discredit appellant's testimony. We disagree and affirm the judgment.

Appellant further contends that the trial court imposed an unauthorized sentence on counts 5 through 9 in violation of section 654. Respondent concedes that section 654 prohibited separate sentences on counts 5, 6, and 7, but asserts that the middle base term imposed on count 4 should be modified from

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[1] Undesignated statutory references are to the Penal Code.

[2] The jury was unable to reach a verdict on three counts of criminal threats (§ 422, subd. (a); counts 1–3), and the trial court declared a mistrial as to those counts.

[3] The sentence consisted of the mid-term of two years on count 4 (stalking), a consecutive term of eight months (one-third the mid-term of two years) for count 8 (criminal threats), and one-year concurrent terms on each of the three misdemeanor counts of disobeying a court order (counts 5–7).

two to three years, or the matter remanded for resentencing on count 4 pursuant to section 646.9, subdivision (b). We reject respondent's contention that the sentence on count 4 should be modified. We further conclude that the trial court properly imposed a separate punishment for count 8, but should have stayed sentencing on count 9 pursuant to section 654. We therefore modify the judgment accordingly and affirm.

FACTUAL BACKGROUND

Martin Labenz (Martin) was the director of scientific affairs at Spectrum Chemical, a supplier of high-purity chemicals to the pharmaceutical and other industries. Martin's responsibilities included ensuring that the company complied with all state and federal regulations.

Martin met appellant on an online dating site in March or April 2002, and they began a dating and sexual relationship shortly thereafter. Sometime between 2002 and 2008, appellant moved in with Martin to Martin's Redondo Beach home. At that time, Martin's adult daughter, Audrey, was also living with Martin.

In October 2010, Martin, Audrey and appellant moved into a house Martin had bought in Carson. Martin and appellant shared the master bedroom, and Audrey had her own bedroom. Appellant invested about $50,000 in the home and a car that Martin eventually paid off.

Audrey was convicted of misdemeanor petty theft in 2008.[4] Appellant became aware that Audrey had issues with stealing

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[4] Audrey suffered a second misdemeanor conviction for petty theft in 2015.

when he picked her up at the Hawthorne police station on Christmas Eve, 2008, and after the move to Carson, the relationship between Audrey and appellant began to deteriorate. Appellant became increasingly critical of Audrey's past behavior and what he considered to be her moral failings and general worthlessness. Over time, appellant became verbally aggressive and insistent that Audrey "needed to be gone." In February 2011, Audrey reported an incident to police in which appellant had jammed his elbow into her throat as he screamed, " 'You're a cunt. You're a whore. You're a drug addict.' "

Audrey frequently overheard appellant tell her father that she needed "to be killed." Audrey also heard appellant say he was going to poison Audrey's food, and he wanted to wash Audrey's vagina out with acid. As these threats became more explicit, Audrey took to sleeping with a knife and carrying a taser around the house. She put locks on her doors and stayed away as much as possible to avoid appellant. She would stay with friends or her boyfriend, returning home once a week in the middle of the night when appellant was asleep. Whenever their paths did cross, appellant would yell at Audrey about some household matter; on one occasion he chased her out of the house as he screamed that she was "a thoughtless cunt" for failing to clean up the kitchen after cooking dinner.

By June 2013, Martin had decided to end the relationship with appellant and wanted him to move out of the house. On June 8, 2013, through his attorney, Brian Carlin, Martin gave appellant written notice of termination of lodging and demanded that appellant vacate the home by July 15, 2013. Appellant responded by threatening to destroy Martin professionally and financially, and he refused to move out. He told Martin that

"calls could be made," which Martin understood to mean he would seek to destroy Martin's trustworthiness at work and jeopardize his credentials with respect to his dealings with federal and state narcotics regulatory agencies, causing him to lose his job. He also threatened to hire an aggressive lawyer and ruin Martin financially. Because Martin was paying Audrey's college tuition and could not afford a legal battle, he backed off of his demand that appellant move out.

Around September 2013, appellant left a note scrawled on an envelope in the kitchen which said, "I will take you down." This note confirmed Martin's belief that appellant's threats to ruin him financially were serious and ongoing. Toward the end of 2013, appellant started threatening physical harm to Audrey. The most notable of these incidents occurred when appellant bellowed at Martin that Audrey " 'must be killed for the good of the world.' " Around this time, appellant told Martin that Audrey must be "killed" or "eliminated" on five or six occasions.

Martin renewed his request that appellant vacate the premises in December 2013. Appellant responded by reiterating his threats, and he again refused to leave. That month, appellant left a voice mail at Spectrum, threatening that the company would hear from the "DEA" (United States Department of Justice Drug Enforcement Administration) about Martin's complicity "in a drug distribution program." He added, "Marty Labenz has got the dirtiest hands in town." Martin's supervisor and the general manager of the facility called Martin to discuss the message.[5]

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[5] Martin's immediate supervisor was Thomas Tyner, Spectrum's vice-president of quality and technical service.

Martin feared he would lose his job. He felt that appellant was "an active threat" and was making good on his promise to take Martin down.

Appellant's threats and outbursts continued to escalate. At some point during this time, appellant blew cigarette smoke into the air intake of Martin's breathing machine, and Martin had become physically fearful of appellant. Finally, on February 3, 2014, Martin filed a temporary restraining order against appellant. The order named both Martin and Audrey as protected persons and prohibited appellant from harassing, stalking, or contacting them, "either directly or indirectly, in any way, including but not limited to, by telephone, mail, e-mail or other electronic means." The order also required appellant to move out of the house immediately. The same day, sheriff's deputies served appellant with the order at Martin's residence, and appellant moved out.

After Martin obtained the temporary restraining order, appellant continued to call him at work, send e-mails, and contact his employer. On February 12, 2014, appellant called Tyner and asked for the address of Spectrum's facility where Martin worked. After confirming that appellant was Martin's former roommate,[6] Tyner said he understood that appellant was not allowed to contact Martin under the terms of the restraining order. Appellant replied that he was filing a counter-restraining order, and "things were really going to get bad for Marty."

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[6] According to appellant, he identified himself to Tyner as Martin's "gay lover for twelve years."

On March 21, 2014, the superior court heard and denied appellant's request for a restraining order against Martin. A few days later, on March 26, 2014, appellant filed a civil lawsuit against Martin seeking a lump sum of cash and title to Martin's house in Carson. He then sent Martin an e-mail on April 8, 2014, with the subject, "53 ways to leave your lover." The text of the e-mail read, "#51 Expensive [¶] #52 Way more expensive [¶] #53 Way more than it was ever worth." Martin felt frightened by appellant's persistent threats to ruin him.

The court granted a permanent restraining order against appellant following a hearing on April 18, 2014. Like the temporary restraining order, this order prohibited appellant from harassing, stalking, or contacting Audrey or Martin directly or indirectly by any means. The permanent restraining order expired on April 18, 2017.

In January 2015, a receptionist at Spectrum who answered the main telephone lines started receiving unusual calls for Martin, which she put through to voice mail. Over the next month, he would call six to seven times a day, several days a week. After being put through to voice mail, the caller often called back immediately, on several occasions angrily yelling that he was Martin's lover, that Martin was a thief, and that he knew things about Martin about which Spectrum needed to be aware.

On January 13, 2015, appellant called Tyner, identifying himself as "Marty's ex-lover for the past ten years." He told Tyner that he intended to file a million-dollar lawsuit against Spectrum. Tyner told Martin about the call and reported appellant's threatened lawsuit to the company. Prior to appellant's calls to the company in January 2015, Martin had never discussed his sexual orientation with anyone at work.

Appellant knew Martin had not revealed to his coworkers that he was gay, but appellant thought "that farce had gone on all too long." Martin feared loss of influence and stature within the management ranks of the company as a result of these revelations about his sexual orientation.

On April 9, 2015, the superior court heard Martin's motion for summary judgment in appellant's civil lawsuit and granted judgment in favor of Martin. The court ordered appellant to pay costs of $2,838.89 to Martin and terminated the litigation.

Later that day at 1:05 p.m., appellant sent an e-mail to Martin with the subject line, "The court order that will stop a bullet." The e-mail stated: "I am coming to get you and your evil your spawn daughter as well (not to be misinterpreted.) You are the man that went looking for this outcome. I will find you, and your spawn, and exterminate you both, temporary jail time not withstanding. Get it? [¶] Sleeveless t shirt blue collar?, look again, down low and guttural and shopping AK 47's on the street. PERHAPS you should call Peggy.[7] She should know where you can hide. [¶] Sorry you are losing your hair. I love you." (*Sic.*) Martin took the threats in this e-mail "extremely seriously," fearing appellant intended to kill him and his daughter.

The same day, Martin received another e-mail from appellant sent at 3:15 p.m. with the subject line, "Shall we do it there?" This e-mail stated: "I will kill you, trust me, I will find a way. Your worthless off spring, as well, in front of and within your view of her face, if I could. Who do the fuck you do you

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7 Peggy was the property manager of the gated community in which Martin lived.

think you are? Why would I want to do such a thing? [¶] Now you have it in writing. Share it with you lawyer. [¶] The resulting paperwork will keep you safe. In your dreams. [¶] A Google search says an AK 47 has a going street price, in Los Angeles, of about $450.00. I know I can raise that. [¶] How could anyone give reason to someone to want to do this? I think you the found exactly the precise way. Sic. You are, so clever. [¶] Are you that proud of yourself? Scientology is a scam, it's repercussions are a nightmare. [¶] You killed my life, now you need to finish the job, unless, I beat you to that punch. [¶] I am the fat lady and I've yet to sin the last song. [¶] I love you." (*Sic.*) Martin felt even more threatened by the second e-mail. He believed appellant intended to ignore any restraining orders and "exterminate" him and his daughter, shooting them with an AK-47.

Martin also received a forwarded e-mail that appellant had sent to Carlin that morning at 11:47 a.m. In that e-mail appellant declared: "He thinks he got away with it, however, I noted today his hair was thinning. Cosmetic surgery, with about eighteen ounces of brass ought to do it well. As I understand it, the street price of an AK 47, in LA is, remarkably cheap. Perpetually looking over your shoulder is another matter, altogether. How do you define priceless? [¶] Let me know when your bill has been paid, wouldn't want to screw you." Martin took appellant's references to "cosmetic surgery," "eighteen ounces of brass," and the price of an AK-47 as threats to modify Martin's body by shooting him with an AK-47.

Martin forwarded each of the e-mails to Audrey. Both Martin and Audrey took all three threats seriously. Martin feared appellant was going to shoot him and his daughter, and he

looked for a sniper every time he left home or work. For the next few weeks, he changed the route he took to work every day, and parked in different locations in case appellant was waiting to shoot him. Martin also changed the locks to his home and moved things away from the property perimeter so that appellant could not hop over the fence.

When Audrey received the e-mail appellant had sent to Martin at 1:05 p.m. on April 9, 2015, she felt "[t]errified for [her] life," knowing that appellant hated her enough to kill her and meant it when he said he would do just that. Audrey was "[h]orrified" by appellant's specific reference to an AK-47 because she believed he knew how to get one and intended to do so. The second e-mail appellant sent to Martin at 3:15 p.m. left her "[s]haken to [her] core," and even more terrified than the first e-mail. She believed appellant intended to kill her in front of her father and then kill Martin, and the restraining order was not going to stop him. Audrey also thought appellant had the means to buy an AK-47 using his disability check. Fearing for her life, and believing appellant capable of and serious about killing her, Audrey changed her daily routines: she was constantly looking for a sniper or appellant, she started parking her car away from the house so it would not be obvious when she was home, she took different routes everywhere she went for about two months, and for two weeks after the e-mails she kept an old rifle near her whenever she was in the house.

Appellant testified in his own behalf. When Martin demanded that he move out of the house in June 2013, appellant refused to leave. Appellant did not consider himself a "tenant" and could not be evicted like one. Appellant denied threatening to destroy Martin financially or professionally. Instead, he had

implored Martin to act like an adult and avoid the legal system. Martin did not press appellant to move out, and life returned to normal with appellant and Martin continuing to maintain an intimate relationship.

Although appellant was critical of Audrey's moral faults and past behavior, he never said she should be killed, nor did he ever threaten to poison her. He denied ever assaulting Audrey. Appellant explained that his "I will take you down" note was intended to show Martin his resolve and to persuade him to separate amicably; it was not meant as a threat of any kind. Appellant also denied blowing smoke into Martin's breathing machine, threatening to harm Martin physically, or threatening to call the DEA. Appellant warned Martin that "things would get ugly" if Martin tried to steal appellant's property, and admitted he left the voice mail at Spectrum about Martin's involvement "in a drug distribution program" to get him in trouble and possibly fired.

When Martin served appellant with another eviction notice in December 2013, appellant consulted an attorney specializing in dissolution proceedings for unmarried couples. He did not, however, threaten to ruin Martin or have any violent reaction. In fact, between December 2013 and February 2014, appellant and Martin remained in an intimate relationship, despite Martin's "mixed signals."

Appellant complied with the temporary restraining order, and did not try to harass, annoy, or embarrass Martin with his phone calls to Spectrum. But after his civil lawsuit was dismissed, appellant intentionally violated the restraining order with his e-mails to Martin and his attorney. Appellant believed the court had dismissed his lawsuit on the basis of false

statements in Martin's declaration in support of the motion for summary judgment, and appellant's purpose in violating the restraining order was to get Martin back into court so he would perjure himself again. He did not believe his e-mail to Carlin would be taken seriously as a threat, nor did he believe Martin would interpret the other e-mails as threats. He also did not expect Martin to share the e-mails with Audrey, nor did he intend them as threats against Audrey.

DISCUSSION

I. Sufficiency of the evidence

Appellant contends substantial evidence does not support his convictions for criminal threats, stalking, and one of the three counts of disobeying a court order. In so arguing, appellant invites us to focus on evidence that supports the defense theory of the case while all but ignoring the evidence which supports appellant's convictions. However, we decline appellant's invitation to reweigh the evidence in contravention with the appropriate standard of appellate review.

In assessing appellant's substantial evidence challenge, " '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.' " (*People v. Avila* (2009) 46 Cal.4th 680, 701; *People v. Watkins* (2012) 55 Cal.4th 999, 1019–1020.) We draw all reasonable inferences in favor of the verdict and presume " 'the existence of every fact the [jury] could reasonably deduce from the evidence' " that supports its findings. (*People v. Maciel* (2013) 57 Cal.4th 482, 515; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) " 'In reviewing the sufficiency

of the evidence, we must 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." ' " (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

" 'The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] " 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " ' " (*People v. Harris* (2013) 57 Cal.4th 804, 849–850.)

"[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Richardson* (2008) 43 Cal.4th 959, 1030–1031.) Moreover, a judgment may be upheld upon one witness's testimony " 'even if it is contradicted by other evidence, inconsistent or false as to other portions.' " (*People v. White* (2014) 230 Cal.App.4th 305, 319, fn. 14.) In sum, we must uphold the judgment " 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' " (*People v. Cravens* (2012) 53 Cal.4th 500, 508.)

A. *Criminal threats against Audrey* (*counts 8 and 9*)

Appellant challenges his criminal threats convictions on the grounds that he never intended his April 9 e-mails to be taken as threats to kill or injure either Martin or Audrey, his statements were not genuine threats, there was insufficient evidence of gravity of purpose or any immediate prospect the threats would be executed, and there was insufficient evidence that Audrey's fear was reasonable. In support of these arguments, appellant relies on his own testimony and asserts that Audrey's testimony was inherently unreliable.

Our Supreme Court has explained that a conviction for criminal threats under section 422 requires proof of the following five elements: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228.)

Viewing the record in the light most favorable to the judgment, we conclude that substantial evidence supports each

element required for a jury to find appellant guilty beyond a reasonable doubt of criminal threats against Audrey.

In his e-mails, appellant threatened he was "coming to get" Martin and Audrey and pledged to "exterminate" both of them. Claiming he could raise the money to buy an AK-47, appellant declared, "I will kill you, trust me, I will find a way. Your worthless off spring, as well, in front of and with your view of her face, if I could." (*Sic.*) The threats in these e-mails plainly satisfied the first element of a criminal threat: the willful threat to commit a crime, that if committed, would result in death or great bodily injury to another person.

Appellant contends he never intended these e-mails to be taken as threats to kill or injure Audrey, nor did he intend that the e-mails be communicated to her. Rather, appellant maintains the e-mails "were more of an emotional outburst and angry reaction than they were a genuine threat." His purpose was only to induce Martin to return to court in hopes of having another opportunity to litigate the issues in his civil lawsuit.

There is rarely direct evidence of intent. Proof of intent is usually based on inferences drawn from the circumstances of the offense. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Despite appellant's explanation of his intentions, there was ample evidence from which the jury could infer appellant's specific intent that the statements be taken seriously as a threat to Audrey's well-being. The e-mails contained explicit threats to fatally shoot Audrey, and there was no evidence beyond appellant's own testimony to suggest any other purpose. On the other hand, there was abundant evidence of a climate of hostility between Audrey and appellant. (See *In re David L.* (1991) 234 Cal.App.3d 1655, 1659 ["climate of hostility" between the

defendant and victim may support inference of intent to threaten].) Moreover, appellant was well aware that Audrey was sufficiently afraid of him to seek a restraining order against him. And appellant knew that Audrey had taken his previous threats seriously enough to take safety precautions to protect herself from him at home.

Of course, after weighing appellant's credibility, the jury was free to accept or reject his explanation regarding the e-mails. (*People v. Lewis* (2001) 26 Cal.4th 334, 361 [" ' "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends" ' "]; *People v. Watts* (1999) 76 Cal.App.4th 1250, 1258–1259 [" 'It is blackletter law that any conflict or contradiction in the evidence, or any inconsistency in the testimony of witnesses must be resolved by the trier of fact who is the sole judge of the credibility of the witnesses' "].)

That appellant may not have actually intended to carry out his threats is irrelevant to the determination of whether he harbored the requisite specific intent. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 806 ["section 422 does not require an intent to actually carry out the threatened crime"]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1220.) It also does not matter that appellant did not convey the threats directly to Audrey. A threat may as readily be conveyed by the defendant through a third party as personally to the intended victim. (*In re David L.*, *supra*, 234 Cal.App.3d at p. 1659.) Here, the e-mails explicitly identified Audrey as a target, and Martin was well aware of appellant's longstanding hostility toward Audrey. On this

evidence, the jury could reasonably find that appellant fully expected Martin to forward appellant's e-mails to Audrey out of concern for his daughter's well-being, and that appellant intended that Audrey take his statements as a serious threat to her life. (*Ibid*. [communication of threat to friend of the victim who was also witness to prior hostilities supports inference that defendant intended the friend act as intermediary and convey threat to victim].)

Section 422 provides that the threat must be "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat." Appellant contends that the evidence failed to establish this element of a criminal threat against Audrey. We disagree.

" 'The use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.' " (*People v. Bolin* (1998) 18 Cal.4th 297, 340, quoting *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157.) "Thus, the third element's four enumerated statutory elements—unequivocality, unconditionality, immediacy and specificity—are ' "simply the factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim." ' " (*People v. Wilson*, *supra*, 186 Cal.App.4th at p. 807.)

Here, appellant explicitly threatened to buy an AK-47 and use it to "kill" or "exterminate" Audrey. His threats to shoot Audrey were specific, unambiguous, unconditional, unequivocal,

and immediate in nature. Appellant conveyed that he had the immediate ability to buy an AK-47, and he would use it to kill Audrey as soon as he acquired the weapon. The threats were unconditional: Audrey could do nothing to prevent appellant from carrying out his plan.

Appellant claims that the prosecution failed to prove that appellant actually attempted to raise the money to buy an AK-47 and presented no evidence that appellant attempted to procure the weapon or get trained in its use. According to appellant, these deficiencies in the People's case were fatal to the jury's findings that he harbored the requisite specific intent or that the threat conveyed a gravity of purpose and an immediate prospect that the threat would be executed. Not so. Section 422 does not require an immediate ability to carry out the threat, nor does it require the details of a time or precise manner of execution be given. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431–1432; see also *People v. Lopez* (1999) 74 Cal.App.4th 675, 679–680.) It is thus irrelevant for proof of a criminal threat that appellant did not specify exactly when he would carry out his threats, or that he may not have had the means to commit the shooting when he made the threats.

Relying on his own testimony and attacking Audrey's as "inherently unreliable and motivated by her dislike of appellant," appellant next asserts that the evidence was insufficient to establish that Audrey's fear was reasonable under the circumstances. Appellant's claim in this regard amounts to an improper gambit to have this court reweigh the evidence, ignoring the substantial evidence in support of his criminal threats convictions. This we will not do.

The evidence before the jury painted a picture of an antagonistic relationship between Audrey and appellant that only grew more hostile over time. Audrey overheard appellant make numerous specific threats to her well-being. In February 2011, Audrey reported an assault by appellant to police. As appellant's threats became more explicit and his conduct more aggressive, Audrey took steps to protect herself in the home. Appellant's pattern of threats and aggression eventually drove Audrey to seek the protection of a restraining order against appellant. Thus, when she received the threatening e-mails, this seemed to be yet another escalation of appellant's prior threats that put her in fear for her life.

While appellant dismisses Audrey's reactions to appellant's prior threats and conduct as "exaggerated," a rational jury could well find her fear upon receiving the direct threats contained in the e-mails was objectively reasonable.

B. *Stalking as to Martin* (*count 4*)

Appellant's substantial evidence challenge to his stalking conviction, like his claims with regard to the jury's findings of criminal threats, seeks a reevaluation of the evidence on appeal at odds with our deferential standard of review.

In order to convict appellant of stalking, the jury must have found beyond a reasonable doubt that appellant willfully and maliciously harassed Martin and made a credible threat with the intent to place Martin in reasonable fear for his safety or the safety of his family. (§ 646.9, subd. (a); *People v. Zavala* (2005) 130 Cal.App.4th 758, 766–767; *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239.) Section 646.9, subdivision (e) defines the term " 'harass' " "as a course of conduct that 'seriously alarms, annoys, torments, or terrorizes the person, and that

serves no legitimate purpose.' " (*Zavala*, *supra*, at p. 767.) A " 'course of conduct' means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose." (§ 646.9, subd. (f).) Subdivision (g) of the stalking statute defines the " 'credible threat' " element as a threat "made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat." (§ 646.9, subd. (g); *Zavala*, *supra*, at p. 767.)

The record in this case abounds with evidence that, over a period of 17 months, appellant knowingly and willfully engaged in a course of conduct directed at Martin that served no legitimate purpose, and seriously alarmed, annoyed, and tormented Martin. To cite just a few examples, after appellant threatened to ruin Martin financially in response to Martin's renewed request that he move out, appellant called Martin's employer and left a voice mail falsely accusing Martin of illegally distributing drugs. Martin's supervisors listened to the message and discussed it with him, causing him to fear his job was in peril and appellant was making good on his threat to take Martin down.

After Martin obtained a temporary restraining order against appellant, appellant's calls and e-mails to Martin at work continued unabated. Knowing that Martin had not revealed his sexual orientation to anyone at Spectrum for fear of negative repercussions, appellant identified himself to Martin's supervisor in one of these calls as Martin's "gay lover for twelve years." During this call appellant also told Tyner that "things were really

going to get bad for Marty." Appellant also repeatedly called Spectrum asking for Martin, and on several occasions angrily asserted he was Martin's lover, while accusing Martin of theft and other misconduct. Appellant's e-mail to Martin about how expensive it was going to be for Martin to end his relationship with appellant continued the pattern of harassment.

This evidence leaves no doubt that appellant's course of conduct seriously alarmed, annoyed and tormented Martin, while confirming his fears that appellant's aim was to ruin Martin financially. It also constitutes substantial evidence of harassment within the meaning of the stalking statute. Even if, as appellant claims, he had legitimate reasons for some of the calls and e-mails to Martin and Martin's employer, the majority served no legitimate purpose, and were intended to embarrass Martin at work, negatively affecting his job and financial security. It also makes no difference that some of the harassment was accomplished through third parties from whom Martin learned of the calls and e-mails. What matters is that, when he did learn of appellant's calls and e-mails, Martin actually and reasonably suffered the requisite emotional distress and fear. (*People v. Norman*, *supra*, 75 Cal.App.4th at pp. 1239–1241 & fn. 4.)

As discussed above in connection with the evidence supporting the criminal threats convictions, substantial evidence also supports the jury's findings that appellant made credible threats in the three e-mails in which he specifically threatened to kill Martin and Audrey. Conveying these threats in violation the restraining order, with the intent of putting Martin in fear for his own and Audrey's safety, and with the apparent ability to carry

them out, appellant caused Martin to suffer serious and prolonged fear for his and his daughter's safety.

C. *The three counts of disobeying a court order*

Appellant contends that the April 9, 2015 e-mail to Carlin did not violate the restraining order, and thus could not support a conviction for disobeying a court order. (§ 166, subd. (a)(4).) The claim lacks merit.

Any person who willfully disobeys the written terms of a lawfully issued court order is guilty of a misdemeanor. (§ 166, subd. (a)(4).) The restraining order here barred appellant from contacting, directly or *indirectly*, Martin or Audrey, by any means. This prohibition certainly included communications through a third party. (See *People v. Norman*, *supra*, 75 Cal.App.4th at pp. 1239–1241 & fn. 4 [harassment and credible threat conveyed through third party sufficient for stalking conviction].) The order did contain an exception allowing "[p]eaceful written contact through a lawyer." But the fact that the third party in this case was Martin's lawyer does not mean the communication did not violate the restraining order, since there was nothing *peaceful* about appellant's obvious threat to shoot Martin with a "remarkably cheap" AK-47 purchased on the street. Indeed, the e-mail contained no indication at all of any legitimate reason for the communication. Finally, appellant could certainly anticipate that Martin's attorney would be compelled share with his client an express threat of violence, leaving no doubt about appellant's willful harassment of Martin with this e-mail in violation of the restraining order.

II. The convictions on two counts of criminal threats against Audrey

Relying on *People v. Wilson* (2015) 234 Cal.App.4th 193, 198 (*Wilson*), appellant contends that even if the evidence was sufficient to prove a criminal threat against Audrey, there was no showing that Audrey read the e-mails at separate times, and thus no evidence that she suffered more than a single period of sustained fear. Appellant thus maintains he could be convicted of only one count of criminal threats based on the two e-mails from appellant that Martin forwarded to Audrey. We disagree.

"Sustained fear" has two components: the emotional reaction the victim has to the communication—fear—and the period of time during which the victim experiences that fear. "Sustained," as used in section 422, refers to " 'a period of time that extends beyond what is momentary, fleeting, or transitory.' " (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.) In *Wilson*, defendant made multiple threats to kill the victim and his family in a single continuing confrontation that lasted 15 to 20 minutes. (*Wilson*, *supra*, 234 Cal.App.4th at pp. 196–197.) The court recognized that " '[f]ifteen minutes of fear . . . is more than sufficient to constitute "sustained" fear for purposes of . . . section 422.' " (*Id.* at p. 201, quoting *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; see also *Fierro*, at pp. 1348–1349.) However, because a violation of section 422 is not complete until the victim has suffered "sustained fear" as a result of the threat, the court concluded that section 422 prohibits multiple convictions based on multiple threatening communications toward a single victim during a single brief, uninterrupted encounter. (*Wilson*, at p. 201.)

Wilson is distinguishable. In contrast to the threats in *Wilson*, which occurred during "a brief, uninterrupted encounter" (234 Cal.App.4th at p. 201), appellant communicated his threats to Audrey in two e-mails separated by a period of hours. Although there was no evidence about exactly when Martin forwarded the e-mails to Audrey or when she read them, we do have Audrey's testimony that she suffered separate and distinct periods of sustained fear following each of the e-mails. Audrey testified that upon receiving the first e-mail, she took the threats seriously, believed appellant was going to shoot her, and felt terrified for her life. This reaction certainly qualifies as "fear." While Audrey did not testify to how long she experienced this fear, nothing about her description suggests her fear was "momentary, fleeting, or transitory." Accordingly, we conclude that Audrey's testimony established one period of "sustained fear" sufficient to complete appellant's first violation of section 422.

After the second e-mail, which appellant sent more than two hours after the first, Audrey testified that she felt "[s]haken to [her] core," and even more afraid than after she read the first e-mail. Given appellant's statement that "[t]he resulting paperwork will keep you safe in your dreams," Audrey feared that no restraining order or other court process could stop appellant from buying an AK-47 and shooting her.

Based on Audrey's testimony, the jury could reasonably find that appellant made two distinct and separate threats against Audrey, there was a meaningful break between the threats, and Audrey suffered separate periods of sustained fear after receiving each threat. Appellant was thus properly convicted of two counts of criminal threats.

III. The trial court's instruction to the jury that this case did not involve a life sentence

Appellant contends that a jury instruction that this case did not involve a life sentence suggested he had committed perjury and thereby served to discredit his entire testimony. He asserts that the resulting denial of his constitutional rights to due process and a fair trial compels reversal. We disagree.

During the prosecution's cross-examination of appellant about the content and intent of the e-mails, appellant joked that "Marty has an appetite, people might have noticed." When the prosecutor asked appellant if he thought this was funny, appellant responded, "I'm having a difficult time understanding why a prosecutor who knows someone is a perjurer and a thief puts him on the stand to put somebody in jail for life. I'm having a real problem with that." The court sustained the prosecution's objection that the answer was nonresponsive and argumentative.

Later during a discussion about jury instructions, the prosecutor expressed concern over appellant's suggestion to the jury that he could go to jail for life if convicted. The prosecutor requested that, in addition to instructing the jury not to consider punishment, the court specifically instruct the jury that this was not a life case to ensure that appellant's improper statement would not influence the jury's decision. The prosecutor argued that a special instruction from the court was required because the prosecutor could not discuss punishment in her closing arguments, and if left unaddressed, the testimony was very likely to prejudice the jury. Defense counsel objected to any such instruction on the grounds that the court was already going to instruct the jury not to consider punishment and a more specific

instruction would unduly draw the jury's attention to appellant's inappropriate comment.

The court overruled the defense objection and gave the following instruction: "You heard testimony from witness that the penalty in this case is life. This is not a life case. You may not consider or discuss penalty or punishment in your deliberations. Penalty or punishment is for the court to decide."[8]

It is well established that a defendant's potential punishment is not a proper matter for jury consideration. (*People v. Thomas* (2011) 51 Cal.4th 449, 486.) "Information regarding the consequences of a verdict is . . . irrelevant to the jury's task. . . . [P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." (*Shannon v. United States* (1994) 512 U.S. 573, 579; see also *People v. Ruiloba* (2005) 131 Cal.App.4th 674, 692–693 ["It is improper to tell a noncapital jury about possible punishment because that subject is not only irrelevant to the jury's factfinding function, it has the potential to deflect the jury by inviting discussion and speculation about the results of whatever findings it makes"].) Such information also creates a substantial danger of undue prejudice to the prosecution by engendering sympathy from the jury. (See *People v. Alvarez* (1996) 49 Cal.App.4th 679, 687–689.)

An admonition that the jury must not be influenced by punishment in determining guilt will ordinarily have the desired

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[8] This instruction was not included in the written instructions provided to the jury.

curative effect. (*People v. Thomas*, *supra*, 51 Cal.4th at p. 486.) But here, the general instruction that the jury could not consider penalty or punishment in its deliberations was insufficient because that instruction alone did nothing to counter appellant's false testimony that the prosecutor was seeking to put him in jail for life. (See *People v. Holt* (1984) 37 Cal.3d 436, 458 [instruction that subject of penalty must not affect the verdict was insufficient to cure prosecutor's improper reference to punishment].) Moreover, as the prosecutor argued below, only the court could correct appellant's statement that he was facing a life sentence, because the prosecutor was barred from raising the matter of penalty in her closing arguments. (*People v. Thomas*, *supra*, 51 Cal.4th at p. 486.)

The trial court acted well within its discretion in clarifying to the jury that this case did not involve the possibility of a life sentence despite witness testimony to the contrary. " 'A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice.' " (*People v. Gonzalez* (2006) 38 Cal.4th 932, 951; § 1044.) This includes " 'the authority " 'to take whatever steps [are] necessary to see that no conduct on the part of any person obstruct[s] the administration of justice.' " ' " (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387.) Further, " 'the trial judge "has the responsibility for safeguarding both the rights of the accused and the interest of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial." ' " (*Ibid.*)

We find nothing improper about the instruction, nor does there appear a reasonable likelihood the jury misapplied it as appellant suggests. (See generally *People v. Thornton* (2007) 41 Cal.4th 391, 436.) The instruction correctly informed the jury that the case did not involve a life sentence despite testimony to the contrary, and properly admonished the jury not to consider or discuss punishment in its deliberations. The instruction made no reference to appellant or his credibility. Moreover, it contained no suggestion that appellant had committed perjury, much less invited the jury to reject the rest of his testimony.

We do not review jury instructions in isolation; rather, we consider the entire charge to the jury in light of the whole trial record. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Williams* (1997) 16 Cal.4th 635, 675; *People v. Jaspar* (2002) 98 Cal.App.4th 99, 111.) We presume jurors are capable of understanding and correlating the instructions, and we further presume the jury to have followed the instructions given. (*People v. Thomas*, *supra*, 51 Cal.4th at p. 487; *People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Here, just before the challenged instruction, the court told the jury, "Do not assume just because I give a particular instruction that I am suggesting anything about the facts." The court instructed the jury that appellant was presumed innocent. And declaring that the jury "alone must judge the credibility or believability of the witnesses," the court explained, "You may believe all, part or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe." As to a witness's credibility, the court instructed, "if you think the witness lied about some things, but told the truth about others, you may accept the part that you think is true and ignore

the rest." Finally, in its concluding instructions, the court reminded the jury: "It is not my role to tell you what your verdict should be. Do not take anything I said or did during trial as an indication of what I think about the facts, the witnesses, or what your verdict should be. [¶] You must reach your verdict without any consideration of punishment."

Reading the challenged instruction in the context of the entire charge along with these other instructions in particular, we find no reasonable likelihood that the jury would have interpreted the instruction as an opinion by the court that appellant had committed perjury or as an invitation for the jury to disbelieve appellant's testimony as a whole. Appellant was not entitled to engender sympathy by improperly testifying about potential punishment and incorrectly stating the case involved a life sentence. Accordingly, we find no error or impropriety in the court's instruction clarifying that this was not a life case and emphasizing that the jury must refrain from considering the subject of possible punishment in its deliberations.

IV. Sentencing issues

A. *The trial court properly sentenced appellant to separate terms on the stalking and one of the criminal threats convictions, but should have stayed sentence on the second criminal threats conviction*

Appellant contends the trial court erred in imposing separate sentences on counts 5 through 9 because the convictions on these counts arose out of an indivisible course of conduct directed to a single objective. Respondent concedes, and we agree, that section 654 prohibited separate punishment on counts 5, 6, and 7 (disobeying a court order), and the sentences on those counts must be stayed. We also conclude that the trial court

should have stayed sentence under section 654 on count 9 (criminal threats against Audrey). But we hold that the court properly imposed a separate consecutive term for the criminal threats conviction in count 8.

The trial court imposed a two-year sentence for stalking in count 4 as the base term. The court found that section 654 did not bar separate sentences for stalking as to Martin and both counts of criminal threats as to Audrey because these counts involved separate victims and separate incidents. The court thus sentenced appellant on count 8 to eight months, consecutive to the sentence on count 4, and two years on count 9, to run concurrently with the count 4 sentence.

Section 654[9] bars separate punishment for multiple convictions arising out of a single act or a course of conduct motivated by a single criminal objective. (*People v. Corpening* (2016) 2 Cal.5th 307, 311; *People v. Beamon* (1973) 8 Cal.3d 625, 639.) Whether section 654 bars multiple punishment requires a two-step inquiry, first to determine if different crimes were committed by a "single physical act" (*People v. Jones* (2012) 54 Cal.4th 350, 358), and if the case involves more than one criminal act, "whether that course of conduct reflects a single ' "intent and objective" ' or multiple intents and objectives" (*People v. Corpening*, at p. 311). " 'Whether *a course of criminal conduct* is

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[9] Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

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. Rodriguez* (2009) 47 Cal.4th 501, 507; *People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Appellant contends that section 654 precluded separate punishment on counts 5 through 9 because the conduct underlying all of the charges, including the stalking count, was motivated by a single objective: recovering appellant's property interests from Martin. In addition, appellant argues that because the April 9 e-mails constituted the factual basis for all of the crimes of which appellant was convicted—stalking, disobeying a court order, and both counts of criminal threats—section 654 mandates that the sentences on counts 5, 6, 7, 8, and 9 be stayed. While we conclude that appellant could be punished only once for the two criminal threats charges, we reject his assertion that both of the sentences on the criminal threats counts must be stayed.

Under the "multiple victim" exception to section 654, "even though a defendant entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim." (*People v. Ramos* (1982) 30 Cal.3d 553, 587, revd. on other grounds in *California v. Ramos* (1983) 463 U.S. 992.) The exception is based on the principle that "[w]hen a defendant ' "commits an act of violence with the intent to harm more than one person or by means likely to cause harm to several persons," his greater culpability precludes application of section 654.' "

(*People v. McFarland* (1989) 47 Cal.3d 798, 803; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1781.)

"The multiple victim exception, simply stated, permits one unstayed sentence per victim of all the violent crimes the defendant commits incidental to a single criminal intent." (*People v. Garcia*, *supra*, 32 Cal.App.4th at p. 1784.) Criminal threats, for purposes of this exception, is a crime of violence. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1024.)

Here, it is undisputed that appellant separately committed the stalking and criminal threats crimes against two different victims: Martin was the named victim in count 4, while Audrey was the named victim in counts 8 and 9. (See *People v. Solis*, *supra*, 90 Cal.App.4th at pp. 1023–1025 [trial court properly imposed separate punishments for two section 422 violations involving two different victims].) Further, as the trial court found, these crimes involved separate acts on different dates, with the conduct underlying the stalking count beginning well before appellant sent the April 9 e-mails, which formed the basis for the criminal threats counts.

Finally, the record contains no evidence to support appellant's vague assertion that the stalking and criminal threats offenses shared a common purpose and objective. To the contrary, it is apparent that appellant's sole purpose in stalking Martin was to harass and annoy him by embarrassing him and threatening him with financial and professional ruin, as well as physical harm. On the other hand, appellant's independent objective in making the criminal threats against Audrey was to place her in sustained fear for her life. (See *People v. Harrison*, *supra*, 48 Cal.3d at pp. 335–336 [to accept "such a 'broad and amorphous' view of the single 'intent' or 'objective' needed to

trigger the statute would impermissibly 'reward the defendant who has the greater criminal ambition with a lesser punishment' "].) Accordingly, the trial court properly imposed consecutive terms on counts 4 and 8.

The same cannot be said for the two criminal threats counts. Characterizing the course of conduct in sending the two e-mails on April 9 as "divisible in time" and involving "two separate volitional and calculated acts," respondent argues that the trial court was not required to stay the sentence on count 9. But respondent fails to articulate any basis for concluding that the two criminal threats against the same victim did not share an identical intent or objective. That being so, appellant could be punished for only one of the criminal threats, and section 654 precluded a concurrent sentence on count 9. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

B. *Respondent may not challenge the trial court's imposition of sentence under section 646.9, subdivision (a) on appeal*

A felony violation of section 646.9, subdivision (a) is punishable by a term of imprisonment of 16 months, two years, or three years. (§ 18.) Section 646.9, subdivision (b) describes the aggravated crime of stalking in violation of a temporary restraining order or injunction, and carries sentencing options of two, three, or four years. Respondent asserts that the middle base term imposed on count 4 should be modified from two to three years, or the matter remanded for resentencing on count 4 pursuant to section 646.9, subdivision (b). We disagree.

Appellant was charged, tried, and convicted for felony stalking in violation of section 646.9, subdivision (a).[10] In accordance with the prosecution's sentencing memorandum, and without objection from the People, the trial court sentenced appellant pursuant to section 646.9, subdivision (a) to the mid-term of two years in prison.

The prosecution's failure to raise the prospect of sentencing under section 646.9, subdivision (b) at any time, and its failure to object to the trial court's imposition of sentence under section 646.9, subdivision (a), has forfeited the issue for appeal. " ' "[A]n appellate court will ordinarily not consider procedural defects or erroneous rulings . . . where an objection could have been, but was not presented to the lower court by some appropriate method." ' " (*People v. Jenkins* (2000) 22 Cal.4th 900, 1000.) As our Supreme Court has explained: "Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

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[10] The amended information referred to a violation of section 646.9, subdivision (a), with no mention of subdivision (b). The court instructed the jury on the elements of stalking without reference to violation of the restraining order. The verdict form specified a conviction for felony stalking under section 646.9, subdivision (a).

Further, unless the sentence imposed by the court may be deemed an unlawful or unauthorized sentence, respondent has no independent right to appeal it. Section 1238 specifies those decisions of a trial court from which the prosecution may appeal. Subdivision (a)(10) permits the People to appeal an unlawful or unauthorized sentence, but not the trial court's choice of the upper, middle, lower, or consecutive or concurrent terms of punishment.[11] Our Supreme Court has described an unauthorized sentence as one that "could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott, supra,* 9 Cal.4th at p. 354.)

Here, appellant's two-year sentence for stalking was authorized under either section 646.9, subdivision (a) or (b). Because appellant's sentence was authorized, the People have no right to appeal it. (*People v. Scott*, *supra*, 9 Cal.4th at pp. 354–356.)

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[11] Section 1238, subdivision (a)(10) allows the People to appeal from "[t]he imposition of an unlawful sentence, whether or not the court suspends the execution of the sentence, except that portion of a sentence imposing a prison term which is based upon a court's choice that a term of imprisonment (A) be the upper, middle, or lower term, unless the term selected is not set forth in an applicable statute, or (B) be consecutive or concurrent to another term of imprisonment, unless an applicable statute requires that the term be consecutive. As used in this paragraph, 'unlawful sentence' means the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction."

DISPOSITION

The judgment is modified to stay the concurrent terms imposed on counts 5, 6, 7, and 9 pursuant to Penal Code section 654. The trial court is ordered to correct the minute order and to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment to reflect these modifications. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.