SUPREME COURT
FILED

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Deputy

Court of Appeal, Second Appellate District, Division Three - No. B303019

S273814

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

WILLIAM ROBERT BRAMSCHER, Defendant and Appellant.

The petitions for review are denied.

CANTIL-SAKAUYE

Chief Justice

Warning
As of: February 22, 2022 7:23 PM Z

People v. Bramscher

Court of Appeal of California, Second Appellate District, Division Three

February 15, 2022, Opinion Filed

B303019

Reporter
2022 Cal. App. Unpub. LEXIS 905 *; 2022 WL 457838

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ROBERT BRAMSCHER, Defendant and Appellant.

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Prior History: [*1] APPEAL from a judgment of the Superior Court of Los Angeles County, No. YA100270, Alan B. Honeycutt, Judge.

Disposition: Affirmed.

Core Terms

threats, trial court, police department, criminal threat, bifurcation, prior conviction, recorded, robbery, protective order, first call, phone, unanimity instruction, continuous course, prejudicial, kill, charged offense, make a threat, sustained fear, no evidence, referenced, convicted, jurors, posts, make a criminal threat, court order, inflammatory, unanimity, minutes, argues, motive

Counsel: Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Kenneth C. Byrne and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: EDMON, P. J.; LAVIN, J., KNILL, J.* concurred.

Opinion by: EDMON, P. J.

Opinion

A jury convicted William Robert Bramscher of making criminal threats and disobeying a court

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* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

order. Bramscher contends his convictions must be reversed because the evidence was insufficient to prove the criminal threats charge, and the trial court made evidentiary and instructional errors. We disagree, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

Christopher C. was the General Manager of the Comedy and Magic Club located in Hermosa Beach (hereinafter "the club"). Between ~~2017~~ and 2019, Christopher twice spoke with appellant Bramscher in person at the club, before or during Jay Leno and Kevin Nealon comedy shows. During that same time period Christopher spoke with Bramscher on the [*2] telephone numerous times, and was able to recognize his voice. During these interactions, Bramscher was always angry. Christopher testified that typically, Bramscher would call "multiple times all in a row. He'll do it for two or three days, and then we won't hear from him. And then he'll get back and start doing it again." Bramscher referred to Christopher as the "salt and pepper motherfucker," and was the only person who used this nomenclature. In multiple calls during this period, Bramscher threatened to kill Christopher, burn the club down, and kill everyone inside.

Hermosa Beach Detective Dove investigated the threats, and on December 17, 2018, Bramscher was convicted of making a criminal threat in violation of *Penal Code section 422, subdivision (a)*. On that same date, a protective order was issued and served on Bramscher, prohibiting him from contacting Christopher and requiring him to stay away from the club. In a December 18, 2018 Facebook post, Bramscher stated: "Because of [Christopher C.] Hermosa Comedy & Magic Club and Hermosa Police I have been in jail on Criminal Threates #JayLeno innocent yet caged. I love life and all sorts of folks and the lies against me are liable [*sic*] and untrue. Life is all 'bout coming [*3] compassion and though this was not my fault I apologize to all those who believe in me and with me." Thereafter, Bramscher continued calling the club and threatening Christopher. In response to some of these threats, Christopher telephoned police.

On the afternoon of May 21, 2019, Christopher was in his office at the club. Employees C.S., Hannah B., and R.C. were working the phone reservation lines at workstations located within 15 feet of his office.

Bramscher called the club and C.S. answered. Christopher heard C.S. say, "you don't need to yell at me like that." C.S. seemed "shook up" by the call, so Christopher told him to put the caller on hold. Christopher then picked up the call, and determined "it was Mr. Bramscher in full rant." Bramscher did not give his name, but Christopher recognized his voice; additionally, Bramscher referred to Christopher as the "salt and pepper motherfucker," the same term he had used in the past. Bramscher was "screaming, cursing, just expletive after expletive, continual rant, a heightened screaming volume." He called Christopher "every name in the book." Bramscher

threatened, "Salt and pepper motherfucker, I'm going to kill you and burn that place [*4] down,"[1] and kill everyone inside the club. Christopher told Bramscher he was not supposed to contact him or the club, and hung up. The call lasted approximately two minutes.

Bramscher immediately called four additional times, in "back-to-back" calls. Christopher put the calls on speakerphone and the other three employees heard them. The calls were "immediate, one right after the other." Bramscher continued his tirade, and repeatedly threatened to kill Christopher, burn the club down, and kill everyone inside. Christopher attempted to record the calls, but was unsuccessful.

Christopher called the Hermosa Beach Police Department. He locked the club door, which was normally kept unlocked during business hours, and notified the club's owners of the threats. Christopher was concerned for his own safety. He took Bramscher's threats seriously and "absolutely" believed Bramscher would follow through on them. Christopher testified that the threats concerned him because Bramscher seemed unstable, and "[i]t's been going on for a year and a half, constant threats. The pattern of constantly calling, the threats. The continued threats."

Hannah testified that she was frightened as well. She explained, [*5] "[H]e was very scary for me. And I honestly didn't even want to be at work that day after it." She believed Bramscher would follow up on his threats. The club's owners also took the threats seriously and hired private outside security in response. They also added a caller identification feature to the club's phones.

At 5:00 p.m. on May 21, 2019, just after the series of calls to the club, Bramscher called the Hermosa Beach Police Department and spoke to a dispatch supervisor. He identified himself as "William." He stated that the "people at the Comedy and Magic Store are assholes"; asked for a copy of the police report related to the earlier incident; referenced "that salt and peppered hair guy"; complained that he "spent nine fucking months in the county jail because of these fucking liars"; complained that Detective Dove was "a fucking liar"; and claimed to be musician Taylor Swift's boyfriend. Bramscher stated that he was in San Diego, but "if I was in Hermosa I would walk up behind [Dove] and taking his fucking gun and put him in a choke hold." He also stated that if Dove wanted "to go man up" on him, he would knock Dove out. When the dispatcher reminded Bramscher that he was making [*6] threats against a police officer on a recorded line, he said "Hey, Detective Dove can suck my fucking cock" and made lewd remarks to the operator. A recording of the call was played for the jury.

The next day, May 22, 2019, Bramscher called the club again and Hannah answered. He identified himself as "Billy Bob Fucking Bramscher," and she recognized his voice. Bramscher immediately

[1] At the preliminary hearing, Christopher testified that Bramscher's threats began in the second call rather than the first. At trial, Christopher testified that to the best of his recollection, Bramscher made threats in the first as well as subsequent calls.

"started screaming and calling [Hannah] names and using profanity." Hannah hung up. Bramscher called back at least once and "continued to do the same thing and make threats." Hannah was able to record at least one call on her cellular telephone, and it was played for the jury. In that call, Bramscher stated, among other things, that he would "fucking bury" the "guy that fucking manages the place"; referenced the "salt and peppered haired mother fucker"; and accused Christopher of lying in the prior criminal case against him.[2] Hannah testified that Bramscher's tone and demeanor on the May 22 call were the same as in his calls the day before; he "pretty consistently stayed over-the-top upset."

Hermosa Beach Police Sergeant Jaime Ramirez determined that the recorded May 21 call to the Hermosa Beach Police Department [*7] was made from a number registered to Bramscher. Ramirez met with Bramscher on May 31, 2019. During that meeting Ramirez called the number, and Bramscher's phone rang. Pursuant to a warrant, Ramirez obtained Bramscher's TMobile cellular telephone records. They showed five calls from Bramscher's number to the club on May 21, 2019, with the first call made at 4:47 p.m. and 57 seconds. The records also showed calls to the Hermosa Beach Police Department on May 21, 2019. The phone records did not show calls from Bramscher's number to the club on May 22, 2019.

A May 21, 2019 Facebook post on Bramscher's account referenced the club and Christopher. The post stated: "Yo Jay Leno The Comedy and Magic Club is a FUCKED-down piece of SHIT! Taylor Swift #swifties. This Hermosa Beach Police Department #SUCKsDOVEcock! [¶] I, this unprofitable servant, San Diego Magazine San Diego, California am GONNA #Fuck Detective Guy Dove & every MOTHER-FUCKER on the Police-force . . . [¶] Dalai Lama i except [*sic*] responsibility for my actions, yeti, I am the one smiling Je Suis Calme. Life is #precious. #Karma is a BITCH i am just a janitor . . . [¶] I really *love* NATURE. Mother-nature. [¶] PAY no-mind to the [*8] CUNTS in the PHOTO just like that Governor of ALABAMA!" The Facebook page, which contained his photo, was public and not protected by privacy settings.

Bramscher represented himself at trial. The defense presented no evidence.

2. *Procedure*

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[2] Bramscher stated, among other things: "The guy that fucking manages that place, I'm going to fucking bury him. Rick, do you know who I am? I'm Billy Bob Fucking Bramscher and you tell that salt, salt and peppered haired motherfucker that . . . he ain't got a fucking job anymore. Well I'll make some calls and what a fake fucking little bitch, crying Jay Leno on my fucking dick, faggot fucker. Got it? Did you blend this call with anybody else? I heard you say that. So here, that salt and pepper fucker lied in fucking court so that is a Felony in my felony court. So, your piece of shit manager lied in a fucking court case with me in court on a felony so that means I get to fucking arrest that mother fucker and send him to hell in a fucking handbag. Cuz guess who's on not guilty? Me. So hey, little fucking Taylor Swift enjoy your fucking life fucking comedy club. Bitches. I'm looking at the paper right now and I said, Dali Lama, I accept responsibility for my actions, yeti, I am the one smiling. Je Suis Calme. . . . [T]hat salt and gray haired mother fucker quote unquote, he called himself that, I didn't. And that fucker lied in a fucking God damned court trial and he, he's a fucking liar."

A jury convicted Bramscher of one count of making criminal threats against Christopher (*Pen. Code, § 422, subd. (a)*, count 1)[3] and willfully violating a court order, a misdemeanor (§ 166, subd. (a)(4), count 2). The jury further found true the allegation that Bramscher had suffered the prior conviction on December 17, 2018, for violating *section 422*, a serious felony. (*§§ 667, subds. (b) — (i), 1170.12, subds. (a) — (d), 1192.7, subd. (c)(38)*.) The trial court sentenced Bramscher to the upper term of three years in prison on the criminal threats count, doubled to six years pursuant to the Three Strikes law, and a concurrent term of six months in jail on count 2.[4] It imposed a restitution fine, a suspended parole revocation restitution fine, a criminal conviction assessment, and a court security assessment.[5]

Bramscher filed a timely notice of appeal.

DISCUSSION

1. *The evidence was sufficient to prove the criminal threats offense*

Bramscher contends the evidence was insufficient to prove the criminal threats charge. We disagree.

To determine whether the evidence was sufficient to sustain [*9] a criminal 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.]'" (*People v. McCurdy (2014) 59 Cal.4th 1063, 1104, 176 Cal. Rptr. 3d 103, 331 P.3d 265*; *People v. Vargas (2020) 9 Cal.5th 793, 820, 265 Cal. Rptr. 3d 604, 468 P.3d 1121*.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Baker (2021) 10 Cal.5th 1044, 1103, 274 Cal. Rptr. 3d 655, 480 P.3d 49*.) The same standard applies when the prosecution relies on circumstantial evidence. (*Vargas, at p. 820*.) Reversal is unwarranted unless it appears ""that upon no hypothesis whatever is there sufficient substantial evidence to support"" the verdict. (*People v. Penunuri (2018) 5 Cal.5th 126, 142, 233 Cal. Rptr. 3d 324, 418 P.3d 263*.)

To prove a violation of *section 422*, the prosecution must "prove five elements: '(1) [T]hat 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 [*10] "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

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

[4] The court struck a *section 667, subdivision (a)* five-year enhancement in the interests of justice. (*§ 1385*.)

[5] The court also found Bramscher in violation of his probation on the earlier threats case, No. YA097929.

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. [Citation.]' [Citations.]" (*People v. Wilson (2010) 186 Cal.App.4th 789, 805, 112 Cal. Rptr. 3d 542*, italics omitted; *People v. Toledo (2001) 26 Cal.4th 221, 227-228, 109 Cal. Rptr. 2d 315, 26 P.3d 1051*.)

There was sufficient evidence to prove all five elements here. Bramscher threatened to kill Christopher, burn down the club, and kill everyone inside. These threats were unequivocal, unambiguous, specific, and unconditional, and threatened death. "A threat is sufficiently specific where it threatens death or great bodily injury." (*People v. Wilson, supra*, 186 Cal.App.4th at p. 806; *People v. Butler (2000) 85 Cal.App.4th 745, 752, 102 Cal. Rptr. 2d 269*.)

Bramscher engaged in a screaming diatribe laced with profanity and called Christopher "every name in the book," demonstrating the extent of his rage and his hatred of Christopher. Bramscher's tone was aggressive and "over the top upset." Given the words used, Bramscher's demeanor, and the repetition of the threats, the jury could **[*11]** readily infer that Bramscher intended his words to be taken as threats. (See *In re David L. (1991) 234 Cal.App.3d 1655, 1659, 286 Cal. Rptr. 398* ["climate of hostility" between threatener and the victim and manner in which threat was made readily supported the inference that the threatener intended the victim to feel threatened].)

The threats were sufficiently immediate and specific to convey a gravity of purpose and an immediate prospect of execution. "A threat is not insufficient simply because it does 'not communicate a time or precise manner of execution, *section 422* does not require those details to be expressed.' [Citation.]" (*People v. Butler, supra*, 85 Cal.App.4th at p. 752; *People v. Wilson, supra*, 186 Cal.App.4th at p. 806.) "While the third element of *section 422* also requires the threat to convey '"a gravity of purpose and an immediate prospect of execution of the threat,"' it 'does not require an immediate ability to carry out the threat. [Citation.]'" (*People v. Wilson*, at p. 807; *People v. Lopez (1999) 74 Cal.App.4th 675, 679, 88 Cal. Rptr. 2d 252*; *People v. Smith (2009) 178 Cal.App.4th 475, 480, 100 Cal. Rptr. 3d 471*; *In re David L., supra, 234 Cal.App.3d at p. 1660*.)

There was also sufficient evidence to show Bramscher's threats caused Christopher to be in sustained fear for his own safety, and that this fear was reasonable under the circumstances. Christopher testified that he took the threats seriously, was "absolutely" afraid Bramscher would carry them out, and they caused him to fear for his safety. He believed Bramscher was unstable—a reasonable conclusion **[*12]** based on Bramscher's behavior and statements—which lent special gravity to the threats. The testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to establish a fact and support a conviction. (*People v. Jones (2013) 57 Cal.4th 899, 963, 161 Cal. Rptr. 3d 295, 306 P.3d 1136*; *People v. Young (2005) 34 Cal.4th 1149, 1181, 24 Cal. Rptr. 3d 112, 105 P.3d 487*;

Evid. Code, § 411.) Given the nature of the threats, Christopher's testimony was not inherently improbable.

In response to the threats, Christopher locked the club doors for the rest of the day and called police. He reported the incident to management, who hired security and obtained a caller identification feature for the club's phones. These facts demonstrated sustained fear, i.e., that which ""extends beyond what is momentary, fleeting, or transitory."" (*People v. Wilson (2015) 234 Cal.App.4th 193, 201, 183 Cal. Rptr. 3d 541* [fifteen minutes of fear is sufficient to constitute sustained fear for purposes of section 422]; *People v. Fierro (2010) 180 Cal.App.4th 1342, 1348-1349, 103 Cal. Rptr. 3d 858*.) Hannah likewise testified that she believed Bramscher would follow through with his threats; she was frightened to the extent she did not "want to be at work" the next day, demonstrating Christopher was not overreacting to an insignificant statement. The fact Bramscher engaged in an unrelenting course of action, undeterred by his prior conviction and the protective order, also demonstrated that Christopher's fear was **[*13]** reasonable.

Bramscher nonetheless argues that the evidence was insufficient. He urges that the threats were made "in the midst of a ranting tirade" that was too irrational and nonsensical to convey a genuine threat of violence; he had made similar threats in the past, but never acted upon them; when he made the calls, he was not near the club and did not tell Christopher he was in the vicinity; Christopher called police at the club owners' direction, not of his own volition; and Christopher had not called police in response to some of the prior threatening calls, demonstrating he did not actually fear for his safety.

These arguments amount to nothing more than a request that this court reweigh the evidence and substitute our judgment for the jury's. This we cannot do. Where the evidence reasonably justifies the jury's findings, the judgment may not be reversed even if the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Solomon (2010) 49 Cal.4th 792, 816, 112 Cal. Rptr. 3d 244, 234 P.3d 501*; *People v. Harris (2013) 57 Cal.4th 804, 849-850, 161 Cal. Rptr. 3d 364, 306 P.3d 1195*.) ""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 **[*14]** falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." [Citation.]'" (*Harris, at p. 849*; *People v. Cortes (1999) 71 Cal.App.4th 62, 81, 83 Cal. Rptr. 2d 519* [where an appellant "merely reargues the evidence in a way more appropriate for trial than for appeal," we are bound by the trier of fact's determination].) The evidence was sufficient.

2. *Admission of evidence*

Bramscher contends that the trial court prejudicially erred by admitting evidence of his May 21, 2019 call to the Hermosa Beach Police Department, his May 22, 2019 call to the club, and the screenshots

of his Facebook page posts. We detect no error.

a. *Additional facts*

Before trial, the prosecutor sought to admit four recorded phone calls from Bramscher to the Hermosa Beach Police Department on May 21, 2019, made in quick succession approximately two minutes after his calls to the club, as well as the May 22, 2019 call to the club that Hannah recorded. As pertinent here, Bramscher objected that the calls were irrelevant and constituted improper character evidence. The trial court excluded all but one of the calls to the Hermosa Beach Police Department under Evidence Code *section 352*, because they were primarily **[*15]** comprised of Bramscher screaming and "being obscene." It found the first call to the police department, and the May 22 call to the club, probative on the issues of motive and identity, and admitted them over Bramscher's objection.

During trial, Bramscher objected to admission of his December 18, 2018 and May 21, 2019 Facebook posts, on the ground the evidence was inadmissible and inflammatory character evidence. The trial court found the Facebook posts were relevant to establish identity. They contained Bramscher's photo and name, referenced Christopher and the club, and used some of the same phrases Bramscher had used in his telephone calls. The court ordered portions of the Facebook posts redacted because they were inflammatory and had minimal relevance.

When Christopher testified that Bramscher had made threats to him prior to May 21, 2019, the court instructed the jury that "the testimony about prior acts and bad acts or threats" could not be considered as propensity evidence; "you can't consider that if someone did something in the past that means they're more likely to do it again." However, the jury could "consider past interaction[s] between [Christopher C.] and Mr. Bramscher **[*16]** as to whether in fact [Christopher C.'s] feelings and reactions to the statements that might have been made to him as to whether those were reasonable or not."

Before deliberations commenced, the court instructed with *CALCRIM No. 303* that "certain evidence was admitted for a limited purpose," and the jury could consider it for that purpose only and for no other. It also instructed with *CALCRIM No. 375* that evidence Bramscher committed an uncharged criminal threats offense could be considered only on the issues of motive, intent, and identity. The instruction further stated that the jury was not to consider this evidence for any other purpose; could not conclude from it that Bramscher had a bad character or was disposed to commit crime; and if it concluded Bramscher committed the uncharged offense, this was only one factor to consider and was not sufficient by itself to prove his guilt of the charged offenses.

b. *Applicable legal principles*

"Except as otherwise provided by statute, all relevant evidence is admissible." (*Evid. Code, § 351.*) Relevant evidence is "broadly defined as that having a 'tendency in reason to prove or disprove any disputed fact that is of consequence' to resolving the case." (*People v. Bryant, Smith and*

Wheeler (2014) 60 Cal.4th 335, 405, 178 Cal. Rptr. 3d 185, 334 P.3d 573 (*Bryant*); *Evid. Code, § 210*.) However, even relevant evidence [*17] may be excluded under Evidence Code *section 352* if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. (*People v. Steskal (2021) 11 Cal.5th 332, 355, 277 Cal. Rptr. 3d 604, 485 P.3d 1*.) Evidence is substantially more prejudicial than probative if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Beck and Cruz* (2019) 8 Cal.5th 548, 656.)

Evidence a defendant has committed misconduct or crimes other than those currently charged is inadmissible to prove he is a person of bad character, has a criminal disposition, or has the propensity to commit the charged acts. (*People v. Rivera (2019) 7 Cal.5th 306, 339-340, 247 Cal. Rptr. 3d 363, 441 P.3d 359*; *Bryant, supra, 60 Cal.4th at pp. 405-406*; *Evid. Code, § 1101, subd. (a)*.) Such evidence is nonetheless admissible if it is relevant to prove, among other things, motive, intent, knowledge, or identity. (*Evid. Code, § 1101, subd. (b)*; *People v. Erskine (2019) 7 Cal.5th 279, 295, 247 Cal. Rptr. 3d 86, 440 P.3d 1112*.) Other crimes evidence should be excluded under Evidence Code *section 352* unless it has substantial probative value that is not outweighed by undue prejudice. (*Bryant, at pp. 406-407*; *People v. Thomas (2011) 52 Cal.4th 336, 354, 128 Cal. Rptr. 3d 489, 256 P.3d 603*.)

A trial court has broad discretion in determining whether evidence is relevant or unduly prejudicial. (*People v. Sanchez (2019) 7 Cal.5th 14, 54, 246 Cal. Rptr. 3d 296, 439 P.3d 772*.) We review a trial court's evidentiary rulings for abuse of discretion. (*People v. Thompson (2016) 1 Cal.5th 1043, 1114, 210 Cal. Rptr. 3d 667, 384 P.3d 693*.)

c. *Application here*

The trial court did not abuse its discretion by admitting the challenged evidence. Both [*18] the recorded calls and the Facebook posts were probative on the issue of identity, a disputed issue at trial. The May 21, 2019 calls to the club were not recorded and the caller did not identify himself. The trial court observed that "Mr. Bramscher has been contesting identity in this case. Several times has raised that issue in this matter."[6]

The two recorded calls and the Facebook posts were all clearly linked to Bramscher. In the call to the police department, Bramscher identified himself as "William," and Detective Ramirez traced the caller's number to Bramscher. The Facebook account listed Bramscher's name and contained his photo. In the May 22 call to the club, Bramscher identified himself as "Billy Bob Fucking Bramscher."

Based on the content of the two recorded calls and the Facebook posts, as well as the timing of the call to the police department, the jury could readily

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[6] Indeed, during cross-examination of Christopher, Bramscher stated, "[Christopher C.'s] identification is an extremely important part of this case." The prosecutor objected that the statement was argumentative, and it was stricken. Nonetheless, the statement demonstrates the defense position on the issue.

infer that the person who made them was the same individual who made the series of calls to the club on May 21, i.e., Bramscher. The May 21 call to the police department was made only minutes after Bramscher's calls to the club. In the police department call, he referenced the club, stating "these people at the [*19] Comedy and Magic Store are assholes." He also referenced the "salt and peppered hair guy," his unique nomenclature for Christopher. In the May 22 call to the club, he likewise referenced the "salt and pepper haired mother fucker" and expressed animosity toward Christopher, threatening to "fucking bury him" and requesting that Hannah tell Christopher, "he ain't got a fucking job anymore."

The December 18, 2018 Facebook post referenced the club, Christopher, and the Hermosa Beach Police Department, and blamed them for his incarceration on the earlier criminal threats charge. The May 21, 2019 Facebook post referenced the Dalai Lama and stated Bramscher took responsibility for his actions yet was still smiling; Bramscher made almost verbatim statements in his May 22, 2019 phone call. The Facebook post also contained unusual references to Taylor Swift and included the phrase "Je Suis Calme," as did the May 22 phone call. Thus, given these similarities, the timing of the call to the police department, and Bramscher's preoccupation with Christopher and the club as demonstrated in the challenged evidence, the jury could readily infer that Bramscher was also the person who made the series of [*20] calls to the club on May 21.

Bramscher complains that the challenged evidence lacked probative value because it was cumulative, in that there was "overwhelming evidence" he was the person who placed the May 21 calls to the club. He points out that Christopher testified he recognized Bramscher's voice, and the T-Mobile records showed a series of calls from a number registered to him to the club on May 21.[7] But, the defense attempted to paint Christopher as a liar. Had the jury accepted this view, it could also have rejected Christopher's testimony that he recognized Bramscher's voice. The T-Mobile records showed that the calls were made from a number linked to Bramscher, but they could not, of course, prove that Bramscher was the person using the phone. Bramscher did not stipulate that he made the May 21 calls to the club. And, even if he had, this would not have required exclusion of the evidence. Even when a defendant opts not to contest an issue or an element, the People are still entitled to prove their case. (See, e.g., *Bryant, supra, 60 Cal.4th at p. 407* [despite defendants' concession that whoever committed murders acted

[7] Bramscher also argues that the evidence was overwhelming because he "actually identified himself on the second call," i.e., the May 22 call to the club. But, as we understand his argument, he contends that May 22 call should have been excluded. Obviously, if the May 22 call had been excluded, his self-identification on that call could not have provided cumulative evidence of identity. Similarly, Bramscher argues that because his voice is distinctive, jurors would have been able to hear and recognize it. Again, if the recordings of his calls had been excluded, as he contends they should have been, no such comparison would have been possible. We also note that the trial court, in an abundance of caution, prohibited the prosecutor from arguing that Bramscher's voice appeared to match that on the calls in order to avoid infringing on his right to self-representation.

with premeditation and the intent to kill, this did not make evidence relating to those elements [*21] irrelevant or unduly prejudicial]; *People v. Rogers (2013) 57 Cal.4th 296, 329, 159 Cal. Rptr. 3d 626, 304 P.3d 124* [prosecutor cannot be compelled to accept a stipulation that would "deprive the state's case of its evidentiary persuasiveness or forcefulness."]; *People v. Steele (2002) 27 Cal.4th 1230, 1243, 120 Cal. Rptr. 2d 432, 47 P.3d 225*.)

Furthermore, the challenged evidence was highly probative on the issue of motive. The December 18, 2021 Facebook post stated Bramscher had been jailed for making criminal threats, complained about the lies that had been told about him, blamed Christopher and the club for his incarceration, and stated he was "innocent yet caged." In the May 21 call to the Hermosa Beach Police Department, Bramscher stated that when he left the jail, he left the police report behind and wanted a copy to prove his innocence in the prior offense. He stated that the "call never happened" and "this is between me and that salt and peppered hair guy." He averred that the officer who had investigated the prior case, Detective Dove, was a liar, and stated, "I spent nine fucking months in the county jail because of these fucking liars." In the May 22 call to the club, Bramscher stated, "that salt and pepper fucker lied in fucking court," "your piece of shit manager lied in a fucking court case with me in court," and "that salt and [*22] gray haired mother fucker . . . lied in a fucking God damned court trial and he, he's a fucking liar." The May 21, 2019 Facebook post expressed great animosity toward the club and the police department. Thus, the challenged evidence showed Bramscher's motive for the May 21 threats: he was angry because he had been charged and incarcerated in the prior case and blamed Christopher and Dove. ""[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence."" [Citation.]" (*People v. Chhoun (2021) 11 Cal.5th 1, 32, 275 Cal. Rptr. 3d 2, 480 P.3d 550*; *People v. Thompson, supra*, 1 Cal.5th at pp. 1114-1115.)

And, the calls were relevant to demonstrate Bramscher's demeanor and tone, factors relevant to the jury's determination of whether Christopher's fear was reasonable. (See *In re Ryan D. (2002) 100 Cal.App.4th 854, 860, 123 Cal. Rptr. 2d 193* [manner in which the threat is made is relevant to prove the communication amounted to a criminal threat]; *People v. Solis (2001) 90 Cal.App.4th 1002, 1013, 109 Cal. Rptr. 2d 464* [defendant's mannerisms, affect, actions involved in making the threat, and subsequent actions should be taken into account to determine if threat falls within the proscription of section 422].) Hannah testified that Bramscher's tone, words, and "level of upset" during the May 22 call were consistent with the [*23] May 21 call. To a lesser extent, the jury could also use Bramscher's demeanor in the call to the police department as a gauge to his demeanor in the calls to Christopher made minutes earlier.

People v. Lopez (2011) 198 Cal.App.4th 698, 129 Cal. Rptr. 3d 583 and *People v. Balcom (1994) 7 Cal.4th 414, 27 Cal. Rptr. 2d 666, 867 P.2d 777*, cited by Bramscher, do not assist him. In *Lopez*,

evidence of prior theft-related incidents did not have substantial probative value to prove intent in the charged burglary. If, as the evidence showed, the defendant entered a residence and took property, his intent could not reasonably have been questioned as there was no innocent explanation for his conduct. (*Lopez, at p. 715.*) In *Balcom*, the court held evidence the defendant committed an uncharged rape and robbery soon after his commission of the charged rape was admissible to prove common design or plan. (*Balcom, at p. 418.*) However, the court noted that evidence of the uncharged rape was not probative on the question of intent; because if the defendant raped the victim of the charged crime at gunpoint, there could have been no genuine question as to his intent. (*Id. at pp. 422-423.*) Thus, these cases stand for the proposition that other crimes evidence is not probative on the issue of intent where, if the defendant committed the acts as charged, he must have had the requisite intent. Here, even [*24] assuming arguendo that the evidence was not particularly probative on the question of intent, it was highly relevant on the questions of identity and motive, as explained.

Nor was the probative value of the evidence outweighed by its potential for prejudice. The threats made in the two recorded calls were less inflammatory than the May 21 threats made to Christopher. In the latter, Bramscher threatened to kill Christopher, burn the club down, and kill everyone inside. In the call to the Hermosa Beach Police Department, Bramscher stated that if he was in Hermosa Beach he would walk up behind Detective Dove, take his gun, and put him in a chokehold; and if Dove "wanted to go man up . . . on me I would knock him the fuck out and he knows it." Thus, Bramscher's calls to the club contained more serious threats; he did not threaten arson or murder in the call to the police department. In the May 22 call recorded by Hannah, Bramscher stated, "The guy that fucking manages that place, I'm going to fucking bury him"; he also stated that because Christopher purportedly lied, Bramscher was entitled to arrest him and "send him to hell in a fucking handbag." These threats were no worse than those [*25] made on May 21. The December 18, 2018 Facebook post contained no threats. The May 21, 2019 Facebook post stated Bramscher would "fuck" Detective Dove and other members of the police force, but did not threaten murder or arson. (See *People v. Cordova (2015) 62 Cal.4th 104, 133-134, 194 Cal. Rptr. 3d 40, 358 P.3d 518* [fact other crimes were less inflammatory than the charged crime reduced any prejudicial effect]; *People v. Eubanks (2011) 53 Cal.4th 110, 144, 134 Cal. Rptr. 3d 795, 266 P.3d 301* [potential for prejudice is decreased when evidence of uncharged acts is no stronger or more inflammatory than that concerning the charged offenses]; *People v. Foster (2010) 50 Cal.4th 1301, 1332, 117 Cal. Rptr. 3d 658, 242 P.3d 105.*)

Moreover, several factors limited any potential prejudice. The trial court limited the evidence it admitted, excluding several of the calls to the Hermosa Beach Police Department and excising potentially inflammatory material from the Facebook posts. It gave a limiting instruction prohibiting the jury from using the uncharged

crimes evidence to conclude Bramscher had a bad character or a propensity to commit crime. We presume the jury followed this instruction, which mitigated the potential for prejudice. (*People v. Case (2018) 5 Cal.5th 1, 40-41, 233 Cal. Rptr. 3d 439, 418 P.3d 360*; *People v. Homick (2012) 55 Cal.4th 816, 866-867, 150 Cal. Rptr. 3d 1, 289 P.3d 791*; *People v. Jones (2011) 51 Cal.4th 346, 371, 121 Cal. Rptr. 3d 1, 247 P.3d 82*.)

"""Prejudice" as contemplated by [Evidence Code] *section 352* is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a *section 352* context, merely **[*26]** because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant."""" (*Bryant, supra, 60 Cal.4th at p. 408*.) Instead, the "prejudice" referred to in Evidence Code *section 352* applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. (*Bryant, at p. 408*; *People v. Duff (2014) 58 Cal.4th 527, 564, 167 Cal. Rptr. 3d 615, 317 P.3d 1148*.) The challenged evidence was not of this ilk. Given the probative value of the evidence, the trial court's ruling was not an abuse of discretion.

3. *Denial of motion to bifurcate*

Bramscher next argues that the trial court prejudicially erred by denying his request to bifurcate adjudication of his prior criminal threats conviction. We disagree.

a. *Additional facts*

Bramscher was charged in count 2 with disobeying a court order in violation of section 166, subdivision (a)(4). To prove this offense, the People were required to show that a court issued a written order requiring that Bramscher have no contact with Christopher; and Bramscher knew about the order and its contents, had the ability to follow it, and willfully violated it. (See *CALCRIM No. 2700*.)

The information also alleged that Bramscher had suffered a prior conviction for making criminal threats, a serious felony within **[*27]** the meaning of the Three Strikes law and *section 667, subdivision (a)*.

Before trial, the prosecutor stated that she intended to prove count 2 by introducing the protective order in the prior case, No. YA097929, along with a minute order indicating Bramscher had been personally served with the protective order. She also intended to introduce evidence of the prior conviction itself. Bramscher objected that admission of the prior conviction was prejudicial, and the court interpreted his comments as a motion to bifurcate.

The court and the parties discussed whether Bramscher and the People would stipulate that the protective order was lawful. Bramscher declined to stipulate to the order's authenticity, and the prosecutor opined that a stipulation would confuse the jury because there was an issue regarding the order's scope. The trial court denied the motion, explaining, "So the request as I interpreted it as a motion to bifurcate, that is denied. It's simply impossible to bifurcate issues in this matter because they're an inherent part of the charges in

count 2; that the People have to prove this is a lawful court order." Bramscher then stated he would agree to a stipulation, but contradictorily stated he still wanted [*28] to challenge the order's authenticity during argument. The court rejected this offer. Bramscher then stated he would "concede without that." The prosecutor, however, declined to stipulate.

Prior to jury selection, the court stated it had "declined to bifurcate [the prior] because it's so intertwined" with the charged offense, but was conducting further research on the issue and would revisit its ruling. After conducting further research, the court stood by its original ruling. It reasoned: "The element of the offense in [count 2] is that he was subject to a lawful court order. It's a lawful court order because he was convicted in that previous case. So I cannot sanitize it to any degree really."

Before opening argument, the court informed the jury, "It's also alleged that Mr. Bramscher was previously convicted of a charge of making criminal threats in case YA097929, and that conviction date was December 17, 2018, in the County of Los Angeles." It instructed that the jury could "not consider this evidence as proof that the defendant committed any of the crimes charged in this [case] or that he's facing."

At trial the prosecutor introduced a certified copy of the December 17, 2018 protective [*29] order, as well as a certified minute order in case No. YA097929 showing the prior conviction and service of the protective order upon Bramscher.

As noted, at the close of the case the court gave a limiting instruction prohibiting the jury from relying on the prior conviction as evidence Bramscher had a bad character or was disposed to commit crime.

b. *Discussion*

A trial court has discretion under *section 1044* to "order that the determination of the truth of a prior conviction allegation be determined in a separate proceeding before the same jury, after the jury has returned a verdict of guilty of the charged offense." (*People v. Calderon (1994) 9 Cal.4th 69, 75, 36 Cal. Rptr. 2d 333, 885 P.2d 83* (*Calderon*); *People v. Hernandez (2004) 33 Cal.4th 1040, 1048, 16 Cal. Rptr. 3d 880, 94 P.3d 1080*.) "Having a jury determine the truth of a prior conviction allegation at the same time it determines the defendant's guilt of the charged offense often poses a grave risk of prejudice," because there is a serious danger "the jury will conclude that defendant has a criminal disposition" and probably committed the charged offense. (*Calderon, at p. 75*.) Thus, such evidence is admitted only with caution, and bifurcation is generally proper. (*Ibid.*; *People v. Cunningham (2001) 25 Cal.4th 926, 983, 108 Cal. Rptr. 2d 291, 25 P.3d 519*.)

"The potential for prejudice will vary . . . depending upon the circumstances of each case. Factors that affect the potential for prejudice include, [*30] but are not limited to, the degree to which the prior offense is similar to the charged offense [citations], how recently the prior conviction occurred, and the relative seriousness or inflammatory nature of the prior conviction as compared with the charged offense [citations]." (*Calderon, supra, 9 Cal.4th at*

p. 79; People v. Burch (2007) 148 Cal.App.4th 862, 866-867, 55 Cal. Rptr. 3d 892.) We review a trial court's ruling on bifurcation for abuse of discretion. (Calderon, at p. 79; Burch, at p. 867.) The denial of a timely bifurcation motion is an abuse of discretion where evidence of the alleged prior conviction poses a substantial risk of undue prejudice. (Calderon, at pp. 77-78.)

However, bifurcation is not required if the defendant will not be unduly prejudiced by a unitary trial. (*Calderon, supra*, 9 Cal.4th at p. 72.) Calderon explained: "bifurcation is *not* required *in every instance*. In some cases, a trial court properly may determine, prior to trial, that a unitary trial of the defendant's guilt or innocence of the charged offense and of the truth of a prior conviction allegation will not unduly prejudice the defendant. Perhaps the most common situation in which bifurcation of the determination of the truth of a prior conviction allegation is *not* required arises when, even if bifurcation were ordered, the jury still would learn of the existence of the prior conviction before returning [*31] a verdict of guilty. For example, when the existence of the defendant's prior offense otherwise is admissible to prove the defendant committed the charged offense—because the earlier violation is an element of the current offense [citations] or is relevant to prove matters such as the defendant's identity, intent, or plan [citations]—admission of the prior conviction to prove, as well, the sentence enhancement allegation would not unduly prejudice the defendant. . . . Under such circumstances, a trial court would not abuse its discretion in denying a defendant's motion for bifurcation." (*Id. at p. 78*, internal fns. omitted; *People v. Cunningham, supra*, 25 Cal.4th at pp. 983-984; *People v. Burch, supra*, 148 Cal.App.4th at p 867.)

Such was the situation here. The existence of the prior conviction was inextricably intertwined with the current charges. To prove count 2, the People had to present evidence of the protective order, which arose from the prior case. Evidence Bramscher had been convicted in the prior case showed the reason for his ire at Christopher, and his motive for making the charged threats. The parties' prior relationship was relevant to the jury's consideration of the current charges. (See, e.g., *People v. Solis, supra*, 90 Cal.App.4th at p. 1013.) Bramscher's history of threatening Christopher, and the fact he had suffered the prior [*32] conviction yet persisted in making threats toward him, was directly relevant and probative to establish Christopher's fear was reasonable. For the reasons we have described, the recorded phone calls and the Facebook posts were highly probative and properly admitted. Through this evidence, the jury would necessarily have learned of the existence of the prior case, as well as the fact Bramscher had served time in jail. Thus, bifurcation would have been of minimal value to the defense; the jury would inevitably have learned of Bramscher's prior conduct, incarceration, and the protective order, at the very least.

Moreover, the prosecution did not introduce evidence of the threats that formed the basis for the prior conviction. The fact the prior conviction existed was less inflammatory than the evidence

admitted to prove the charged offenses. The limiting instruction also served to minimize potential prejudice. Thus, Bramscher could have suffered no prejudice by admission of the conviction itself. In sum, the trial court's ruling was based on precisely the rationale stated in *Calderon*, and was not an abuse of discretion.

Contrary to Bramscher's argument, *Calderon* does not compel a different result. There, [*33] the defendant was charged with burglary, and the court admitted evidence he had previously been convicted of a theft-related offense. (*Calderon, supra*, 9 Cal.4th at p. 72.) *Calderon* held the trial court erred by denying defendant's bifurcation request.[8] (*Id.* at p. 80.) But, unlike in the instant matter, there was "no indication" that the potential for prejudice "would be lessened because evidence of the alleged prior offense, or additional prior criminal conduct, would be admitted for other purposes" at trial. (*Ibid.*)

Relying on *People v. Bouzas (1991) 53 Cal.3d 467, 279 Cal. Rptr. 847, 807 P.2d 1076*, Bramscher further argues that his request to bifurcate should have been granted because he offered to stipulate to the fact a valid protective order existed. *Bouzas* held that a defendant charged with petty theft with a prior could stipulate to the prior and thus preclude the jury from learning of it. (*Id. at p. 469.*) But, assuming arguendo that Bramscher's offer to stipulate was unequivocal, bifurcation was nonetheless not required. As explained *ante*, bifurcation is not required where the jury would learn of the conviction regardless. As discussed, such was the case here. In contrast, the *Bouzas* decision gave no indication that the prior conviction was admissible for any other purpose in that case.

4. *Purported instructional [*34] errors*

Bramscher contends the trial court erred by failing to give a unanimity instruction and by failing to instruct on the lesser included offense of attempted criminal threats. Neither contention has merit.

a. *Unanimity instruction*

A jury verdict in a criminal case must be unanimous. (*People v. Selivanov (2016) 5 Cal.App.5th 726, 751, 210 Cal. Rptr. 3d 117.*) This means that "'the jury must agree unanimously the defendant is guilty of a *specific* crime.' [Citation.] Thus, 'if one criminal act is charged, but the evidence tends to show the commission of more than one such act, "*either* the prosecution must elect the specific act relied upon to prove the charge to the jury, *or* the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." [Citations.]' [Citation.]" (*People v. Jo (2017) 15 Cal.App.5th 1128, 1178, 224 Cal. Rptr. 3d 82, People v. Covarrubias (2016) 1 Cal.5th 838, 877-878, 207 Cal. Rptr. 3d 228, 378 P.3d 615.*) The prosecutor may make such an election during argument or opening statement. (*People v. Brown*

[8] *Calderon* held the error was harmless in regard to the burglary charge because the defendant admitted the prior outside the jury's presence, but could have been prejudicial to the extent it caused him to forego his right to a jury trial on the prior conviction allegation. (*Calderon, supra, 9 Cal.4th at p. 80.*)

(2017) 11 Cal.App.5th 332, 341, 217 Cal. Rptr. 3d 589.) The unanimity requirement is intended to eliminate the danger that the defendant will be convicted even though there is no single offense all the jurors agree he or she committed. (People v. Sorden (2021) 65 Cal.App.5th 582, 615, 280 Cal. Rptr. 3d 116.) The trial court must give a unanimity instruction sua sponte where the circumstances of the case require. (Covarrubias, at p. 877; Jo, at p. 1178.)

However, neither an election nor a unanimity instruction **[*35]** is required where the case falls within the continuous conduct exception, which arises in two contexts. (*People v. Jo, supra*, 15 Cal.App.5th at p. 1178; People v. Hernandez (2013) 217 Cal.App.4th 559, 572, 159 Cal. Rptr. 3d 35.) First, no unanimity instruction is required "when the criminal acts are so closely connected that they form part of the same transaction, and thus one offense." (*People v. Jo*, at p. 1178; People v. Williams (2013) 56 Cal.4th 630, 682, 156 Cal. Rptr. 3d 214, 299 P.3d 1185; *People v. Sorden, supra*, 65 Cal.App.5th at p. 615; *People v. Selivanov, supra*, 5 Cal.App.5th at p. 752.) "There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime. [Citation.]" (People v. Jennings (2010) 50 Cal.4th 616, 679, 114 Cal. Rptr. 3d 133, 237 P.3d 474; *People v. Covarrubias, supra*, 1 Cal.5th at p. 879; *People v. Selivanov*, at p. 752; *People v. Williams*, at p. 682 [continuous conduct rule "'applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.'"].)

Second, no unanimity instruction is required when the statute in question "defines the offense to comprise a continuous course of conduct over a period of time." (*People v. Jo*, at p. 1178; *Jennings, at p. 679.*)

We review questions of instructional error de novo. (*People v. Sorden, supra*, 65 Cal.App.5th at p. 615; *People v. Selivanov, supra*, 5 Cal.App.5th at p. 751.)

Here, the criminal threats offense was alleged to have occurred during the series of five calls Bramscher made to the club on May 21, 2019. The prosecutor did not make an election as to which of the five calls served as the basis for the charge, and the court did not give a unanimity instruction. But, neither was required because **[*36]** the five calls and the threats made therein comprised a continuous course of conduct.[9]

All five calls were made within a brief period, one immediately after the other, in a continuous, "back to back" transaction. The T-Mobile call logs indicated that the first call occurred at 4:47 p.m. and the last at 4:56 p.m. (See *People v. Williams, supra*, 56 Cal.4th at p. 682 [unanimity instruction not required where the criminal acts took place within a very small window of time]; People v. Haynes (1998) 61 Cal.App.4th 1282, 1295-1296, 72 Cal. Rptr. 2d 143 [course of conduct exception applied where two robberies occurred just minutes and blocks apart, involved the same victim, the same property, and had the same objective of

[9] It is undisputed that the second statutory basis for the exception does not apply here.

getting all the victim's cash]; *People v. Sorden, supra*, 65 Cal.App.5th at pp. 616-617 [defendant's acts of struggling with a female victim, punching a male victim, and then throwing the female victim over his shoulder and carrying her down a driveway, were so closely connected in time as to form part of one transaction].) Here, as in these cases, the calls all occurred within a brief period, and involved the same victim and the same threats. (See *People v. Hernandez, supra*, 217 Cal.App.4th at p. 573 [a continuous course of conduct exists "when the same actor performs the same type of conduct at the same place within a short period of time, such that a jury cannot reasonably distinguish different instances [*37] of conduct."].) For all practical purposes, the five calls were equivalent to one conversation.

Bramscher argues that because of Christopher's "confusion regarding the calls, and when the threat actually occurred," the absence of a unanimity instruction was problematic. We disagree. Christopher testified at trial that, to the best of his recollection, during the first call Bramscher threatened to kill him, burn the club down, and kill everyone inside, and made essentially the same threats in each call thereafter. At the preliminary hearing, Christopher's testimony suggested that during the *first* call, he hung up on Bramscher before the threats were made, and the threats began in the second call. Based on this, Bramscher argues it is reasonably probable that the jury did "not agree on which call constituted the single count of making criminal threats and the single count of violating a court order." But the salient point is that Christopher definitively testified the threats were made during the series of calls, which constituted a continuous course of conduct. He explained at trial, "Whether the threat happened on that [first] call or other calls, I don't know, but you threatened me [*38] so many times." After the first call, Bramscher "called immediately back and started with the profanity and the ranting again. So there [were] continued threats made. Whether they were on the first, second, third, I think it was all the way through." "The tirades . . . they're so many they bleed together." In other words, the only evidence showed the sequence of calls was properly viewed as a continuous course of conduct.

Contrary to Bramscher's argument, there is no probability that jurors might have disagreed on which act formed the basis for the charged crimes. Even if some jurors concluded Bramscher's threats began during the first call, whereas others concluded the threats began during the latter calls, such a disagreement would have been of no moment. Any juror who credited Christopher's trial testimony that Bramscher made threats during the first call could have had no rational basis to disbelieve Christopher's testimony that the same threats were made in the subsequent calls. (See *People v. Covarrubias, supra*, 1 Cal.5th at p. 880.) A different juror who found no threats were made in the first call, but who voted guilty, necessarily would have concluded threats were made in the subsequent calls. In other words, even if jurors [*39] disagreed about whether Bramscher made threats in the first call, they must have all agreed that he did make threats in the other calls. There was no conceivable basis for jurors to

conclude the threats were limited to the first call or only a single one of the subsequent calls. In short, there was no danger that jurors would base their verdicts on different acts.[10]

Further, Bramscher did not present different defenses in regard to the different calls.[11] He argued, instead, that he was exercising his protected First Amendment right to free speech; because discrepancies between the police report or search warrant, preliminary hearing testimony, and Christopher's trial testimony existed, there was inadequate proof any threats were made; because the prosecution failed to present additional items of evidence, it had not met its burden of proof; and the terms of the protective order did not prohibit him from contacting the club. Bramscher did not offer a defense based on a showing that he made threats in one call but not others; rather his defense was that the prosecution had failed to prove he made criminal threats, or violated the protective order, at all. (See *People v. Williams, supra*, 56 Cal.4th at p. 682 ["Defendant did not offer a defense based **[*40]** on a showing that he committed either the attempted robbery or the completed robbery, but not both. Rather, his defense was that he was not present at the scene of the crime and therefore played no role whatsoever in any of the crimes committed there. A unanimity instruction therefore was not required."]; *People v. Covarrubias, supra*, 1 Cal.5th at p. 880; *People v. Percelle (2005) 126 Cal.App.4th 164, 182, 23 Cal. Rptr. 3d 731* [defendant twice attempted to purchase cigarettes using a counterfeit access card; there was "no reasonable basis to distinguish between defendant's first visit to Discount Cigarettes on September 20, 2002, and his second visit a little over an hour later"; he did not proffer a separate defense to the two acts and there was "no conceivable construction of the evidence that would permit the jury to find defendant guilty of the crime based upon one act but not the other."].)

People v. Riel (2000) 22 Cal.4th 1153, 96 Cal. Rptr. 2d 1, 998 P.2d 969, is instructive. There, the defendants robbed a truck stop and kidnapped the cashier, drove the victim to another location, stole his wallet while in the car, and killed him. (*Id. at pp. 1172-1173.*) The defendant argued that a unanimity instruction was required because the evidence disclosed two distinct acts of robbery: (1) the initial robbery at the truck stop, and (2) the subsequent robbery of the victim in the car. (*Id. at p. 1199.*) Our Supreme **[*41]** Court rejected this argument, reasoning: "Even assuming that two distinct robberies occurred rather than one continuous robbery, 'there was no evidence here from which the jury could have found defendant was guilty of the robbery in the car but not the earlier one. [Citation.] . . . . The parties never

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[10] Bramscher argues that the arrest warrant stated Christopher did not answer any of the subsequent calls, apparently to support his contention that jurors might have split on whether any threats were communicated in subsequent calls. But the arrest warrant was not admitted into evidence; the only evidence at trial was that Christopher spoke to Bramscher in all five back-to-back calls.

[11] Bramscher conclusorily states that he "made separate defenses to each alleged phone call," but does not further elaborate on this assertion. The portions of the record he cites do not support this contention.

distinguished between the two acts. The defense was the same as to both: defendant was asleep in the backseat of the car and did not participate in any act of robbery." (*Ibid.*) It was "inconceivable" that a juror would have believed the testimony of a prosecution witness regarding commission of the car robbery, but disbelieved his testimony about the truck stop robbery. (*Id. at p. 1200*, see also *People v. Bui (2011) 192 Cal.App.4th 1002, 1011, 121 Cal. Rptr. 3d 754* [several gunshots, fired within seconds of each other, were part of a continuous course of conduct; there was no evidence from which the jury could conclude defendant fired one shot but not the other and the jury must either have accepted or rejected victim's testimony in toto].)

The authorities Bramscher cites in support of his argument do not assist him. *People v. Diedrich (1982) 31 Cal.3d 263, 182 Cal. Rptr. 354, 643 P.2d 971*, is factually distinguishable. In *Diedrich*, "which found prejudicial error in not requiring unanimity, the facts showed two distinct acts of bribery to which **[*42]** the defendant offered different defenses: a 'simple denial' of one act and an '"expla[nation]"' of the other. [Citation.] Accordingly, the *Diedrich* jury could have divided on which bribery he committed, with the result that there was no unanimous verdict as to any act." (*People v. Riel, supra*, 22 Cal.4th at p. 1199 [discussing *Diedrich*].) There was no such possibility here.

In *People v. Melhado (1998) 60 Cal.App.4th 1529, 70 Cal. Rptr. 2d 878*, the defendant made separate threatening statements to the victim, the manager of an auto repair shop. At approximately 9:00 a.m., he threatened to blow the victim away if he did not release defendant's car, and said he would come back with a grenade. (*Id. at p. 1533.*) At 11:00 a.m., he returned with a grenade and threatened to blow up the establishment and the manager. (*Ibid.*) At 4:30 p.m., he returned a third time to pay for the car, with the grenade in his pocket. (*Ibid.*) The prosecutor failed to sufficiently communicate to the jury that only the 11:00 a.m. event was the basis for a criminal threats charge, and thus the trial court erred by failing to give a unanimity instruction. (*Id. at pp. 1535-1536.*) To the extent Bramscher cites *Melhado* for the proposition that the continuous conduct exception is inapplicable, this effort fails. *Melhado* did not consider the exception and therefore sheds no light on its application **[*43]** here. (See *People v. Baker, supra*, 10 Cal.5th at p. 1109 [cases are not authority for propositions not considered].) In any event, as is readily apparent, unlike the situation here, the threats in *Melhado* were made hours apart and under different circumstances.

Finally, Bramscher's citation to *People v. Salvato (1991) 234 Cal.App.3d 872, 285 Cal. Rptr. 837*, does not assist him. He argues that *Salvato* held "a series of criminal threats could not amount to a single violation of section 422 as a continuous course of conduct as a matter of law." *Salvato* observed that, as we have discussed, the continuous course of conduct exception applies in two contexts: first, when the acts are so closely connected that they form part of one and the same transaction; and second, when '"the statute contemplates a continuous course of conduct of a

series of acts over a period of time.'"[12] (*Id. at p. 882.*) Section 422, the court concluded, does not fall within the *second* context. (*Salvato, at p. 882.*)

It is undisputed that the second, statutory form of the continuous conduct exception does not apply here. Bramscher argues that because the People agree this facet of the exception is inapplicable, they have conceded "*People v. Salvato* is controlling," and reversal is required. But Bramscher misunderstands the import of *Salvato* and the People's argument. *Salvato* did *not* hold that the *first* category of the exception can [*44] never apply in a criminal threats case, or that the continuous course of conduct exception applies *only* when the statute at issue contemplates a series of acts over time. *Salvato* did not consider application of the first category. Indeed, *Salvato* recognized that the prosecution is not required to elect which acts constituted the offense where "the various acts do not constitute distinct potential crimes but rather one continuous course of criminal conduct." (*People v. Salvato, supra*, 234 Cal.App.3d at p. 882.)[13]

b. *Failure to instruct on lesser included offense*

Bramscher next contends that the trial court prejudicially erred by failing to sua sponte instruct on attempted criminal threats.

A trial court must sua sponte instruct the jury on lesser included offenses when there is substantial evidence the defendant is guilty of the lesser offense, but not the greater. (*People v. Landry (2016) 2 Cal.5th 52, 98, 211 Cal. Rptr. 3d 160, 385 P.3d 327*; *People v. Whalen (2013) 56 Cal.4th 1, 68, 152 Cal. Rptr. 3d 673, 294 P.3d 915.*) Substantial evidence is that which a reasonable jury could find persuasive. (*People v. Williams (2015) 61 Cal.4th 1244, 1263, 192 Cal. Rptr. 3d 266, 355 P.3d 444.*) The existence of *any* evidence, no matter how weak, will not justify an instruction. (*Whalen, at p. 68*; *People v. Nelson (2016) 1 Cal.5th 513, 538, 205 Cal. Rptr. 3d 746, 376 P.3d 1178*; *People v. Simon (2016) 1 Cal.5th 98, 132, 204 Cal. Rptr. 3d 380, 375 P.3d 1.*) In determining whether substantial evidence existed, we do not evaluate the credibility of the witnesses, a task for the jury. (*People v. Wyatt (2012) 55 Cal.4th 694, 698, 148 Cal. Rptr. 3d 508, 287 P.3d 78.*) We independently review the question of whether the trial court erred by failing to [*45] instruct on a lesser included offense, and view the evidence in the light most favorable to the defendant. (*Nelson, at p. 538*; *People v. Millbrook (2014) 222 Cal.App.4th 1122, 1137, 166 Cal. Rptr. 3d 217*; *People v. Larsen (2012) 205 Cal.App.4th 810, 824, 140 Cal. Rptr. 3d 762.*)

We have set forth the elements of section 422 *ante*. Attempted criminal threats is a lesser included offense of making criminal threats.

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[12] Examples of such statutes include sections 136.1 (attempt to prevent or dissuade a witness from testifying), 288.5 (continuous sexual abuse of a child), and 278.5 (concealing a child). (See *People v. Salvato, supra*, 234 Cal.App.3d at pp. 882-883; *People v. Jo, supra*, 15 Cal.App.5th at pp. 1178-1179; *People v. Cissna (2010) 182 Cal.App.4th 1105, 1123-1124, 106 Cal. Rptr. 3d 54.*)

[13] In light of our conclusion that a unanimity instruction was not required, we do not reach the parties' arguments regarding prejudice.

(*People v. Chandler (2014) 60 Cal.4th 508, 513-514, 176 Cal. Rptr. 3d 548, 332 P.3d 538*, *People v. Toledo, supra*, 26 Cal.4th at pp. 226, 230; *In re Sylvester C. (2006) 137 Cal.App.4th 601, 607, 609, 40 Cal. Rptr. 3d 461*.) It occurs when, for example, the victim does not actually receive the threat, does not understand it, or for some reason is not placed in sustained fear. (See *Chandler, at p. 515*; *Toledo*, at p. 231.) To prove attempted criminal threats, the People must establish that the defendant harbored a subjective intent to threaten, and that the intended threat, under the circumstances, was objectively threatening, that is, was sufficient to cause a reasonable person to be in sustained fear. (*Chandler, at pp. 511, 525*.)

Here, the trial court did not err because, viewing the record in the light most favorable to the defense, there was insufficient evidence to support the conclusion that Bramscher was guilty of only attempted criminal threats. As we have discussed, the evidence showed Christopher heard the threats, which were made repeatedly. The threats were unconditional, unequivocal, and direct. Christopher testified that he was frightened by the threats, took them seriously, was "absolutely" afraid Bramscher **[*46]** would carry them out, and locked the doors in response; the club owners hired security and added a caller identification feature to the phones. Hannah likewise testified that she was frightened and believed Bramscher would follow through. This evidence showed Christopher's fear was reasonable and genuine. No evidence meaningfully contradicted the foregoing facts; there was no evidence from which the jury might have concluded Christopher did not receive the threats, did not understand them, was not placed in sustained fear as a result, or his fear was unreasonable. (See *People v. Toledo, supra*, 26 Cal.4th at p. 231.) Bramscher did not argue that Christopher's fear was unreasonable or not genuine; instead, the defense theory was that Christopher was lying and the perceived contradictions in the People's case were significant enough as to raise a reasonable doubt that the threats were made. In short, there was no evidence that would have supported a jury finding of the lesser included offense.

Bramscher argues that instruction on attempted criminal threats was required because (1) "there was little or no evidence" he "knew he was speaking to the target of his threatening language"; (2) there was evidence Christopher was aware Bramscher **[*47]** was not in a position to carry out the threat; (3) because Bramscher's past threats were not carried out, and were "expressed" in a "nonsensical way," Christopher's fear was not objectively reasonable; (4) there was no evidence Christopher was in sustained fear "based on any particular threat"; (5) Christopher's fear was based on the number of calls, rather than their content; (6) the threats were not unconditional and were "incomplete"; and (7) Christopher did not experience sustained fear.

These contentions lack merit. There was evidence Bramscher knew he was speaking to Christopher on May 21, 2019; Bramscher referred to him as the "salt and pepper mother fucker" in the calls. Bramscher's threats to kill Christopher, burn down the club, and kill everyone inside were not

nonsensical, conditional, or incomplete. The record contains no evidence that Christopher knew Bramscher was not in a position to carry out his threats, and Bramscher cites none.[14] The assertion that Christopher was afraid due to the number of calls rather than their content is a non sequitur and not supported by the evidence. Christopher testified consistently that he was afraid and believed Bramscher would follow through [*48] on his threats. He called police and locked the club doors, and the club thereafter hired security and got new phones. Given this evidence, the mere fact Bramscher had not previously carried out his threats was not sufficient evidence to require an instruction on attempt. Because the evidence was insufficient, no instruction on attempted criminal threats was required.

5. *Cumulative error*

Bramscher contends that the cumulative effect of the purported errors requires reversal, even if they were individually harmless. Because we have found no error, "there is no cumulative prejudice to address." (*People v. Landry, supra*, 2 Cal.5th at p. 101; see *People v. Cole (2004) 33 Cal.4th 1158, 1235-1236, 17 Cal. Rptr. 3d 532, 95 P.3d 811*.)

DISPOSITION

The judgment is affirmed.

EDMON, P. J.

We concur:

LAVIN, J.

KNILL, J.*

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[14] Apparently Bramscher was in San Diego, not Hermosa Beach, when he called. But, even assuming arguendo that this fact would have shown a lack of immediacy, there was no evidence that Christopher or anyone at the club knew that.

* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.