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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WAYNE JEROME JOHNSON, Defendant and Appellant.	A159389 (Contra Costa County Super. Ct. No. 05-190590-0)

A jury convicted defendant Wayne Jerome Johnson of stalking, domestic violence, and assault with a deadly weapon. On appeal, defendant contends his due process rights were violated by the admission of evidence regarding a restraining order against him, and the convictions for assault with a deadly weapon and related domestic violence charge and his stalking in violation of a restraining order conviction were not supported by substantial evidence. He further asserts he received ineffective assistance of counsel and contends his conviction for stalking in violation of a restraining order must be reversed because the restraining order was void. Finally, in supplemental briefing, defendant argues he is entitled to resentencing based on statutory changes to Penal Code sections 654 and 1170. We agree his

conviction for stalking in violation of a restraining order must be modified and he is entitled to resentencing, but otherwise affirm the judgment.[1]

I.

BACKGROUND

Jane Doe and defendant began dating after meeting at Space 550 San Francisco (Space 550), a salsa dance club that they both frequented. They dated on and off for approximately seven months until Doe ended the relationship. According to Doe's testimony, their relationship was punctuated with instances of domestic violence and harassment, which then continued after she attempted to end the relationship.

A. Procedural Background

Defendant was charged by information with stalking (Pen. Code, § 646.9, subd. (a); count 1), two counts of infliction of corporal injury on a person with whom he had a dating relationship (*id.*, § 273.5 subd. (a); counts 2 & 4), stalking in violation of a restraining order (*id.*, § 646.9, subd. (b); count 3), and assault with a deadly weapon (*id.*, § 245, subd. (a)(1); count 5). The information also asserted great bodily injury allegations (*id.*, § 12022.7, subd. (e)) as to counts 4 and 5, personal gun use allegations (*id.*, § 12022, subd. (b)(1)) as to count 4, and that counts 3 through 5 were committed in multiple counties (*id.*, § 784.7, subd. (b)).

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[1] On January 27, 2021, defendant requested this court take judicial notice of its nonpublished opinion in his prior appeal, [*Doe*] *v. Johnson* (Jan. 3. 2020, A156075) (*Johnson I*). On August 9, 2021, defendant filed a second request for judicial notice of a trial court order denying his petition for writ of habeas corpus. No opposition was filed to either request. Because the documents are relevant and appropriate for judicial notice, we grant both requests. (Evid. Code, §§ 452, subd. (d) & 459, subd. (a).)

A jury convicted defendant as to all counts and found true the personal use allegations. The court sentenced defendant to six years in prison. Defendant timely appealed.

B. Trial Testimony

1. Doe's Testimony

At trial, Doe testified regarding various threatening acts taken by defendant against her. In early September 2018, Doe testified she returned home in the evening and was unable to open her front or back doors. She called the police, and the responding officer found parts of a broken key inside each keyhole. Following the incident. Doe installed security cameras at her home.

Two days later, Doe arrived home and pulled into her garage. Doe screamed when she saw defendant approach her vehicle. Doe testified defendant grabbed her, forced her to the floor, straddled her, and pinned her down. Defendant stated something like, "It's all over for you," and Doe thought he was going to kill her. Doe attempted to defuse the situation by talking with defendant, telling him she loved him, and begging him not to hurt her. Defendant subsequently released Doe and left, and Doe called 911. Doe drove herself to the hospital, and she was diagnosed with a facial contusion. Footage from Doe's security camera showed defendant near her garage around the time she returned home. An automated license plate reader also captured defendant's car near Doe's home several times around the time of the incident.[2]

A few days later, Doe was at Space 550 when defendant approached her, grabbed her wrist, and insisted they dance. Doe initially told defendant

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[2] After this incident, Doe sought and obtained a temporary restraining order against defendant.

she did not want to dance, but acquiesced "because [she] was afraid of confrontation" and "didn't want to make a scene" in public.

The following night, defendant again approached Doe at Space 550, grabbed her wrist, and insisted they dance. When Doe refused, defendant said "something to the effect of, You don't want me to leave . . . because you know how it'll all go down." Doe interpreted the statement as a threat, and called the police while driving home.

A few days later, around 3:00 a.m., Doe was asleep when she was awoken by a loud noise on her bedroom window. She called 911, and the responding officer found a photocopy of a birthday card Doe had given defendant, a copy of a text or e-mail exchange between Doe and defendant, and an earring Doe had left at defendant's home, taped to Doe's bedroom window. Later that same day, defendant sent Doe an e-mail with the subject, "Get over the Bullshit!" Defendant wrote in part to Doe: "You chose to make me your enemy. . . . [¶] . . . [¶] . . . I am not going any damn place until you treat me right. . . . like you love me. [¶] . . . Does your choice to refuse to love me anger me? Of course it does. . . . [¶] Will it deter me[,] distract me from doing what I think I need to do? Hell no! Not in the slightest. I'm signed on for good. The only way you will slow me is to mortally wound me. . . . [¶] Love and kindness are the only things to which I will respond positively. Violence begets violence . . . . [¶] . . . [¶] . . . You'd better get it together before it's too late."

Three days later, Doe returned home to find a large posterboard taped over her security camera (a Ring doorbell) at her front door. The posterboard had a copy of an e-mail or text taped to it, which read, "Maybe you should reevaluate whether, in trying what you have been advised and what you know is not right, you are actually starting something or finishing

something." Doe called the police, who processed the posterboard and recovered defendant's fingerprint from tape attached to the posterboard. An automated license plate reader also captured defendant's car in the vicinity of Doe's home.

Doe's car also was vandalized on numerous occasions while parked near Space 550. The car's tires had been "slashed," the body keyed, the convertible canvas roof slashed, and the windshield was cracked. Doe reported these incidents to the police. She subsequently obtained a permanent restraining order against defendant.[3]

On December 1, 2018, Doe was walking with her friend near Space 550, when they heard a noise, and Doe reported feeling like she had been "clubbed" on her head. Doe felt her head and realized she was bleeding. Both Doe and her friend reported seeing a dark-colored Volkswagen[4] leaving the scene. Video footage in the area indicated a car matching their description in the area.

An ambulance transported Doe to the hospital, where it was determined she sustained a laceration to the back of her head, and medical personnel removed a metallic pellet from her head.

Toward the end of December, Doe was at the Allegro Ballroom dance studio in Emeryville, when she saw defendant nearby looking at her. Doe called 911, went outside to speak with the 911 dispatcher, and noticed

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[3] On January 3, 2020, Division Three of this court reversed the five-year restraining order on the grounds that defendant had not been properly served. The court directed the trial court to reinstate the temporary restraining order and set a new hearing to allow Doe to serve defendant. (*Johnson I, supra*, A156075.)

[4] Defendant's vehicle was a dark-colored Volkswagen Jetta.

defendant was also outside. Defendant looked directly at Doe and gestured toward her "as if he had a gun pointing at [her]."

In early January, Doe again saw defendant while she was at the Allegro Ballroom. She was sitting by a window when she saw defendant outside, "stoop[ed] low like he didn't want to be seen and . . . scooting along the front of the building looking inside." When she saw defendant directly at her window looking at her, Doe screamed and ran from the window. She went home and called the police.

2. Defendant's Testimony at Trial

Defendant testified in his own defense. He acknowledged meeting Doe in December 2017 at a salsa dance club. Regarding the allegations against him, defendant denied ever harassing or verbally and physically abusing Doe, including damaging her locks, physically attacking her, taping items to her window, covering her security camera, or vandalizing her car. Defendant admitted owning a Volkswagen Jetta at the time of the shooting, but suggested someone else could have been driving it that night. Defendant also denied violating the restraining order.

II.

DISCUSSION

On appeal, defendant raises numerous arguments challenging the judgment. First, he asserts his conviction for stalking while a restraining order was in place must be vacated because the restraining order was subsequently deemed void by this court. Second, defendant argues the trial court violated his due process rights by allowing evidence regarding the restraining order. Third, defendant asserts defense counsel was ineffective by failing to adequately challenge the admission of the restraining order and prior bad acts. Fourth, defendant contends insufficient evidence supports his

convictions for assault with a deadly weapon, and the corresponding domestic violence conviction and gun use enhancement. Fifth, defendant argues insufficient evidence supports his conviction for stalking in violation of a restraining order for events in December 2018 through January 2019. And, finally, defendant asserts cumulative error justifies reversal. We address each argument in turn.

A. Conviction for Stalking While a Restraining Order Was in Place

The jury convicted defendant of stalking in violation of a restraining order. (Pen. Code, § 646.9, subd. (b); count 3.) Defendant contends the conviction must be reversed because this court found the restraining order void. The Attorney General agrees the current conviction cannot stand, but instead argues this court should modify the judgment to reduce the conviction to stalking.

1. Relevant Factual Background

The prior opinion of our colleagues in Division Three summarizes the pertinent background, which we recount in relevant part here. (*Johnson I, supra*, A156075.) On September 10, 2018, Doe obtained a temporary restraining order (TRO) against defendant, and a hearing was scheduled for a permanent restraining order. While the TRO directed that a copy of Judicial Council form DV-109, "Notice of Court Hearing," and various other papers including the TRO be served on defendant, no such service was accomplished. Nor were the papers left at or mailed to either his home or work addresses.

At the hearing for the permanent injunction, defendant did not appear. The court proceeded with the hearing and issued a five-year restraining order precluding defendant from contacting or harassing Doe and her children. Defendant was served with the permanent injunction, and he moved to quash service of the TRO and the five-year restraining order.

On appeal, Division Three concluded the process server's declaration failed to satisfy the statutory service requirements. The court noted the declaration did not show proof of personal service—only unsuccessful attempts—or any attempts at substituted service in lieu of personal service. The court thus concluded the trial court lacked jurisdiction over defendant and "the five-year restraining order issued in violation of his right to due process." (*Johnson I, supra*, A156075.) The court reinstated the TRO and directed the trial court to conduct a hearing on a new multiyear restraining order.

2. Analysis

Penal Code section 646.9, subdivision (a) provides: "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking . . . ."
Subdivision (b) then imposes increased penalties for "Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party . . . ." (Pen. Code, § 646.9, subd. (b).)

At the time of defendant's conviction, the only operative restraining order was the five-year restraining order issued by the superior court. And that restraining order was reversed on appeal. (*Johnson I, supra*, A156075.) The parties agree a person cannot be convicted of violating a court order that was unlawfully issued. We agree. "The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment." (*People v. Gonzalez* (1996) 12 Cal.4th 804, 817.)

However, the statutory scheme allows this court to modify, rather than vacate, the conviction. In *People v. Muhammad* (2007) 157 Cal.App.4th 484, our colleagues in Division Five addressed "whether subdivisions (a), (b), and (c)(1) and (2) of [Penal Code] section 646.9 define separate substantive offenses, each with its own distinct elements." (*Id.* at p. 490.) The court rejected the Attorney General's argument that each subdivision constituted separate substantive offenses. (*Id.* at p. 492.) Rather, the court explained, "subdivisions (b), and (c)(1) and (2) of section 646.9 do not define a substantive offense. Subdivision (a) sets out the elements of the crime of stalking. Subdivisions (b) and (c), after referring to subdivision (a), focus on ' " 'the criminal history of the defendant which is not present for all such . . . perpetrators and which justifies a higher penalty than that prescribed for [stalking].' " ' " *Id.* at p. 493, fn. omitted.) The court thus concluded "subdivisions (b), and (c)(1) and (2) of [Penal Code] section 646.9 are penalty provisions triggered when the offense of stalking as defined in subdivision (a) of that section is committed by a person with a specified history of misconduct." (*Id.* at p. 494.)

The imposition of increased penalties under Penal Code section 646.9, subdivision (b) for stalking in violation of a restraining order amounts to a sentencing error. It does not impact the jury's stalking conviction under subdivision (a). And "[w]hen [a] sentencing error does not require additional evidence, further fact finding, or further exercise of discretion, the appellate court may modify the judgment appropriately and affirm it as modified." (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1441.) Given that the error in the present case does not require further factfinding or the further exercise of discretion by the trial court, we will modify the judgment to reduce the conviction to stalking by striking the application of the penalty provision of

Penal Code section 646.9, subdivision (b). We affirm the judgment as modified.[5]

B. Evidence Regarding the Domestic Violence Restraining Order

Defendant next argues his due process rights were violated when jurors heard evidence regarding the five-year restraining order, which was subsequently reversed on appeal. Defendant contends a juror would have concluded he committed stalking in September 2018 and domestic violence in September 2018, as alleged in counts 1 and 2, based solely on the issuance of the restraining order in October 2018.

1. Forfeiture

As a preliminary matter, defendant did not argue at trial that admission of the restraining order would violate his due process rights. "Evidence Code section 353 provides, as relevant, 'A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears [on] record an objection to or a motion to exclude or to strike the evidence that was timely made and *so stated as to make clear the specific ground of the objection or motion* . . . .' (Italics added.) 'In accordance with this statute, we have consistently held that the "defendant's failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable.' " (*People v. Partida* (2005) 37 Cal.4th 428, 433–334 (*Partida*).)

Defendant asserts his petition for writ of habeas corpus in the trial court, along with a motion in limine asking the court to prohibit references to

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[5] Apart from seeking reversal generally, we note defendant did not assert any specific opposition to the Attorney General's request that this court modify the judgment.

alleged prior bad acts by defendant, sufficiently raised his objections to the restraining order. Neither, however, actually objects to use of or reference to the restraining order at trial. First, the petition was filed—and ruled upon—approximately two months before defendant's jury trial. The petition thus could not replace the need to object at trial to the admission of the restraining order.

Nor did defendant's motion in limine preserve his due process objection. "A motion in limine can preserve an appellate claim, so long as the party objected to the specific evidence on the specific ground urged on appeal at a time when the court could determine the evidentiary question in the proper context." (*People v. Solomon* (2010) 49 Cal.4th 792, 821.) Here, however, the two-sentence motion only asked the court to "prohibit[ ] the Prosecution from directly or indirectly using, mentioning, or attempting to convey to the jury in any way information concerning any alleged prior bad acts attributed to Defendant." The motion neither identified the specific legal ground now advanced (i.e., an alleged due process violation) nor the specific evidence at issue (i.e., the five-year restraining order). Accordingly, the motion in limine did not preserve defendant's objection for appeal.

Finally, defendant asserts admission of the restraining order violated his right to a fundamentally fair jury trial. However, the California Supreme Court has explained a "constitutional argument is forfeited to the extent the defendant argued on appeal that the constitutional provisions required the trial court to exclude the evidence for a reason not included in the actual trial objection." (*Partida, supra*, 37 Cal.4th at pp. 437–438.) Here, there was no trial objection.[6]

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[6] Defendant also contends his objection to the admission of the restraining order constitutes a pure question of law appropriate for appeal. While a court "*may* consider on appeal 'a claim raising a pure question of law

2. Due Process

Even if defendant had not forfeited this claim, he has not demonstrated a due process violation. First, defendant contends the jury would have interpreted the restraining order as a finding that he committed past acts of abuse and made it more likely for them to convict him on all counts. Next, defendant asserts the title of the restraining order (" 'Domestic Violence Prevention' " order) would be interpreted as indicating past domestic violence and cause the jury to believe Doe's testimony regarding the charged acts. Similarly, he contends the gun prohibition and stay-away provisions of the restraining order prejudiced the jury against him. Finally, defendant argues evidence he violated the restraining order was prejudicial because it tended to prove his guilt on the related offenses.

The admission of evidence "violates due process only if it makes the trial fundamentally unfair." (*Partida, supra,* 37 Cal.4th at p. 436.) Erroneous admission of evidence results in an unfair trial " '[o]nly if there are no permissible inferences the jury may draw from the evidence,' " and " '[e]ven then, the evidence must "be of such quality as necessarily prevents a fair trial." ' " (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.) "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson*[7] test." (*Partida*, at p. 439.)

The admission of the restraining order does not meet this high threshold for finding a due process violation. At the time of trial, this court had not reversed issuance of the restraining order. And the trial court thus

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on undisputed facts,' " defendant offers no persuasive basis for this court to exercise such discretion. (*In re Stier* (2007) 152 Cal.App.4th 63, 75, italics added.)

[7] *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

reasonably admitted the restraining order to prove the elements of stalking in violation of a restraining order. CALCRIM No. 1301A required the prosecution to prove "a restraining order had previously been issued prohibiting" defendant from engaging in certain conduct against Doe, it "was in effect at the time of the conduct," and "defendant knew about the court order and its contents." Admitting evidence of the restraining order to prove this element of the charge did not render the trial unfair. And defendant has not cited any authority to suggest otherwise.

While defendant speculates as to what the jury may have implied from the restraining order, he does not argue the prosecution attempted to raise such implications. (Accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83 [speculation on appeal that the jury might not have followed instructions does not support reversal].) To the contrary, the prosecution's reliance on the restraining order appears extremely limited. Doe testified about obtaining the restraining order, and defendant testified about being served with the restraining order. Similarly, the prosecution elicited limited police testimony regarding service of the restraining order. Finally, during closing arguments, the prosecution only discussed the restraining order when asserting defendant had been served with the order. At no point during the trial did the prosecution explicitly or implicitly argue the jury should assume guilt based on the issuance of the protective order.

Defendant relies on *People v. Carmichael* (1926) 198 Cal. 534 and *People v. Rollo* (1977) 20 Cal.3d 109 to assert the jury would be more likely to find him guilty knowing a judge found that he committed the acts underlying the first two counts. We find those cases distinguishable. In *Carmichael*, the appellant argued the trial court erred in preventing him from asking prospective jurors about whether they were aware of his former trial. (*People*

v. Carmichael, at p. 543.) The court concluded "it was prejudicial error for the court to refuse the appellant the right to examine the jurors as to the effect on their minds of the standing of the former jury." (*Id.* at p. 547.) Similarly, in *Rollo*, the court concluded the trial court erred by allowing the prosecutor "to use [the] defendant's prior conviction for the purpose of impeachment without revealing to the jury the identity of the crime." (*People v. Rollo*, at p. 118.)

Here, however, there was no prior conviction or assessment of the charges against defendant. "[T]he issuance of a temporary restraining order, injunction or court order referred to in [Penal Code,] section 646.9[, subdivision] (b) does not necessarily reflect a criminal offense, but is issued to prohibit the stalking 'behavior' described in section 646.9[, subdivision] (a)." (*People v. Muhammad*, *supra*, 157 Cal.App.4th at p. 494, fn. 9; accord, *In re B.S.* (2009) 172 Cal.App.4th 183, 193–194 [issuance of restraining order does not require evidence of past abuse or an apprehension of future abuse].) And the acts underlying the restraining order were not "prior bad acts," but rather the basis for the criminal charges against defendant.

Defendant, citing *People v. Garcia* (2001) 89 Cal.App.4th 1321, next argues evidence that he violated the restraining order was " 'highly probative' " on the domestic violence charges and thus made jurors more likely to find him guilty of such charges. In *Garcia*, the defendant was charged in relevant part with spousal rape. (*Id.* at p. 1324.) The court admitted evidence of the defendant's restraining order violation as relevant to the issues of intent, lack of consent, and delayed reporting. (*Id.* at p. 1334.) The court noted such evidence was not admitted to prove a defendant's " 'disposition to commit such an act.' " (*Id.* at p. 1335.)

Here, the record does not reflect the trial court admitted evidence regarding the restraining order for any improper purpose. Nor does defendant cite any evidence in the record indicating admission of the restraining order made it more likely for the jury to find him guilty. The jury had no need to rely on the restraining order. Rather, ample evidence apart from the restraining order supported defendant's conviction.[8] For example, Doe testified about various events occurring at her house, including jammed locks on her doors, defendant's assault on her in her garage, and other harassment at her home. Doe's testimony regarding these events were corroborated by supporting evidence. Specifically, responding police confirmed objects had been jammed into her locks, found personal items between defendant and Doe taped to Doe's bedroom window, and recovered defendant's fingerprint from tape attached to a posterboard covering one of her security cameras. Footage from Doe's security cameras showed defendant near her home, and automated license plate readers captured defendant's car in the vicinity. Medical personnel confirmed Doe's injuries following the assault in her garage. Accordingly, the record contained ample evidence justifying the jury's conviction apart from the restraining order.

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[8] Defendant raises various arguments regarding the title of the restraining order and certain provisions therein. However, he failed to include a copy of the restraining order as part of the record. Nor has he included any other evidence to support his claims that (1) the trial court found defendant committed prior acts of domestic violence or that such evidence was presented to the jury, (2) Doe made similar statements at the restraining order hearing as she made at trial, or (3) the restraining order had certain provisions that would prejudice the jury against him. An appellant must present both facts supported by the record and legal argument supported by authorities, and defendant's failure to do so results in the waiver of his argument on appeal. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 109.)

C. Ineffective Assistance of Counsel

The legal principles governing a claim of ineffective assistance of counsel are well established. A defendant is " ' "entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate." ' " (*In re Lucas* (2004) 33 Cal.4th 682, 721.) To prevail on a claim of ineffective assistance, a "defendant must show both: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced his defense." (*People v. Davis* (2005) 36 Cal.4th 510, 551.)

To establish the first prong, a defendant must show that "counsel's performance . . . fell below an objective standard of reasonableness under prevailing professional norms." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) In evaluating this prong, "a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*Ibid.*) " ' "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." ' " (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) Because the presumption of counsel's competence can typically be rebutted only with evidence outside the record, a reversal on direct appeal is not warranted unless "(1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance [of counsel] are more appropriately resolved in a habeas corpus proceeding." (*Mai*, at p. 1009.)

To establish the second prong, a defendant must demonstrate "resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been

different." (*People v. Mai, supra*, 57 Cal.4th at p. 1009.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) "A defendant must prove prejudice that is a ' "demonstrable reality," not simply speculation.' " (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) As "[t]he object of an ineffectiveness claim is not to grade counsel's performance," where possible it is preferable "to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice" without addressing whether counsel's performance fell below an objective standard of reasonableness. (*Strickland*, at p. 697.)

1. The Restraining Order

Defendant first contends he was denied effective assistance of counsel because his attorney failed to challenge the restraining order despite being provided with defendant's appellate brief on this issue. Defendant asserts reasonably competent counsel would have been aware of the issue of ineffective service and brought a pretrial order to exclude the restraining order.

We need not decide whether defendant is correct that his trial counsel's failure to object to the restraining order was improper because defendant has failed to demonstrate prejudice. As discussed above, the restraining order served a limited role in defendant's trial. His speculation regarding how the jury may have interpreted the restraining order, or what assumptions they may have drawn from it, are insufficient to support a claim of ineffective assistance of counsel. (See *People v. Fairbank, supra*, 16 Cal.4th at p. 1241 ["A defendant must prove prejudice that is a ' "demonstrable reality," not simply speculation.' "].) Moreover, defendant raised his objections to the restraining order during his testimony. We thus conclude defense counsel's

failure to object to the restraining order was not reasonably likely to have affected the verdict and therefore did not constitute ineffective assistance of counsel.

2. Prior Bad Acts

Defendant next contends he received ineffective assistance of counsel because his attorney failed to object to the admission of prior uncharged acts of domestic violence.

a. Relevant Factual Background

Prior to trial, the prosecutor filed a motion to admit evidence of defendant's "prior acts of violence, harassment, and threats against [Doe]" pursuant to Evidence Code[9] sections 1101, subdivision (b) and 1109. These acts included 12 specific incidents: (1) defendant hitting Doe and pushing her down the stairs; (2) pushing Doe to the kitchen floor, holding a knife over her, and threatening to kill her; (3) pointing a weapon resembling a rifle at Doe; (4) dragging Doe into the bathroom and forcing her to remove her clothes and sit in the bathtub for an extended period; (5) forcefully putting his arm around Doe; (6) striking Doe in the face, removing her sunglasses, and taking her vehicle without permission; (7) throwing Doe's cell phone across a room while shouting at her; (8) publicly distributing a protective order issued against Doe; (9) sending harassing and threatening communications to Doe; (10) entering Doe's garage without permission after she returned home; (11) driving a vehicle within three feet of Doe after she left Space 550; and (12) telling Doe he would kill her if she sought a protective order against him.

In response, defendant filed a motion in limine to "prohibit[ ] use of prior bad acts." Specifically, defendant requested the court "prohibit the Prosecution from directly or indirectly using, mentioning, or attempting to

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[9] Further undesignated statutory references are to the Evidence Code.

convey to the jury in any way information concerning any alleged prior bad acts attributed to Defendant." He asserted such evidence would be irrelevant and "more prejudicial than probative."

At the in limine hearing, the court and the parties discussed both defendant's in limine motion to prohibit use of prior bad acts and the prosecution's motion in limine to allow uncharged bad acts under section 1109. The court noted section 1109 generally allows propensity evidence subject to an undue prejudice analysis under section 352. The court further explained its position that all bad acts were likely to come into evidence: "It just seems to me that what's going to happen here, happens in most of these trials, is the door is open and all aspects of this relationship eventually make their way into the record. Including, for example, allegations by defendants about inappropriate behavior, provocative behavior by the person that's alleged to be the victim."

Defense counsel emphasized his client's defense was that these events did not happen. In part, defense counsel explained he planned to attack Doe's credibility by using a restraining order issued against her, along with other materials, arising from an unrelated divorce proceeding. The court agreed to allow defense counsel to offer appropriate evidence demonstrating Doe threatened to take revenge on defendant to establish her motive to lie about instances of domestic violence. The parties also discussed at length two specific prior bad acts: (1) the incident involving defendant bringing a copy of a restraining order against Doe to a salsa club she frequented; and (2) an instance where defendant left her in Fremont after an argument in her car during which she exited the vehicle and he then drove away. The court informed the parties that evidence would be admitted if it was relevant and there was no undue prejudice, and the court's view of these prior acts was

that, "even if it could be subjected to serious criticism, [it] is still relevant." The court explained, "[I]n the absence of something that's sort of clearly frivolous in the sense that it has no bearing on the charges here at all . . . . everything that they've done in its entirety in the relationship is relevant here." The court further concluded, in light of the parties' differing versions of events, that the jury should "assess whether or not the conduct happened and how serious it was." The court then reemphasized its conclusion that all the evidence should be admitted for the jury to assess.

During the trial, Doe testified as to defendant's uncharged domestic violence against her. Doe stated that sometime in February or March 2018, she was leaving defendant's home in Oakland when he grabbed her, told her she could not leave, and pushed her down a set of stairs. Doe sustained bruises on her face and eye. Doe did not report the incident to police, but later confided to a friend that defendant had "thrown [her] down the stairs."

Also, in early 2018, Doe and defendant were in his home when he knocked her down, straddled her, and held a butcher knife over her. Doe thought defendant was going to kill her, but did not report the incident to police.

In the spring of 2018, Doe was gathering her personal things to leave defendant's home when he pointed what appeared to be a rifle at her. Defendant "told [Doe] to leave" or "he'll kill" her.

Doe ended her relationship with defendant for about six weeks around early May 2018. One day in late May or early June 2018, while Doe and defendant were separated, defendant approached Doe while she was on the dance floor at Space 550, put his arm around her neck, and "forcefully guided" her from the dance floor. Doe did not want to talk to him but

acquiesced because she "didn't want to make a scene." Defendant was angry and accused Doe of speaking poorly about him to a fellow dancer.

Doe and defendant resumed their relationship in late June 2018. Following their reconciliation, Doe was at defendant's home when he became "furious about [her] leaving or wanting to leave." Defendant dragged Doe into a bathroom, forced her to remove her clothes, filled the tub with water, and forced Doe to sit in it naked for about 45 minutes while he watched her. Doe cried and begged defendant to let her go, while he made multiple threats to kill her.

In late June, Doe was driving with defendant to Monterey when they got into an argument. Doe pulled off the freeway. Defendant hit Doe's head and pulled off her sunglasses, and she subsequently exited the vehicle. Defendant then got into the driver's side and drove away in her vehicle. Doe reported the incident to the police.

In late July, Doe was at defendant's house because they were planning to leave for Lake Tahoe the following day when he became angry at her for not giving him sufficient attention. Doe stated defendant grabbed her phone and threw it across the room. Doe was afraid and thought defendant might hurt her. She decided to stay the night because she thought he would try to stop her if she attempted to leave, and instead left in the morning. After she left, she contacted defendant and ended the relationship. She informed him she was not going on the trip to Lake Tahoe with him, but was instead going to Space 550.

That evening, Doe saw defendant at Space 550. When she arrived, someone handed her a copy of the protective order issued against her from her divorce proceedings. Doe reported feeling humiliated. Defendant

acknowledged bringing " 'a couple' " of copies of the order to Space 550, but denied " 'distribut[ing]' " them.

In August, Doe arrived home one night, and realized defendant had followed her inside the garage. There had been no indication that he would be there, and she had not invited him over. Doe screamed. Defendant told her to calm down, and then subsequently left.

Later in August, Doe encountered defendant at Space 550. Defendant stood right next to her, and she believed he was trying to intimidate her. Later, when Doe was leaving the club, defendant "zoomed" past her in his car at a high speed approximately three feet away.

After their breakup, defendant sent Doe numerous text messages, e-mails, and letters berating or harassing her.

At the close of evidence, the court instructed the jury with CALCRIM No. 852, which sets forth the permissible use of such evidence. CALCRIM No. 852 listed the 12 uncharged acts and informed the jury: "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed a specific act or acts of uncharged domestic violence. . . . [¶] If the People have not met this burden of proof as to any particular one of the twelve allegations specified above, you must disregard this evidence entirely as to that particular allegation or allegations." The instruction then provided guidance on how the jury could use the evidence if they determined the defendant committed one or more acts of uncharged domestic violence.

b. Analysis

Section 1109, subdivision (a)(1) provides in relevant part, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is

not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review the admission of evidence under the aforementioned rules for abuse of discretion. (*People v. Story* (2009) 45 Cal.4th 1282, 1295.)

i. Whether defense counsel's performance was deficient

Defendant first contends the prior bad acts evidence was inadmissible under sections 1109 and 352 because the evidence had minimal probative value and was highly prejudicial. Defendant contends the evidence had low probative value because Doe's testimony as to those events was uncorroborated and thus could not bolster her credibility. He thus contends the trial court would have excluded the evidence had trial counsel objected to its admission.

As an initial matter, defense counsel did, in fact, file a motion in limine to exclude evidence regarding prior bad acts. However, his advocacy in support of that motion and in opposition to the prosecution's motion to admit such evidence was minimal. Defense counsel explained his limited advocacy for excluding such evidence because he wanted leeway to admit evidence of Doe's past conduct to challenge her credibility. And he did so during the trial.

Moreover, we disagree with defendant's position that evidence of prior domestic violence was inadmissible.[10] "In conducting the careful weighing process to determine whether propensity evidence is admissible under section 352, trial courts 'must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission . . . .' " (*People v. Kerley*, *supra*, 23 Cal.App.5th at p. 535, quoting *People v. Falsetta* (1999) 21 Cal.4th 903, 917.) Courts applying this balancing test have regularly found evidence of past abuse to be relevant and admissible as propensity evidence. (See, e.g., *People v. Megown* (2018) 28 Cal.App.5th 157, 168 [affirming trial court order that found "unique 'probative value' " in history of abuse evidence "to establish a 'pattern of . . . violence' and found the evidence 'highly relevant' "]; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1338 [trial court did not abuse discretion in admitting past evidence of domestic violence because evidence "was not inflammatory," "there was no risk of confusion because the prior acts of domestic violence were less serious than the charged act," "the prior acts were not remote" in time, and the "evidence about these acts [did not] consume much time at trial"]; *People v. Johnson* (2010) 185 Cal.App.4th 520, 532 [finding "great" probative value in prior instances of domestic violence that were similar in nature to the charged offenses].)

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[10] Defendant argues prior acts lack probative value on the issue of credibility. But the question is whether the prior acts constitute valid propensity evidence, not whether they bolster Doe's credibility. (See *People v. Kerley* (2018) 23 Cal.App.5th 513, 535.)

While defendant complains about the number of prior instances of domestic violence presented to the jury, that numerosity makes such evidence more probative than evidence that he only engaged in such conduct once or twice. As explained by our colleagues in Division Four, "it is the frequency, regularity, and severity . . . that infuses this propensity evidence with probative strength." (*People v. Kerley*, *supra*, 23 Cal.App.5th at p. 536.) In addition, " ' " '[t]he principal factor affecting the probative value of an uncharged act is its similarity to the charged offense.' " ' " (*Ibid.*) And defendant acknowledges the uncharged acts "were virtually indistinguishable from the charged acts."

There are certainly factors that weigh against admission of the evidence. For example, as noted by defendant, there is no independent corroboration for many of the uncharged acts. However, evidence of uncharged crimes is not limited to evidence provided by third parties. (Accord, *People v. Gonzales* (2017) 16 Cal.App.5th 494, 502.) When considering the factors in sum, we conclude the trial court properly admitted such evidence. Accordingly, we cannot conclude defense counsel provided ineffective assistance by failing to advocate more fully to exclude such evidence.

ii. Prejudice from defense counsel's conduct

Even assuming defense counsel's advocacy was deficient, defendant has failed to demonstrate resulting prejudice.

"Error in admitting evidence of a defendant's prior acts of domestic violence under sections 1109 or 1101 is subject to the standard of prejudice set forth in [*Watson*, *supra*,] 46 Cal.2d 818." (*People v. Megown*, *supra*, 28 Cal.App.5th at p. 167; see also *People v. Ogle* (2010) 185 Cal.App.4th 1138, 1145 (*Ogle*) [any error in admitting uncharged act of domestic violence was

harmless under *Watson*].) "Under the *Watson* test, the trial court's judgment may be overturned on appeal only if the defendant shows 'it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error.' " (*People v. Megown*, at p. 167.)

Here, defendant has not demonstrated a reasonable probability of a more favorable result absent error. Specifically, defendant has not demonstrated a likelihood the court would have excluded the evidence of the uncharged acts had his counsel more vigorously advocated for exclusion of such evidence. The court repeatedly indicated its intention to allow all evidence related to the parties' relationship into the record. At the outset of the parties' argument on the issue, the court explained, "[A]bsent some unusual circumstance, I understand [section] 1109 pretty much opens the door to the history of the relationship." The court further explained its position that section 1109 "broadens the framework within which the prosecution can offer evidence," and stated, "It just seems to me that what's going to happen here, happens in most of these trials, is the door is open and all aspects of this relationship eventually make their way into the record. Including, for example, allegations by defendants about inappropriate behavior, provocative behavior by the person that's alleged to be the victim." Following argument by counsel, the trial court again reemphasized its position that "everything that they've done in its entirety in the relationship is relevant here" apart from "something that's sort of clearly frivolous in the sense that it has no bearing on the charges here at all . . . ." At no point did the court indicate any inclination to reconsider its position on the admissibility of such evidence.

Defendant argues the court would have, at a minimum, excluded several uncharged acts as inadmissible if properly argued by his counsel.

doubt standard for all other determinations." (*Ibid.*; see also *People v. Johnson* (2008) 164 Cal.App.4th 731, 738–740 [following *Reliford*]; *People v. Reyes*, *supra*, 160 Cal.App.4th at pp. 251–252 [same].)

Defendant primarily relies on *Cruz*, *supra*, 2 Cal.App.5th 1178 to argue against CALCRIM No. 852. In that case, the trial court instructed the jury it could consider charged and uncharged sexual offenses to draw the discretionary inference that the defendant had a propensity to commit sexual offenses. (*Cruz*, at pp. 1183–1184.) Instead of properly informing the jury that it could use other *charged* offenses as propensity evidence only if those charged offenses were proven beyond a reasonable doubt, the jury was told that it could apply a preponderance of the evidence standard when those charged offenses were being used as propensity evidence, but it was then required to use a beyond a reasonable doubt standard to determine whether the defendant was guilty of *the same charged offense*. (*Id.* at pp. 1185–1186.) As *Cruz* sensibly pointed out, "It would be an exaggeration to say the task required of the jury by the instruction given in this case . . . was logically impossible. A robot or a computer program could be imagined capable of finding charged offenses true by a preponderance of the evidence, and then finding that this meant the defendant had a propensity to commit such offenses, while still saving for later a decision about whether, in light of all the evidence, the same offenses have been proven beyond a reasonable doubt. A very fastidious lawyer or judge might even be able to do it. But it is not reasonable to expect it of lay jurors. We believe that, for practical purposes, the instruction lowered the standard of proof for the determination of guilt." (*Id.* at p. 1186.) The instruction in *Cruz* "presented the jury with a nearly impossible task of juggling competing standards of proof during different phases of its consideration of the *same* evidence." (*Id.* at p. 1187, italics

added.) Here, in contrast, the task which CALCRIM No. 852 directed the jury to perform was neither logically impossible nor complicated, and it did not concern the same evidence. The jury was simply expected to assess *uncharged* offenses under a propensity of the evidence standard, and to assess the different evidence concerning the *charged* offenses under a beyond a reasonable doubt standard.

Every jury instruction the trial court gave that mentioned a burden of proof to establish defendant's guilt advised the jury that a conviction could only be based on proof beyond a reasonable doubt. In fact, the trial court gave CALCRIM No. 220, a specific instruction on reasonable doubt, which states in relevant part: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. . . . [¶] . . . [¶] . . . Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." No jury instruction referenced conviction on anything other than proof beyond a reasonable doubt. Read as a whole, the charge to the jury was not susceptible to an interpretation that defendant could be convicted on less than proof beyond a reasonable doubt. Accordingly, defendant was not prejudiced by his counsel's failure to object to CALCRIM No. 852.

3. Elements of Charges

Defendant contends he was denied effective assistance of counsel because defense counsel failed to discuss the elements of the charges against defendant during closing argument.

"The right to effective assistance extends to closing arguments. [Citations.] Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing

presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact,' [citation], but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. [Citation.] Judicial review of a defense attorney's summation is therefore highly deferential . . . ." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 5–6.) "Reversals for ineffective assistance of counsel during closing argument rarely occur; when they do, it is due to an argument against the client which concedes guilt, withdraws a crucial defense, or relies on an illegal defense." (*People v. Moore* (1988) 201 Cal.App.3d 51, 57.) "The mere circumstance that a different, or better, argument could have been made is not a sufficient basis for finding deficient performance by defense counsel." (*People v. Ledesma* (2006) 39 Cal.4th 641, 748.)

Defendant merely asserts his counsel should have presented a different closing argument that emphasized the elements of the charges. But he does not contend, for example, that his counsel misrepresented the elements to the jury or conceded guilt as to certain elements or charges. Accordingly, defendant has not demonstrated ineffective assistance in connection with his counsel's closing argument.

4. Cumulative Error

Finally, defendant appears to argue he would not have been convicted absent the alleged errors by counsel in allowing evidence regarding the restraining order and prior bad acts, and by failing to discuss the elements of the charges. " 'Under the cumulative error doctrine, the reviewing court must "review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more

favorable to defendant in their absence." ' [Citation.] 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." ' " (*People v. Mireles* (2018) 21 Cal.App.5th 237, 249.)

Because we conclude defense counsel did not provide ineffective assistance to defendant, we reject his claim of cumulative error.

D. Sufficiency of the Evidence for Assault with a Deadly Weapon, the Related Domestic Violence Conviction, and the Deadly Weapon Enhancement

Defendant contends insufficient evidence supports his conviction for assault with a deadly weapon, the related domestic violence conviction, and an enhancement based on the use of a deadly weapon. We disagree.

1. Standard of Review

"In evaluating a claim regarding the sufficiency of the evidence, we review the record 'in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Westerfield* (2019) 6 Cal.5th 632, 713.) " 'To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt.' " (*People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

" 'The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.' [Citations.] 'We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.' " (*People v. Westerfield, supra*, 6 Cal.5th at p. 713.)

2. Relevant Law

Penal Code section 245, subdivision (a)(1) makes it unlawful to "commit[ ] an assault upon the person of another with a deadly weapon . . . ." "As used in [Penal Code] section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.)

Similarly, the enhancement under Penal Code section 12022, subdivision (b)(1) provides: "A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment . . . unless use of a deadly or dangerous weapon is an element of that offense."

The corresponding jury instruction, CALCRIM No. 3145, informed the jury in relevant part: "Someone *personally* uses a deadly or dangerous weapon if he or she intentionally does any of the following: [¶] 1. Displays the weapon in a menacing manner; [¶] 2. Hits someone with the weapon; or [¶] 3. Fires the weapon."

3. Analysis

Defendant argues insufficient evidence demonstrates that Doe was hit by a pellet, a pellet gun was used to cause the object to strike Doe, or he was the individual who fired the pellet gun. Defendant also argues the pellet gun was not a deadly weapon because it was not used in a manner that would cause great bodily injury. We disagree.

Substantial evidence supports the finding that Doe was struck with a pellet. Doe testified she felt something hit the back of her head while, at the same time, hearing a "thug" sound. She then discovered she was bleeding from her head. When Doe arrived at the hospital, the radiologist noted the presence of a "6 millimeter metallic attenuation foreign body in the left occipital scalp." Similarly, the treating physician wrote in her notes, "The CT reveals bullet" and Doe had a "Laceration on left occiput." Doe likewise testified a "metallic pellet" was "removed from the back of [her] head at the hospital." A photograph of the object removed from her head, which appears to be a metallic pellet-like object, was admitted into evidence.

A jury could reasonably conclude from this evidence that Doe was hit by a pellet. While defendant argues Doe testified the object was an inch long and thus could not be a pellet, which is closer to one-quarter of an inch, the photograph and the radiologist's notes indicate a small metallic object similar to a pellet.

Upon concluding Doe was struck by a pellet, the jury also could reasonably conclude this pellet was from a pellet gun fired by defendant. Doe and another individual present during the incident testified they saw a vehicle that looked like defendant's driving away from the scene. A camera in the area partially recorded the vehicle's license plate, and those numbers and letters that were recorded matched defendant's license plate. Prior to

the incident, defendant had sent an e-mail to Doe stating in part: "You chose to make me your enemy. . . . [¶] . . . [¶] . . . Does your choice to refuse to love me anger me? Of course it does. . . . [¶] . . . The only way you will slow me is to mortally wound me. . . . [¶] Love and kindness are the only things to which I will respond positively. Violence begets violence . . . . [¶] . . . [¶] . . . You'd better get it together before it's too late." And the next time Doe saw defendant at the Allegro Ballroom, Doe testified defendant looked directly at Doe and gestured toward her "as if he had a gun pointing at [her]."

While defendant argues someone else could have been driving his vehicle, he offers no evidence to suggest he was in a different location at the time or that someone else had access to his vehicle. " 'If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also be reasonably reconciled with a contrary finding.' " (*People v. Westerfield*, *supra*, 6 Cal.5th at p. 713.)

Likewise, sufficient evidence supports the finding that the pellet gun constituted a deadly weapon. Multiple courts have concluded a pellet gun constitutes a deadly weapon as a matter of law. (See, e.g., *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 535; *People v. Brown* (2012) 210 Cal.App.4th 1, 8.) As explained by our colleagues in Division Five, "We are convinced that a pellet gun is a dangerous weapon . . . as a matter of law because it is dangerous to others in the ordinary use for which it was designed. . . . [A] BB gun is not an imitation gun. It is an instrument designed to shoot by expelling a metal projectile at a target, is commonly recognized as such, and thus, . . . is reasonably perceived as capable of inflicting serious injury." (*In re Bartholomew D.* (2005) 131 Cal.App.4th 317, 326.) We agree with our colleagues, and we thus conclude the evidence

demonstrating Doe was shot by a pellet gun also constitutes sufficient evidence that defendant used a deadly weapon.

In re B.M. (2018) 6 Cal.5th 528, relied upon by defendant, does not compel a different conclusion. In that case, the trial court found the defendant guilty of assault with a deadly weapon via her use of a butter knife. (*Id.* at p. 530.) The California Supreme Court first noted a knife is not a deadly weapon as a matter of law and proceeded to assess whether the knife was "used in a manner that is not only 'capable of producing' but also ' "*likely to produce* death or great bodily injury." ' " (*Id.* at p. 533, italics added by *In re B.M.*) Specifically, the court focused on "how the defendant actually 'used' the object," the harm that could have been caused from the actual use, and the actual harm—or lack thereof—actually caused. (*Id.* at pp. 534–535.) The court concluded "the evidence was insufficient to establish that [the defendant's] use of a butter knife against her sister's blanketed legs was ' "likely to produce . . . death or great bodily injury." ' " (*Id.* at p. 536; see also *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1029 [object that is not "deadly per se" can still be a "deadly weapon" if it is "used, under certain circumstances, in a manner likely to produce death or great bodily injury"].)

Here, however, there is no question as to whether pellet guns are deadly weapons. Moreover, slashing at someone's legs through a blanket with a butter knife is drastically different from shooting at a person's head with a pellet gun. Defendant argues Doe's injuries were sufficiently minimal to undermine the conclusion that a pellet gun was likely to cause great bodily injury. Even accepting his position that Doe's injuries were minimal, the Supreme Court instructs us to consider the harm that *could have been caused* from the actual use. (*In re B.M.*, *supra*, 6 Cal.5th at p. 535.) And firing a pellet at someone's head could certainly result in great bodily injury.

Accordingly, substantial evidence supports defendant's convictions for assault and domestic violence, and the true finding on the deadly weapon enhancement.[13]

E. Sufficiency of the Evidence for the December and January Stalking Conviction

Defendant asserts his stalking conviction for conduct during the period of December 2018 through January 2019 can only be affirmed if he made a credible threat to Doe and harassed her on two or more occasions. He asserts the evidence does not support such a finding.

Three events occurred during this period: (1) the shooting in December 2018 outside Space 550; (2) an encounter between Doe and defendant at the Allegro Ballroom, during which defendant followed Doe outside and gestured toward her "as if he had a gun pointing at [her]"; and (3) an encounter between Doe and defendant at the Allegro Ballroom, during which Doe observed defendant crouched outside looking through the window at her.

First, defendant argues the record does not contain substantial evidence he shot Doe with a pellet gun in December 2018. But as, discussed in the prior section, we reject this argument. Accordingly, the December 2018 shooting qualifies as an event to support the stalking charge. Second, defendant only claims the *second* encounter at the Allegro Ballroom, in which he was looking through the window, does not meet the definition for harassment. We need not address whether this event constitutes harassment because defendant concedes the *first* encounter at the Allegro Ballroom—during which he made a shooting gesture toward Doe—would qualify as harassment. Accordingly, the first encounter at the Allegro Ballroom and the

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[13] Because we conclude the convictions and enhancement are supported by substantial evidence, we need not address defendant's argument that those convictions violate his federal due process rights.

shooting in early December are sufficient to support defendant's conviction for stalking.[14]

F. Cumulative Error

Finally, defendant asserts he would not have been convicted absent the numerous errors during his trial. " 'Under the cumulative error doctrine, the reviewing court must "review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." ' [Citation.] 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." ' " (*People v. Mireles*, *supra*, 21 Cal.App.5th at p. 249.)

Because we conclude the trial court did not err and substantial evidence supported the judgment, we reject defendant's claim of cumulative error.

G. Requested Remand for Resentencing

On January 28, 2022, defendant filed a supplemental brief in which he asserted he is entitled to be resentenced under Penal Code section 1170, as amended by Senate Bill No. 567 (2021–2022 Reg. Sess.) (Senate Bill 567). He also argued remand is necessary to allow the trial court to exercise its discretion under section 654, as amended by Assembly Bill No. 518 (2021–2022 Reg. Sess.) (Assembly Bill 518). The Attorney General agrees resentencing is appropriate.

On March 22, 2022, after the Attorney General filed its response, defendant filed a supplemental reply brief in which he noted the sentencing

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[14] Because we conclude this stalking conviction is supported by substantial evidence, we need not address defendant's argument that the conviction violates his federal due process rights.

issues "may" be moot because he "just about served his complete sentence" and is not currently in physical custody. No other information or argument was made by defendant about whether the sentencing issues are moot.[15]

At the time of sentencing, Penal Code section 1170 provided that the sentencing choice between the low, middle, and upper term "shall rest within the sound discretion of the court" based on which term "best serves the interests of justice." (Pen. Code, former § 1170, subd. (b).) Former section 654 required the trial court to impose punishment "under the provision that provide[d] for the longest potential term of imprisonment." (Pen. Code, former § 654, subd. (a).)

Effective January 1, 2022, Senate Bill 567 and Assembly Bill 518 modified these provisions. Senate Bill 567 modified Penal Code section 1170, subdivision (b), to require imposition of the middle term of imprisonment unless circumstances in aggravation justify imposition of a greater sentence. (Stats. 2021, ch. 731, § 1.3.) It also modified section 1170, subdivision (b) to require the circumstances in aggravation be found true beyond a reasonable doubt or be stipulated to by the defendant. (Stats. 2021, ch. 731, § 1.3.) Penal Code section 654, as modified by Assembly Bill 518, now provides that an act or omission punishable in different ways by two different provisions of

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[15] Defendant's supplemental reply brief also raises a host of new issues that were not raised in either his opening brief or his initial supplemental brief. (*People v. Caceres* (2019) 39 Cal.App.5th 917, 923 [issues not raised in opening brief are waived].) Defendant also requested this court take notice of various additional authority. California Rule of Court, rule 8.254(a) provides: "If a party learns of significant new authority, including new legislation, that was not available in time to be included in the last brief that the party filed or could have filed, the party may inform the Court of Appeal of this authority by letter." All of the authorities cited by defendant were available at the time defendant filed his opening brief, reply brief, and supplemental briefs.

law, as in this case, may be punished under either provision. Hence, the longest term of imprisonment is no longer mandatory.

Here, defendant was sentenced to the upper term of four years on count 4, based on the nature and circumstances of the crime. The court also found the conviction on count 4 for domestic violence and the conviction on count 5 for assault with a deadly weapon related to the same act or omission under Penal Code section 654 and stayed the sentence for count 5. As the parties agree, defendant is entitled to resentencing under Senate Bill 567 and Assembly Bill 518 on remand because the sentence is not final and these changes to the sentencing law are ameliorative. (See *People v. Flores* (2022) 73 Cal.App.5th 1032, 1039 [remanding for resentencing under another ameliorative amendment to Pen. Code, § 1170 by Senate Bill 567].) Accordingly, defendant appears to be entitled to resentencing. We disagree with defendant's argument that the issue is moot because insufficient evidence has been presented to this court for it to determine whether, in fact, the sentencing issues are moot. In the event the trial court concludes the sentencing issues are not moot, we instruct the trial court to vacate defendant's sentence and apply Penal Code section 1170, as modified by Senate Bill 567, and Penal Code section 654, as modified by Assembly Bill 518, in the first instance in order to determine defendant's new sentence.

III.

DISPOSITION

We modify the judgment to reduce defendant's conviction for stalking in violation of a restraining order on count 3 to a conviction of stalking in violation of Penal Code section 646.9, subdivision (a). The matter is remanded to the trial court for resentencing on that count and in accordance with this opinion. We further remand to the trial court to determine whether

the sentencing issues raised in connection with Penal Code sections 654 and 1170, as amended by Assembly Bill 518 and Senate Bill 567, respectively, are moot and, if not, to vacate and resentence defendant in accordance with those provisions. In all other respects, the judgment is affirmed.[16]

[16] In a related petition for a writ of habeas corpus (case No. A161862), Johnson argues he received ineffective assistance of counsel, and provides supporting declarations. We deny the petition today by separate order.

MARGULIES, J.

WE CONCUR:

HUMES, P. J.

EAST, J.*

A159389
People v. Johnson

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

S276932

IN THE SUPREME COURT OF CALIFORNIA

En Banc

WAYNE JOHNSON, Petitioner,

v.

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE et al., Respondents;

THE PEOPLE, Real Party in Interest.

The petition for writ of mandate, prohibition, or other appropriate relief is denied.

CANTIL-SAKAUYE

Chief Justice

Additional material from this filing is available in the Clerk's Office.