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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DAVID LOWDER,

Defendant and Appellant.

A132733

(Napa County
Super. Ct. No. 151663/153437)

Michael David Lowder appeals from a judgment imposed following revocation of probation in two cases. He contends that the evidence is insufficient to support the trial court's finding that he violated probation.

I. FACTUAL BACKGROUND

We recently affirmed the judgments in two cases which resulted in defendant being placed on probation. (*People v. Lowder* (Mar. 14, 2012, A131829) [nonpub. opn.] (*Lowder I*) and *People v. Lowder* (Mar. 14, 2012, A131831) [nonpub. opn.] (*Lowder II*)). In *Lowder I*, defendant was convicted of receiving stolen property (Pen. Code,¹ § 496, subd. (a)), and was placed on probation for three years. (*Lowder I, supra*, A131829 at p. 2.) In *Lowder II*, defendant was convicted of stalking (§ 646.9, subd. (b)), and placed on probation for three years. (*Lowder II, supra*, A131831 at pp. 1-2.) On March 14, 2011, the district attorney filed a petition to revoke probation in both cases, alleging that defendant violated probation by making a false report of a criminal offense (§ 148.5).

¹ All further statutory references are to the Penal Code.

The court found that defendant committed the probation violation by making a false report that Jill Sandbek, his former girlfriend, came to his house with another man, tied him up and cut the pinkie finger of his left hand. (*Lowder I, supra*, A131829 at pp. 2-4.) We affirmed the court's judgment finding defendant in violation of probation and reinstating him on probation in both cases. (*Lowder I, supra*, A131829 at p. 5; *Lowder II, supra*, A131831 at p. 2.)

On May 17, 2011, the district attorney filed a petition to revoke defendant's probation in both cases alleging that he violated the terms of probation by committing stalking (§ 646.9, subd. (c)(2)), vandalism (§ 594, subd. (b)(1)), violation of a protective order (§ 273.6, subd. (a)), and contempt of court (§ 166, subd. (c)(1)).

A contested revocation hearing was held on June 3, 2011. The following evidence was presented: Jill Sandbek testified that she was at home on Division Street in Napa on the morning of May 12, 2011 when she received a telephone call from the Napa County jail informing her that defendant had been released. Robert Kiehl, her boyfriend, was also there. Sandbek had a prior romantic relationship with defendant and, due to his threats against her and her family, and his stalking of her, she had a restraining order against him. At around 1:30 p.m. on May 12, 2011, she heard rocks being thrown at her house. She also heard someone calling her name. She thought the voice sounded like defendant's.

Sandbek had installed a camera surveillance system because she feared defendant. The camera filmed images occurring outside of the house that could be watched in real time on a screen inside of the house. When Sandbek heard the rocks, she activated the camera and started to watch the screen. After she heard the sound of a can "crunching" or another rock, she looked at the screen and saw defendant walking past her car which was parked in front of the house. She went to the window and saw defendant walking away toward Franklin Street. Defendant was wearing long pants, white tennis shoes, and a cap. Sandbek testified that she recognized the cap and that defendant always wore a cap. Sandbek was afraid and testified that she feared he might injure her. Sandbek testified that a still photo taken from her surveillance camera resembled defendant's gait

but was not a good image and did not look the same as what she saw on the screen. She was positive that the image she saw on the screen in real time was defendant. She later discovered that the rear window to her BMW had a big hole in it. She spent \$450 for the window and parts; Kiehl did the repairs.

Defendant had damaged Sandbek's car in the past. On one occasion in August 2010, defendant left a dead raccoon on top of her rental car; the raccoon had her pantyhose or one of her undergarments tied around its neck. On still another occasion in August 2010, defendant and Sandbek argued and defendant grabbed her by the hair, threw her on the floor, and hit her. Sandbek suffered bruises to her arm, leg, and back and some of her hair was ripped out of her head. A few days prior to the revocation hearing, Sandbek received three letters from county jail inmates. She did not know any inmates at the jail other than defendant. She had not given her name and address to any inmate at the county jail.

The parties stipulated that Sandbek had two restraining orders against defendant and that both were in effect.

Kiehl testified that he was at home on May 12, 2011 when he heard someone yelling outside and heard a couple of rocks hit the house. He left the house to investigate but did not see anyone. When he returned to the house later, he saw that the rear window of Sandbek's car was broken. He discovered a rock inside the car during the process of repairing the window.

Shawna Bagdon, a friend of both defendant and Sandbek, testified that defendant had damaged Sandbek's car previously when it had been parked in her driveway. She testified that defendant visited her at her house on May 12, 2011 at between 1:00 p.m. or 1:30 p.m. Defendant stayed and talked with Bagdon until about 2:45 p.m. Bagdon testified that she was concerned about the possibility that defendant would retaliate against her. She would not want him to get mad at her for something she said during the hearing.

Gerard Anger, a friend of Sandbek's, testified that in September 2010, Sandbek stayed at his mobile home park residence periodically. One evening during that month,

he saw defendant use a slingshot to shoot rocks at his home. The next day, defendant called him and asked him to pick up a package for Sandbek. Anger refused but defendant came by later that day with a brown gunnysack in his hands. He stabbed the gunnysack with his knife, ripped it open and pulled out a raccoon. He placed the dead raccoon on the roof of Sandbek's car. When Sandbek stayed with Anger during that month, defendant called her repeatedly. Anger heard defendant threaten Sandbek about three times.

Officer Thomas Keener responded to the call concerning vandalism to Sandbek's car. He observed a two by four inch hole in the rear window of her car. He found Sandbek to be distraught; she was crying and appeared frightened. Sandbek told him that she saw defendant in front of her house near her car on the surveillance video at approximately 1:30 p.m.

Crystal Villatoro, defendant's probation officer, testified that she met with defendant from 10:45 a.m. to 11:30 a.m. on May 12, 2011.

Officer Brad Baker investigated the incident and contacted defendant on May 13, 2011. Defendant denied any involvement in the vandalism at Sandbek's residence. Baker also testified regarding the facts that led to the filing of the probation revocation petitions in *Lowder I* and *Lowder II* based on defendant's filing of a false report of a criminal offense.

Lieutenant Steven Blower testified that inmates Daniel Coles, Damon Hughey, and Gary Larson were housed in module 105, at various times from March to May of 2011. Hughey and Larson told an investigator from the district attorney's office that they got Sandbek's name from a pen pal note on the bulletin board in module 105.

In defense, Steven Flinn, an attorney, testified that he represented defendant several years ago, and that he and his wife had taken on the task of mentoring him in basic life skills. He said that he had concerns about Sandbek's influence on defendant and their drug usage. He would not believe Sandbek's or defendant's testimony unless it was corroborated. Flinn saw defendant at between 2:45 p.m. and 3:00 p.m. on May 12, 2011 when defendant came to his office.

David Yarlott testified that he saw defendant at about 10:00 a.m. and again between 5:00 and 6:00 p.m. on May 12, 2011. Yarlott testified that defendant was not the person in the photograph from the surveillance video. The surveillance video tape was played for the court.

The court found defendant in violation of probation based on the totality of the circumstances, the similarity of the rock throwing to defendant's prior instances of misconduct, the vandalism on Sandbek's car window, her testimony that she recognized him at the scene, and defendant's past conduct toward Sandbek's car. Based on the evidence the court found that the People had met the burden of proof for a violation of probation and had shown by a preponderance of the evidence that defendant violated his probation.

II. DISCUSSION

Defendant contends that the evidence was insufficient to support the probation violation finding. He argues that Sandbek's testimony did not establish that defendant threw the rock that broke her car's window.

A court may revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation" (§ 1203.2, subd. (a).) The standard of proof required for revocation of probation is a preponderance of the evidence to support the violation. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447.) The evidence, however, "must support a conclusion the probationer's conduct constituted a willful violation of the terms and conditions of probation." (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981-982.) The determination of whether to revoke probation is addressed to the sound discretion of the trial court. (*Ibid.*, *People v. Kelly* (2007) 154 Cal.App.4th 961, 965.) On appeal, we will not disturb the trial court's findings absent an abuse of discretion. (*Ibid.*)

Contrary to defendant's argument, Sandbek's testimony established that she identified defendant not only from the surveillance video in "real time" but that she also caught a glimpse of defendant outside her bedroom window. Defendant's act in

vandalizing her car was consistent with his prior bad acts in damaging her car. While defendant argues that he had an alibi because he was visiting with Bagdon at the time the incident allegedly occurred, Bagdon's testimony was not exact, and as the trial court found, "the incident certainly could have occurred somewhere around 1:30 [p.m.], and still allow Mr. Lowder [who could travel by bike between Sandbek's home and Bagdon's home in 10 minutes] to see Ms. Bagd[o]n."² In sum, the evidence established, by a preponderance of the evidence, that defendant committed the vandalism of Sandbek's car. The trial court properly found defendant to be in violation of probation.

III. DISPOSITION

The judgment is affirmed.

² The trial court based its finding on the testimony of Bagdon, Flinn, and Baker: "We heard testimony that he was across town at Pueblo at around 1:00 to 1:30 [p.m.], according to the testimony of Ms. Shawna Bagd[o]n. She testified she was pretty positive it was somewhere between 1:00 and 1:30 [p.m.] We heard testimony that he was there from 1:30 until about 2:45 [p.m.] when she left to pick up her children from school. And we heard from Mr. Flinn that Mr. Lowder was there somewhere between 2:45 and 3:00 [p.m.] And from Pueblo to downtown, depending upon if you're listening to Officer Baker, or however long you think it takes to ride a bike, with that testimony, he would have been there in 10 minutes, or thereabouts. And if he could be from Pueblo to Second Street in 10 minutes, it makes sense that he could be from Division Street [Sandbek's residence] to Pueblo in about 10 minutes as well, and that the incident certainly could have occurred somewhere around 1:30 [p.m.], and still allow Mr. Lowder to see Ms. Bagd[o]n."

RIVERA, J.

We concur:

RUVOLO, P. J.

REARDON, J.