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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **MALIK ALI MUHAMMAD,** **Defendant and Appellant.**	**A110774** **(Marin County Super. Ct. No. SC139601)**

Penal Code section 646.9[1] sets out in several subdivisions the definition of stalking as well as alternate penalties for the offense that depend upon the stalker's criminal history. Thus, in subdivision (a) stalking is defined and an alternate misdemeanor or felony punishment of up to three years in prison is prescribed. A felony sentence of up to four years under subdivision (b) or five years under subdivision (c) is imposed if subdivision (a) is violated at a time when a valid restraining order protecting the victim from the accused is outstanding or the accused has certain specified prior convictions. Defendant Malik Ali Muhammad was convicted by jury trial of stalking (§ 646.9, subd. (a)) (hereafter section 646.9(a)) (count 1); stalking in violation of a restraining order (§ 646.9, subd. (b)) (hereafter section 646.9(b)) (count 2); stalking with a prior terrorist threats conviction (§ 646.9, subd. (c)(1)) (hereafter section 646.9(c)(1))

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, parts II., III. and IV. of this opinion are not certified for publication.

1 All undesignated section references are to the Penal Code.

(count 3); stalking with a prior felony stalking conviction (§ 646.9, subd. (c)(2)) (hereafter section 646.9(c)(2)) (count 4); and misdemeanor criminal contempt (§ 166, subd. (a)(4)) (count 5).) He admitted a prior strike allegation (§§ 1170.12, subds. (a)-(d), 667; subds. (b)-(i)) and was sentenced to 10 years in state prison.

On appeal, defendant contends he was erroneously convicted of counts 1, 2 and 3 because subdivisions (a), (b), (c)(1) and (c)(2) of section 646.9 do not describe four separate offenses but describe alternate punishments for the single offense of stalking. He also contends the court committed judicial misconduct and instructional and sentencing error. In the published portion of this opinion, we conclude defendant's claim regarding his stalking convictions is correct and order the convictions on counts 1, 2 and 3 stricken. In the unpublished portion, we affirm the conviction and sentence on counts 4 and 5.

BACKGROUND

In September 2001, defendant and the victim, Ivory Jean Hart, began a dating relationship that she ended six or seven months later. Hart was employed as a financial center manager and served as a vice president of Citibank (the bank).

In April 2003, defendant was convicted of stalking (§ 646.9(a)) and making terrorist threats (§ 422) stemming from acts[2] committed against Hart between September and October 2002. In August 2003, defendant was placed on probation and a 10-year restraining order issued against him, prohibiting his contact with Hart and her employer.

Current Offenses

In December 2003, Hart received over 50 hang-up phone calls. On December 17, she received two calls to her cell phone from the 916 area code, and the next day received a call on her home phone from defendant's Sacramento phone number.

On January 7, 2004, defendant called the bank's ethics hotline to report that Hart had been smoking marijuana, using nonprescription sleeping pills and Vicodin and had marijuana delivered to the bank. On January 13, defendant again wrote to the bank

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[2] Defendant's acts consisted of leaving Hart threatening telephone messages.

regarding Hart's "habitual narcotics usage and addiction." On January 16, he wrote to the bank attaching a warning to the bank's customers of Hart's habitual marijuana use and he threatened to publish the warning to bank customers on March 1. On January 22, he wrote to the bank "strongly" suggesting that Hart undergo drug testing and a polygraph examination so she could "come to grips with her problem." On February 4, in response to a letter from the bank informing defendant that his allegations were untrue and would no longer be investigated, defendant wrote the bank stating he would distribute the aforementioned warning. On February 6, defendant wrote to the bank's chief executive officer (CEO) in New York regarding Hart's drug use. In late February, he was arrested and remained in custody until his release on January 13, 2005.

On May 24, 2004, defendant again wrote to the CEO attaching photos of Hart and stating he was facing imprisonment as a result of his prior attempt to provide information to the bank. On that same date, defendant was sentenced to prison for a violation of the probation imposed following his convictions for stalking and making terrorist threats in April 2003. The following day (May 25), defendant left a telephone voice mail message at the Alameda County prosecutor's office stating that for "the rest of [his] life" defendant would continue to publicize that Hart is a marijuana addict, but he would never use any violence or threats of violence.

On May 27, 2004, defendant again wrote to the bank's CEO stating that all future communications regarding Hart's criminal behavior would be sent directly to bank customers and the media. On December 7, 2004, defendant wrote to the Alameda County District Attorney's office summarizing defendant's concerns about the judicial system and Hart's use of illegal narcotics. On the same day, defendant again wrote to the CEO stating he intended to expose any attempt by the bank to conceal evidence of Hart's criminal conduct, attaching his letter to the district attorney's office.

Defendant was an inmate at San Quentin prison from June 7, 2004, until he was paroled in January 2005. Prior to being paroled, defendant objected to the parole condition prohibiting his contact with Hart and her family, friends and employer, but nonetheless signed an agreement to his parole conditions.

Hart testified that after each of defendant's threats, she was fearful that he would follow through on them and she would lose her job. She was also fearful that he would kill her. She said she had trouble sleeping, was seeing a psychotherapist and taking antidepressant medication. A San Quentin correctional counselor testified that when Hart was informed of defendant's upcoming parole, she was "extremely" fearful and anxious.

The Defense

Defendant testified he had been an Oakland police officer, after which he went to law school. He worked as a deputy district attorney and then practiced as a defense attorney until 1999. He was eventually disbarred. Thereafter he taught at "Cal State Hayward."

Defendant admitted making all the telephone calls to Hart except for the December 2002 call. He said he made the calls to Hart when he was drinking and did not intend to frighten, harm, or kill her. He said he merely intended to unleash his anger and frustration and was now ashamed and embarrassed for leaving the messages. Defendant also admitted writing the letters to the bank out of concern for Hart's drug use and because the district attorney's office would not investigate.

Defendant said after being placed on probation on August 14, 2003, he was never provided with the terms and conditions of his probation, and did not receive them until mid-September. He said his calls and letters to the district attorney's office were to clarify the difference between the protective order issued against him and the court's minute order, and to express frustration "for the way that this entire matter had been handled." He said he objected to the parole conditions because he could not contact or sue the bank.

DISCUSSION

I. *Section 646.9*

Defendant was convicted as charged in count 1 of simple stalking (§ 646.9(a)), in count 2 of stalking in violation of a court order (§ 646.9(b)), in count 3 of stalking with a prior conviction for making terrorist threats (§ 646.9(c)(1)), and in count 4 of stalking

with a prior conviction for stalking (§ 646.9(c)(2)).[3] Each of the four stalking counts involved the identical course of conduct committed against Hart between December 17, 2003, and December 10, 2004. The court sentenced defendant to a five-year upper term prison sentence on count 4 that it doubled under the "three strikes" law, and stayed imposition of sentence on counts 1 through 3 pursuant to section 654.[4]

Section 646.9 provides, in relevant part:

"(a) 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, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.[5]

"(b) 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, shall be punished by imprisonment in the state prison for two, three, or four years.

"(c)(1) Every person who, after having been convicted of a felony under Section 273.5, 273.6, or 422, commits a violation of subdivision (a) shall be punished by imprisonment in a county jail for not more than one year, or by a fine of not more than

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[3] The information alleged that each of the four stalking counts occurred between December 17, 2003, and December 10, 2004, and were committed against Hart with the intent to place her in reasonable fear for her safety and the safety of her immediate family.

[4] Section 654 prohibits multiple punishment for a single act or omission, where the defendant violates multiple criminal statutes as a means of accomplishing one objective and harbors a single intent. (*People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1044.)

[5] Stalking under section 646.9(a) is punishable in the county jail or in the state prison for 16 months, two years or three years. (§ 18 [unless otherwise specified, felonies generally subject to prison term of 16 months, two years or three years]; *People v. Markley* (2006) 138 Cal.App.4th 230, 244.)

one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or five years.

"(2) Every person who, after having been convicted of a felony under subdivision (a), commits a violation of this section shall be punished by imprisonment in the state prison for two, three, or five years. [¶] . . .

"(e) For the purposes of this section, 'harasses' means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.

"(f) For the purposes of this section, 'course of conduct' means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. . . ."

The heart of the parties' dispute focuses on whether subdivisions (a), (b), (c)(1) and (c)(2) of section 646.9 define separate substantive offenses, each with its own distinct elements. Defendant argues they do not and, instead, merely define the one substantive offense of stalking, with enhancements or alternative punishments for that offense. Thus, he argues his convictions on counts 1 through 3 must be vacated.[6] The People respond that these subdivisions describe separate substantive offenses, and, for this reason, section 954 permits multiple convictions. Section 954 provides, in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense . . . under separate counts . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the *offenses* charged . . . ." (Italics added.) Thus multiple charges and multiple convictions can be based on a single criminal act, if the charges allege separate offenses. (*People v. Ryan* (2006) 138 Cal.App.4th 360, 368.)

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6 Alternatively, defendant argues that if the subdivisions of section 646.9 define separate crimes, his count 1 conviction for stalking (§ 646.9(a)) must be vacated because subdivision (a) of section 646.9 is a lesser included offense of subdivisions (b) and (c) of that section. The People agree that subdivision (a) is a necessarily included offense of subdivisions (b) and (c) of section 646.9.

In resolving this dispute, we find *People v. Kelley* (1997) 52 Cal.App.4th 568 instructive. In *Kelley*, the defendant, who previously had been prosecuted and convicted of misdemeanor contempt (§ 166, subd. (a)(4)) for violating a restraining order, was charged with stalking in violation of the same restraining order under section 646.9(b). (*Kelley*, at pp. 574-575.) As *Kelley* explained, the double jeopardy clause of the Fifth Amendment prohibits a person from being prosecuted twice for the same offense or any included offense, and the test is whether each offense contains an element the other does not. (*Kelley*, at p. 576.) The defendant argued that his prosecution for stalking violated the prohibition against double jeopardy because the crime of stalking in violation of a restraining order contains all the elements of the crime of contempt for violating that restraining order. (*Id.* at p. 576.) In rejecting the argument, the court stated, "In making this argument, [the defendant] incorrectly assumes section 646.9 defines the crime of stalking in violation of a restraining order. The section merely defines stalking. The provisions relating to the violation of a restraining order do not define a crime. They merely create a punishment enhancement. As such, they are not to be considered in the double jeopardy analysis. [Citation.] Absent these provisions, the crimes are distinct and the constitutional prohibition against double jeopardy was not violated." (*Kelley*, at p. 576, fn. omitted; see *People v. Markley*, *supra*, 138 Cal.App.4th at p. 244 [§ 646.9(c)(2) provides an "*alternative* sentencing scheme" if the defendant has suffered a previous stalking conviction]; *People v. McClelland* (1996) 42 Cal.App.4th 144, 152 [§ 646.9 (b) serves the legislative purpose of providing "enhanced punishment to those stalkers who have been ordered to refrain from such conduct in civil proceedings, and, hence, have been warned that their behavior is unacceptable"].)

The People assert *Kelley* is "wrong" and that the court failed to explain its conclusion that section 646.9(b) does not define a crime. Relying on the recent Supreme Court decision in *People v. Corpuz* (2006) 38 Cal.4th 994, they argue that subdivisions (a), (b) and (c) of section 646.9 define different offenses because each has an element different from the other. However, *Corpuz* considered only whether a particular "stay away" order imposed as a condition of probation fell within the "any other court order"

language of section 646.9(b), and held that it did. (*Corpuz*, at pp. 997, 1000.) At the outset of its discussion, *Corpuz* cited the language of section 646.9(a) and (b) and stated that section 646.9(a) "describes a 'wobbler,' offense" and section 646.9(b) "describes a straight felony offense." (*Corpuz*, at p. 997.) The People rely on this statement as if it were a holding by our Supreme Court that subdivisions (a) and (b) of section 646.9 describe "different crimes." But that question was not raised in *Corpuz*, much less resolved by that decision; the People's reliance on *Corpuz* for that proposition is misplaced. (*People v. Superior Court* (*Gaulden*) (1977) 66 Cal.App.3d 773, 777 [cases are not authority for propositions not expressly considered therein], disapproved on other grounds in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6.)

Our conclusion that subdivisions (a), (b) and (c) of section 646.9 do not create separate offenses is confirmed by examining the definition of the terms "offense," "enhancement," and "penalty provision."

A substantive "crime or public offense" is defined as "an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: [¶] 1. Death; [¶] 2. Imprisonment; [¶] 3. Fine; [¶] 4. Removal from office; or [¶] 5. Disqualification to hold and enjoy any office of honor, trust or profit in this State." (§ 15.)

"By definition, a sentence enhancement is 'an additional term of imprisonment added to the base term.' " (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898-899, quoting Cal. Rules of Court, rule 4.405(c) (now rule 4.405(3)) & *People v. Jefferson* (1999) 21 Cal.4th 86, 101.)[7]

" '[A] penalty provision prescribes an added penalty to be imposed when the offense is committed under specified circumstances. A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater

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[7] "An example [of an enhancement is] subdivision (a) of section 12022.7, which provides that any person who personally inflicts great bodily injury in the commission of a felony shall 'be punished by an *additional term* of three years . . . .' " (*People v. Jefferson*, *supra*, 21 Cal.4th at p. 101.)

degree of the offense charged. [Citations.]' " (*Robert L. v. Superior Court, supra,* 30 Cal.4th at p. 899, quoting *People v. Bright* (1996) 12 Cal.4th 652, 661.)

Despite language to the contrary in *Kelley*, we conclude that subdivisions (b), (c)(1) and (c)(2) of section 646.9 are not sentence enhancements; they clearly do not add an additional term of imprisonment to the base term.

"The California Supreme Court has recognized, however, that statutory provisions which are not 'enhancements' in the strict sense are nevertheless 'penalty provisions' as opposed to substantive offenses where they are 'separate from the underlying offense and do[] not set forth elements of the offense or a greater degree of the offense charged. [Citations.]' " (*People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702, quoting *People v. Bright, supra*, 12 Cal.4th at p. 661; accord, *Robert L. v. Superior Court, supra,* 30 Cal.4th at p. 899.) Phrased slightly differently, a penalty provision does not define a substantive offense, but " ' "focus[es] on an element of the commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves." [Citation.]' [Citations.]" (*Wallace*, at p. 1702.)

For example, *Robert L.* considered section 186.22, subdivision (d) (hereafter section 186.22(d)), which provides that any person who is convicted of a public offense committed for the benefit of a criminal street gang shall receive a specified penalty. The court concluded that section 186.22(d) was not a sentence enhancement "because it does not add an additional term of imprisonment to the base term; instead it provides for an alternative sentence when it is proven . . . . Neither is it a substantive offense because it does not define or set forth elements of a new crime. [Citation.]" (*Robert L. v. Superior Court, supra,* 30 Cal.4th at p. 899.)

In *Bright*, the court concluded that section 664, subdivision (a), which provides that an attempt to commit a " 'willful, deliberate, and premeditated murder' . . . shall be subject to the punishment of imprisonment for life with the possibility of parole" (*People v. Bright, supra,* 12 Cal.4th at p. 657), "does not create a greater degree of attempted murder but, rather, constitutes a penalty provision that prescribes an increase in

punishment (a greater base term) for the offense of attempted murder" (*id*. at pp. 657-658). "[A] penalty provision prescribes an added penalty to be imposed when the offense is committed under specified circumstances. A penalty provision is separate from the underlying offense and does not set forth elements of the offense . . . . [Citations.] The jury does not decide the truth of the penalty allegation until it first has reached a verdict on the substantive offense charged. [Citation.]" (*Id.* at p. 661; see *People v. Bouzas* (1991) 53 Cal.3d 467, 478 [§ 666 (petty theft with a prior theft-related conviction) imposes a penalty and does not define a substantive offense and "is structured to enhance the punishment for violation of other defined crimes and not to define an offense in the first instance"].)

Similarly, subdivisions (b), (c)(1) and (c)(2) of section 646.9 do not define a substantive offense. Subdivision (a) sets out the elements of the crime of stalking.[8] 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]." [Citation.]' [Citations.]" (*People v. Wallace, supra,* 109 Cal.App.4th at p. 1702; see also *People v. Murphy* (2001) 25 Cal.4th 136 [penalties under one and three strikes laws (§§ 667, 667.71) depend on fact of the defendant's recidivism, not on an act or omission]; see also *People v. Tardy* (2003) 112 Cal.App.4th 783, 787 [§ 666 gives court authority to impose felony sentence on defendant convicted of misdemeanor petty theft who has a prior theft conviction].) The effect of subdivisions (b) and (c) is to establish a higher base term for stalking when it is committed by a defendant with a particular criminal history.[9] Moreover, the jury

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[8] Subdivision (a) of section 646.9 provides that those elements are: "(1) repeatedly following or harassing another person, and (2) making a credible threat (3) with the intent to place that person in reasonable fear of death or great bodily injury." (*People v. Ewing* (1999) 76 Cal.App.4th 199, 210, citing *People v. Carron* (1995) 37 Cal.App.4th 1230, 1238.)

[9] We recognize that the issuance of a temporary restraining order, injunction or court order referred to in section 646.9(b) does not necessarily reflect a criminal offense, but is issued to prohibit the stalking "behavior" described in section 646.9(a).

does not consider the truth of these penalty facts until it has reached a verdict on the substantive stalking offense under subdivision (a). (See *People v. Bright*, *supra*, 12 Cal.4th at p. 661.)

We conclude that subdivisions (b), (c)(1) and (c)(2) of 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. In this case, defendant committed the crime of stalking against Hart when a temporary restraining order was in effect protecting her, after having been previously convicted of making terrorist threats (§ 422), and after he had been previously convicted of felony stalking. Thus, at the time defendant committed the *single offense* of stalking, his history of misconduct satisfied three separate penalty provisions, each of which required that he be subject to a greater punishment than imposed in section 646.9(a). (§ 646.9(b), (c)(1), (c)(2).) Though the single stalking offense was charged in four separate counts, defendant could be convicted of only one count of stalking. Consequently, three of defendant's four stalking convictions must be vacated. (See *People v. Ryan*, *supra*, 138 Cal.App.4th at p. 371.) As asserted by defendant, since the court selected the count 4 conviction under subdivision (c)(2) of section 646.9 as the principal term, it is appropriate to affirm that conviction and vacate his convictions on counts 1 through 3, which involved subdivisions (a), (b) and (c)(1) of that section.**[10]**

II. *Judicial Misconduct**

Defendant contends the trial court committed judicial misconduct depriving him of a fair trial and due process. In particular, he argues the court "impermissibly vouched for [Hart] by interjecting its own, favorable, opinion of her demeanor and capabilities,"

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10 In light of our decision vacating the count two conviction of stalking in violation of a restraining order (§ 646.9(b)), we need not address defendant's contention that his count 5 conviction of misdemeanor criminal contempt for willful disobedience of a restraining order (§ 166, subd. (a)(4)) must be vacated "because it is a lesser included offense of count [2] and/or because multiple convictions for the same offense violated [his] Fifth Amendment right" against double jeopardy.

* See footnote, page 1, *ante.*

"undermined the defense by intervening as an adversary in [defendant's] examination," and "improperly buttressed the prosecution case by interrupting examination of key prosecution witnesses to elicit testimony favorable to the prosecution." Defendant concedes that defense counsel failed to object regarding any of the claimed instances of judicial bias, but argues that the failure to object does not preclude review because an objection would have been futile. Alternatively, he argues that defense counsel was ineffective in failing to object.

A. *Claim that Court Vouched for Hart*

Hart was the first prosecution witness. Early in her direct examination, after Hart identified defendant in the courtroom and explained when and how she met him, the following colloquy occurred:

"[The Prosecutor]: Ms. Hart, how do you feel right now being in the courtroom?

"The Court: She doesn't feel good. She's obviously a competent business person and runs her own operation, and she's very uncomfortable here. Visibly so. Thank you.

"[The Prosecutor]: Thank you, your Honor."

Defendant argues that the court's comment was "utterly improper" because it conveyed to the jury that it viewed Hart as a "responsible and competent person in a difficult situation," and the jury should view her that way too, as well as credible. He also argues that the court's comment was unsupported by the evidence and implied she was so uncomfortable that the prosecutor's question as to how she felt was unnecessary. He asserts the comment withdrew material evidence from the jury's consideration and deprived the jury of the opportunity to perceive Hart answer the question.

" 'The object of a trial is to ascertain the facts and apply thereto the appropriate rules of law, in order that justice within the law shall be truly administered.' [Citation.] To this end, 'the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination.' [Citation.] The trial court has a statutory duty to control trial proceedings, including the introduction and exclusion of evidence. [Citation.] As provided by section 1044, it is 'the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and

material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.' However, 'a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant.' [Citation.] [¶] Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.]" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237-1238.)

In general, claims of judicial misconduct are not preserved for appellate review where no objection to the claimed misconduct was lodged at trial. However, failure to object does not preclude review when an objection and admonition could not cure the prejudice caused by the misconduct, or when an objection would have been futile. (*People v. Sturm, supra,* 37 Cal.4th at p. 1237.)

Despite defendant's unsupported assertion that an objection to the court's comment would have been futile, we conclude this claim of judicial misconduct is barred by defendant's failure to object. The comment by the court was made within the first few minutes of the prosecutor's direct examination of Hart, the first witness for the prosecution. Defendant points to nothing in the record at the time of the court's comment or prior thereto to indicate any hostility between the court and defense counsel or bias by the court against him.

We also reject defendant's assertion that defense counsel's failure to object to the court's comment constituted ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to the defendant such that it " 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' [Citations.]" (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659-660.) We conclude that counsel's failure to object could reasonably be attributed to a perception that the court's comment was not improper. The thrust of the defense was that defendant's conduct in the charged offenses was not harassing, and he did not specifically intend to cause Hart to be fearful. Defense counsel

argued that defendant's letters and phone calls were directed to the bank not Hart, and no legally enforceable order prohibited him from doing so. Hart's position at the bank was not at issue nor was her credibility. Consequently, defense counsel could reasonably conclude that the court's comment was merely a comment on Hart's visibly uncomfortable demeanor and was not intended as a comment on her credibility.

B. *Claim that Court Improperly Intervened in Defendant's Examination*

Defendant next contends the court twice improperly undermined his defense by intervening as an adversary during his direct examination. After defendant explained he had not received the terms and conditions of his probation upon his release from custody in August 2003, the following colloquy occurred:

"[Defense Counsel]: Sir, what document did you rely on to help you guide your conduct on probation?

"[Defendant]: This one. It is the only one I had.

"[Defense Counsel]: Does that document prohibit you from writing letters to Ms. Hart's employer?

"The Court: The document will speak for itself."

Defendant argues that the court's comment "stopped him from explaining the terms he believed bound him." Aside from defendant's waiver by failing to object below, the argument lacks merit. The court's comment was a proper statement of the "secondary evidence rule," i.e., if a litigant seeks to introduce evidence of the words contained in a document, he must introduce the document itself, not a verbal recollection of its terms. (See *Meadows v. Lee* (1985) 175 Cal.App.3d 475, 490 (dis. opn. of Johnson, J.).)

Thereafter, while defendant was testifying about the 10-year protective order he received, the following colloquy occurred:

"[Defendant]: Because there were serious contradictions. I had terms and conditions of probation from my probation officer. I had a protective order and I also had a minute order from August 14, 2003. The protective order reflected the same as the terms and conditions of my probation. The minute order reflected differently.

"[Defense Counsel]: Does one document say it takes precedence over the other?

"[Defendant]: Protective order says it takes precedence over any conflicting court order.

"[Defense Counsel]: So when you received that, did you then now rely on the 10-year protective order?

"The Court: What does that language have to do with your question? He's got a memo from a probation officer and a court order and you are comparing the two. He says the language says it takes precedence over any other court order.

"[Defense Counsel]: Yes.

"The Court: Is there something about the probation document that makes it a court order?

"[Defense Counsel]: No.

"The Court: So pursue that, if you want to, but at the moment there is nothing that relates to the relationship between that and the other document.

"[Defense Counsel]: Correct.

"The Court: So the thing that was sent by [Inspector Corey] White says it took precedence over any other court order?

"[Defense Counsel]: That's correct.

"The Court: Which doesn't bear any relationship to the probation document?

"[Defense Counsel]: That's correct."

Defendant argues that the court's questions and comment made in front of the jury were an "argumentative, adversarial dismissal of the defense theory" in violation of the court's duty of impartiality. He also argues the court's questioning was meant to demonstrate that he knowingly and willfully violated a court order. He also suggests if the court wanted to discuss the relevance of defense counsel's line of questioning it could have done so in a sidebar conference or outside the presence of the jury.

Contrary to defendant's assertion, the court's questions and comment were neither argumentative nor inappropriate. The court's questions and comment were intended to focus defense counsel's examination on defendant's testimony that the protective order

took precedence over any other *court order*, and keep the questions from straying to collateral matters.

Defendant also argues that the court interrupted defense counsel's effort on cross-examination of the prison counselor to show that defendant was so nonviolent, the prison classified him at the lowest level of security. After defense counsel asked the prison counselor whether there was a certain classification to which inmates are assigned, the following colloquy occurred:

"The Court: Was he classified?

"The Witness: He was not classified. He was currently housed in the San Quentin reception center, which is a transitional county jail, so to speak, until they are introduced to a main line facility.

"The Court: So he was never classified?

"The Witness: Not classified.

"The Court: That's just because the number of people in the system and the fact that he was a short-timer, didn't get around --

"The Witness: Various reasons. He was also housed in our special needs yard placement, special program population."

Defendant concedes that the evidence being elicited was not critical to the defense, but argues that the court's explanatory comment was another instance of inappropriate, seemingly partisan conduct. Once again, aside from defendant's waiver by failing to object below, the judicial misconduct claim lacks merit. Nothing about the court's comment up to the point it was interrupted by the witness was inappropriate or partisan and it did not preclude the witness from testifying. Instead, the witness went on to clarify why defendant was not classified. No judicial misconduct is shown.

C. *Claim that Court Improperly Intervened to Elicit Testimony Favorable to the Prosecution*

Defendant contends that on two occasions the court intervened in the examination of prosecution witnesses to buttress the prosecution's case. Once again, the argument lacks merit.

During defense counsel's cross-examination of Hart as to whether defendant's calls caused her concern about losing her job, the following colloquy occurred:

"The Court: Do you remember being concerned about your employment up to the time of testifying at the trial in Alameda?

"[Hart]: There was one specific call that he made when he said it was between me, you, and Cal Fed.

"The Court: Do you remember when that happened? Before the trial?

"[Hart]: It was before the trial.

"[Defense Counsel]: Were you concerned about your job at this time?

"[Hart]: I was concerned about him approaching my job, yes.

"[Defense Counsel]: How about losing your job?

"[Hart]: I was concerned about him going to my job. I wasn't too much concerned about losing my job because I have had my job for a long time.

"The Court: Were you concerned about some form of employment consequence because of his contact with your employer?

"[Hart]: Yes, that's a possibility.

"The Court: What kind of complication or consequence did you have concern for as of the time of the trial?

"[Hart]: His threats.

"The Court: What did you think might be the upshot of problems like that at work?

"[Hart]: His accusations, the fact that he was coming in and out of the job harassing me. I think they would look at that as a risk to not only customers' lives, but mine and employees."

Defendant argues that the court's partisan intervening questions "fed . . . Hart leading questions to establish one of the essential elements of the [charged] offense." However, defendant does not specify what element of the crime of stalking the court's questions helped to establish. The elements of the crime of stalking are (1) repeatedly following or harassing another person, and (2) making a credible threat (3) with the intent

to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family. (§ 646.9(a).) In addition, the court's questions were within the limits of its duty to bring out facts relevant to the jury's determination and were not leading, partisan or improper.

Defendant also argues that the court improperly intervened in the prosecutor's direct examination of Citibank employee Pamela Austin to elicit evidence favorable to the prosecution. During the course of Austin's testimony that on January 12, 2004, she called defendant and told him his complaint had been received and the issues he reported had been previously investigated and found to be without merit, the following colloquy occurred:

"[The Prosecutor]: What was his reaction to you telling him that you investigated the matter and that these allegations are unfounded?

"[Austin]: My memory isn't very clear about that. I remember that he continued to object, but beyond that, I don't remember.

"[The Prosecutor]: The following day, January 13, 2004, did Citibank receive voice mail messages from the defendant concerning Ms. Hart?

"[Austin]: Yes.

"[The Prosecutor]: Can you describe those to the jury?

"[Austin]: It was a message to me asking that I call him.

"[The Prosecutor]: Were you aware of any other message that [defendant] left at Citibank that same day?

"[Austin]: A call was also left with a woman that works with me making allegations against [Hart].

"The Court: As for the January 12th telephone call, you said he continued to object and you don't remember much about the rest of the substance of the conversation. Was it a calm and pleasant conversation?

"[Austin]: It was an intense conversation. He was very insistent."

Defendant argues that the court's question suggests that the court was unsatisfied with Austin's "neutral" description of the call she received from defendant and therefore

asked a leading question designed to elicit testimony damaging to the defense. Once again, we see no impropriety in the court's question. " 'The duty of a trial judge, particularly in criminal cases, is more than that of an umpire; and though his power to examine the witnesses should be exercised with discretion and in such a way as not to prejudice the rights of the prosecution or the accused, still he is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished when a few questions asked from the bench might elicit the truth. It is his primary duty to see that justice is done both to the accused and to the people. He is, moreover, in a better position than the reviewing court to know when the circumstances warrant or require the interrogation of witnesses from the bench.' [Citation.]" (*People v. Raviart* (2001) 93 Cal.App.4th 258, 272.) The court's question indicates only an intent to ferret out relevant facts, not to damage the defense. Thus, no misconduct is shown.

III. *The Court's Preinstruction Statement**

During jury selection the trial court informed the prospective jurors of the charges against defendant and stated: "I want to hasten to point out that you probably all remember from your seventh grade civics course anyway, we are not going to infer or assume that because [defendant] is charged with something here, or there is an allegation of some prior conviction, that he is more likely than not to be guilty of anything, including spitting on the sidewalk, because it just isn't so. [¶] You, I, and everybody else in this county, citizen or no, is entitled to the protection of our Constitution, and it provides for a presumption of innocence. So if we are ever charged with a public offense, we are entitled to that presumption of innocence until it is proved beyond a reasonable doubt that we have broken the law. [¶] So we are not going to infer or assume from the fact that [defendant] is charged with some things, or may have been arrested at some point, or is here to have a trial, that he is any more likely than not to be guilty of anything, because that just wouldn't be fair, reasonable, or consistent with our rule of law here. So keep that in mind. [¶] *I also want to be sure that nobody jumps to the*

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* See footnote, page 1, *ante.*

conclusion or infers that because we are here to have a trial, the prosecution is not capable of proving the charges beyond a reasonable doubt. That wouldn't be a fair inference either." (Italics added.)[11] Thereafter unreported voir dire continued and the following day the jurors selected were sworn.

Defendant contends that the above italicized statement by the court diluted the presumption of innocence and lessened the prosecution's burden of proving his guilt beyond a reasonable doubt, in violation of his rights to due process under the Fourteenth Amendment. Defendant's contention fails for several reasons.

Defendant's failure to object to the court's preinstruction constitutes a waiver of his claim on appeal. "Defendant's failure to object at trial . . . particularly where (as here) such action would have permitted the court to clarify any possible misunderstanding resulting from the comments, bars his claim of error on appeal. [Citation.]" (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1053.) " 'The purpose of the rule requiring timely objection is to give the trial court the opportunity to cure any error, if possible, by an admonition to the jury.' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 531.)

Notwithstanding defendant's waiver, he fails to establish any prejudice from the court's comments. First, the record does not reflect that the jurors in the case were part of the venire when the court's preinstruction statement was made. Second, the jury was properly instructed on reasonable doubt at the close of the case, and both the prosecutor and defense counsel properly explained the concept of reasonable doubt during closing argument. Third, the court did not identify the preinstruction statement as an instruction. Instead, one week after making the preinstruction statement, at the conclusion of the case, the court made it clear that it was then going to read the instructions to the jurors and that written instructions would be available to them during their deliberations. Thus, it is not reasonably likely that the jury was misled by the court's preinstruction comment. (See

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[11] Defendant concedes that at the conclusion of the case the court properly instructed the jury on the presumption of innocence pursuant to CALJIC No. 2.90.

People v. Melton (1988) 44 Cal.3d 713, 746; *People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

IV. *Sentencing Error*[*]

Defendant admitted an April 2003 prior strike conviction for making criminal threats (§ 422). At sentencing, after denying defendant's *Romero* motion to strike the prior strike allegation (*People v. Romero* (1996) 13 Cal.4th 497), the court imposed the upper term on counts 1 through 4 "in view of the nature of the conduct and its protraction, it appears that [defendant lacks] any demonstration of intention not to continue the conduct." Defendant contends the court's imposition of the upper terms[12] violated the rule enunciated by the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296, that other than the fact of a prior conviction, a fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court applied the Sixth Amendment and held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. When a sentencing court's authority to impose an enhanced sentence depends upon additional factfinding, there is a right to a jury trial and proof beyond a reasonable doubt. (*Blakely v. Washington, supra,* 542 U.S. at pp. 301-305.) In *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 871], the high court held that California's determinate sentencing law violated a defendant's federal right to trial because it assigned to the trial

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[*] See footnote, page 1, *ante.*

[12] In light of our conclusion that the convictions on count 1 through 3 are vacated, only the court's imposition of the upper term on count 4 is at issue.

judge, not the jury, the authority to make factual findings that subject the defendant to the possibility of an upper term.

"The United States Supreme Court has recognized two exceptions to a defendant's Sixth Amendment right to a jury trial on an aggravating fact that renders him or her eligible for a sentence above the statutory maximum. First, a fact admitted by the defendant may be used to increase his or her sentence beyond the maximum authorized by the jury's verdict. [Citation.] Second, the right to jury trial and the requirement of proof beyond a reasonable doubt do not apply to the aggravating fact of a prior conviction. [Citations.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 836-837.) Moreover, "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional [factfinding] engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to a jury trial." (*People v. Black* (2007) 41 Cal.4th 799, 813.)

Here, appellant admitted he was previously convicted by jury trial of criminal threats against the same victim. Under *Apprendi*, appellant's admission of a prior conviction was sufficient to raise the statutory maximum from the middle to the upper term. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.) In addition, the court imposed the upper term in part because of "the nature of the conduct and its protraction." This statement by the court could reasonably be construed as a reference to appellant's continuing criminality and recidivism, and as such, was an aggravating factor properly considered by the court.

Because at least one aggravating factor was established by means that independently satisfied the requirements of the Sixth Amendment and rendered defendant eligible for the upper term, we conclude the court properly sentenced him to the upper term on count 4.

DISPOSITION

The convictions on counts 1 through 3 and the sentence imposed thereon are vacated. The convictions on counts 4 and 5 and sentencing on these counts are affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A110774)

Marin County Superior Court, No. SC139601, John S. Graham, Judge.

Candace Hale, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, Stan Helfman and John R. Vance, Jr., Deputy Attorneys General for Plaintiff and Respondent.