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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL KAY HUNT,

Defendant and Appellant.

C073880

(Super. Ct. No. 12F6380)

Defendant Russell Kay Hunt and Sheryll Lemke frequented the same karaoke bars. Defendant began sending Lemke disturbing messages on Facebook, a social networking Web site, contacting her friends, and leaving things on her car despite her attempts to dissuade him. Lemke obtained a permanent restraining order against defendant. Defendant's unwelcome attentions continued, and resulted in his arrest and an information charging him with stalking, stalking with a court order in effect, and contempt of court for disobeying a court order. (Pen. Code, §§ 646.9, subs. (a), (b), 166, subd. (a)(4).)¹ A jury found defendant guilty on all counts, and the court sentenced

¹ All further statutory references are to the Penal Code unless otherwise designated.

him to four years eight months in state prison. Defendant appeals, arguing the stalking convictions are not supported by sufficient evidence, the court improperly denied his request for appointment of counsel, the court erroneously failed to instruct on privileged communications, the court erred in failing to excuse a biased juror, and the court incorrectly imposed a lifetime sex offender registration requirement. We shall remand for the trial court to comply with section 290.006. In all other respects, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 2010 defendant's and Lemke's paths crossed as both performed karaoke in local clubs. Lemke performed karaoke several nights a week, every other week, at both the Castle and Showboat clubs. Defendant also frequented both karaoke spots. Lemke occasionally said hello to defendant but did not have any other interaction with him. A karaoke operator testified that on a few occasions defendant would enter the bar after Lemke and would sign up to sing right after her, requesting songs she had sung the week before.

Facebook Messages

In February 2011 defendant sent Lemke a Facebook message about her relationship with a karaoke disc jockey (DJ). After Lemke failed to respond, defendant sent a Facebook message assuring her he had no criminal convictions, never brought harm to others, and did not have a "dark side." Lemke found the message very strange. In a third message, defendant told Lemke there was "an opportunity for us to be great friends and things get distorted." The message also stated they "might scare each other" and suggested they sing a duet at karaoke. Defendant apologized for being shy, which he said was caused by "abusive times."

Lemke finally responded to the messages. She told defendant she preferred a private life and was not interested in pursuing a friendship with him.

The Facebook messages from defendant continued. In one message defendant told a story about a woman named Sheryll who was distraught because her husband had beaten her. Defendant comforted the woman and told her she could end the “nightmare” by getting a restraining order and a divorce. Lemke found the message disturbing and asked him to stop sending her messages. She said she would see defendant at the Showboat but asked that he respect her earlier decision.

Lemke later saw defendant at the Showboat; she told him he misunderstood her situation and asked him to stop bothering her. Lemke attempted to distance herself from defendant when she went to the karaoke bars. She asked the karaoke DJ’s to separate them in the singing lineup in an effort to avoid contact with defendant.

Messages, Letters, and Gifts

Defendant continued to send Lemke messages. He also sent a karaoke machine, along with a letter and a picture of Shrek cartoon characters that were intended to represent the two of them, to Lemke at a prior employer’s address. In the letter, defendant stated he was encouraging Lemke to pursue her singing in a way he hoped was “not too intrusive.” Lemke responded that defendant was being too intrusive and asked that their relationship remain “strictly social” and he not invade her privacy again.

Defendant admitted he found Lemke “interesting” and that he had found her former employer on one of her old online profiles. Defendant asked Lemke to forgive him and told her, “I have found often people stumble when they are getting to know each other. I promise to be more thoughtful. No harm was intended.”

Defendant, in March 2011, sent Lemke a message telling her of a revelation from God informing him that he and Lemke would be married someday. Although Lemke, with the help of a friend, wrote defendant a letter telling him to leave her alone, defendant continued to contact her.

Subsequently, defendant began sending messages to Lemke’s e-mail, although she had not given him her address. Defendant found the address in an online profile. He told

Lemke there was no need to put a wall between them. Defendant talked about Lemke being an abuse victim and told her he hoped the greatest romantic relationship she would ever have would be with him. Defendant admitted he believed he frightened her at times.

Lemke was afraid because she did not know how defendant was discovering her contact information or why he was making assumptions about her. Again, Lemke informed defendant she did not want to be friends or have a relationship. Lemke requested that he cease contacting her and threatened legal action if he ignored her request. She blocked defendant on Facebook.

At this point, Lemke contacted local law enforcement about defendant's continuing unwelcome attentions. The police suggested a restraining order. Lemke did not pursue the option because she hoped defendant would cease if she avoided and ignored him. In addition, Lemke did not know how defendant would react if she obtained one.

Defendant's attentions did not cease. He suggested to a third party that the third party contact Lemke about a singing position in that person's band. Lemke received flowers at her home from defendant on Mother's Day. Defendant also sent her a pair of T-shirts he had made with her picture on them and a nickname he thought she should use in her singing career. The arrival of these gifts at her home frightened Lemke.

The next time she went to the Showboat, Lemke brought the T-shirts. She gave them back to defendant and told him not to send her anything again. Later that evening, defendant put on one of the T-shirts and wore it around the club. Lemke told him to take it off. Defendant responded that he would talk to Lemke's ex-husband about it, using her ex-husband's name. Lemke had never mentioned her ex-husband to defendant. Defendant also threatened to contact her employer and get her fired.

Defendant also left things on Lemke's car when it was parked outside the karaoke bars. Lemke believed he left a Shania Twain autobiography on her car. Defendant left a note encouraging her to pursue a career as a teacher. Defendant left a CD of his songs on

her seat at the karaoke bar. On Lemke's birthday, defendant had her birthday put up on the "birthday board" at the bar.

Contact with Lemke's Boyfriend and Ex-husband

When Lemke began dating Justice Larson in September 2011, she told him about defendant. Larson noticed defendant frequently watched Lemke. When Lemke and Larson occasionally kissed in the bar parking lots, defendant would walk past them sometimes, chanting "Justice, she is yours." The first time defendant walked past Lemke and Larson in the parking lot, Lemke asked defendant if he was following her and defendant admitted he was "looking out for my friend."

In October 2011 Lemke's ex-husband received a letter from defendant in which defendant accused Lemke of lying. Defendant also provided details regarding Lemke's financial situation so her ex-husband could reduce his payments. In addition, defendant stated Lemke had a mental illness and had been molested by her father, facts which defendant suggested could help her ex-husband gain full custody of their children. Defendant wrote another letter to Lemke's ex-husband in which he mentioned a kidnapping and a posttraumatic stress disorder that he might have learned about from Lemke's mother.

Music CD's

In late 2011 Lemke told friends about a dream she had of her late father. It was a beautiful dream that "brought a smile" to her heart. Defendant was nearby when she talked about the dream. A few months later, Lemke found a song by defendant on the Internet entitled "Every Day You Bring a Smile to My Heart," accompanied by a picture of Lemke and her name. On the Web site defendant wrote that the song had been inspired by Lemke and was his response to her father's death. Defendant left a CD with the song on it on Lemke's car, with a note stating that he would give her 10 percent of any profits from the song.

Lemke believed defendant was constantly monitoring her. The fact that defendant put her picture up on music Web sites along with the song particularly upset her. Music Web sites also had another of defendant's songs that referenced Lemke and contained facts about her life that she had never told him.

In July 2012 Lemke and a friend sat at the Showboat bar. Defendant's CD was on the bar and they began to discuss his music. Lemke's friend asked defendant to come over even though the friend was aware of Lemke's discomfort with defendant. When defendant sat down by them, Lemke told her friend never to pull her into a conversation with defendant and walked away. After Lemke heard defendant describe her as crazy, she threw water in his face.

Lemke Moves and Obtains Restraining Orders

By the summer of 2012 Lemke had moved. She began receiving notes and gifts from defendant at her new address. Defendant sent Lemke a note telling her to have her taillight fixed, accompanied by \$40. He also left a box of painting supplies next to her mailbox with a note telling her to paint her car because it looked like a "meth-mobile." Lemke was terrified because defendant had physically left the painting supplies at her new residence. She feared he was watching her and her children and that he might harm them.

Lemke did not know what defendant was capable of, but she knew he would not leave her alone. After she saw a picture on the cover of a CD of defendant holding a gun, she became even more afraid for her safety. Lemke decided to obtain a restraining order, and in August 2012 the court issued a temporary restraining order, followed by a permanent restraining order.

After Lemke had a friend serve defendant with the temporary restraining order, defendant sent her a letter telling her she suffered from schizophrenia and needed treatment. Defendant offered to pay for the treatment. This disturbed Lemke, who did not have schizophrenia. Not long after, defendant e-mailed and mailed to Lemke's sister-

in-law's employer a note warning that Lemke was schizophrenic and encouraging the family to get her into treatment.

Defendant mailed three more letters to Lemke's residence. In the first, defendant sought discovery in preparation for the hearing on the restraining order and named Lemke's minor son as one of his witnesses. He stated friends of Lemke "are hostile witnesses against you and you must submit this to the Court," she would have to compensate them for lost wages, and she would have to "serve them with a subpoena." He threatened to bring Lemke's family into court and to file a lawsuit against her. In the second letter, defendant threatened to have Lemke arrested for using a phony name. He also sent a copy of a letter he had sent to the court, urging the court to run checks on Lemke with various state and government agencies. The third letter requested the immediate issuance of a bench warrant for Lemke for using a false identity.

After defendant was arrested for violating the temporary restraining order, he filed a civil lawsuit against Lemke for defamation. He also tried to obtain a restraining order against her. Defendant sent letters to Lemke's friends, her mother, and her attorney. He sent Lemke's employers subpoenas with handwritten notes containing claims about Lemke's mental state.

Lemke purchased pepper spray and a stun gun to protect herself after defendant was released from custody. She took a concealed weapons course and outfitted her home with an alarm system. Defendant eventually dropped his lawsuit against her.

Prior Uncharged Conduct

The prosecution also introduced evidence of prior uncharged conduct under Evidence Code section 1101, subdivision (b).

Maureen Pierson

Maureen Pierson met defendant during their participation in a 12-step program 22 years before. Defendant began leaving Pierson gifts and notes on the group bulletin board or on top of her car, though Pierson had no personal relationship with defendant.

Among the gifts was a framed photograph of a Porsche with her maiden name on it and a rubber doll in a nurse's uniform wired to the photo. Pierson never worked as a nurse. On another occasion, Pierson found a cup of flowers with her name on it in the bathroom.

Pierson told defendant to leave her alone. However, defendant continued to contact her and write her letters. Pierson contacted the police because defendant was disrupting her life. Defendant obtained Pierson's address and phone number and left messages on her answering machine. He told Pierson that God had told him they were to be together and that her fiancé was in the way. Defendant said he wanted to be friends with Pierson's son. Although Pierson obtained a restraining order, defendant did not stop contacting her.

Brandi Hood

Brandi Hood worked at a bar that defendant frequented in 2005. Hood considered defendant only a customer, but defendant would often leave her notes with his phone number. He also left a college catalog to which he had taped a photo he had taken of her without her knowledge. Somehow, defendant discovered Hood's home address and had a box of schoolbooks delivered to her home. After defendant ignored Hood's request that he leave her alone, she obtained a restraining order. Defendant sent "slanderous" letters to Hood's boss and to owners of businesses near the bar.

Defense Case

Defendant testified he first met Lemke when he was selling cherries at his home in June 2010. The two spoke, and Lemke mentioned her son. He gave Lemke the karaoke machine to encourage her to branch out and sing new songs. He admitted he tended to write romantic letters.

Defendant stated he saw Lemke suffer a panic attack in April 2011 that endangered her son. He sent Lemke flowers after the incident. Defendant sent Lemke money and supplies to fix her car in order to help her get jobs. Because he believed Lemke suffered from schizophrenia, he offered to pay for psychiatric help. He sent her

T-shirts to help promote her singing. It was after he sent the shirts that Lemke told him to leave her alone.

Defendant testified he frequently saw Lemke's car in front of his home. Once he saw Lemke following him. In 2011 defendant drafted a restraining order against Lemke but never filed it. At the beginning of 2012 Lemke confronted him and threatened to "get" him. Defendant had no idea what she was talking about. Lemke threw water in his face because she was upset about defendant singing his original songs at the karaoke bar.

When Lemke had defendant served with the restraining order, defendant told her to stay out of his life. Defendant sought to have Lemke arrested for using a false name before he realized she had changed her name. Since that time, defendant had avoided Lemke.

Lauren Huey, an employee at the Showboat, testified about the incident in which Lemke threw water in defendant's face. Huey never saw defendant behave in an offensive manner toward anyone.

Verdict and Sentencing

The jury found defendant guilty of all counts. The court sentenced defendant to four years eight months in state prison: the upper term of four years on count 2 and one-third the midterm, or eight months, on count 1. The court sentenced defendant to 180 days on count 3, stayed pursuant to section 654. Defendant filed a timely notice of appeal.

DISCUSSION

Sufficiency of the Evidence

Defendant begins by challenging the sufficiency of the evidence in support of his convictions for stalking. Specifically, defendant argues the evidence did not establish that his words or deeds constituted a threat of violence. Defendant also contends some of his communications were privileged.

In reviewing a defendant's challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence such that a reasonable jury could find the defendant guilty beyond a reasonable doubt. Substantial evidence is evidence that is credible, reasonable, and of solid value. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

We do not reassess the credibility of witnesses, and we draw all inferences from the evidence that supports the jury's verdict. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) Unless it is physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Section 646.9, subdivision (a) applies to "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."

Count 1 charged defendant with stalking; count 2 charged defendant with stalking with a court order in effect. Both offenses required that the prosecution prove defendant made a credible threat with the intent to place Lemke in reasonable fear for her safety or for the safety of her family. (CALCRIM No. 1301.)

Defendant argues his conduct toward Lemke might have been "obnoxious, insensitive, offensive, misguided, invasive and any number of other things, but it was not a threat to Lemke's personal safety." According to defendant, "being creepy is not the same as making a credible threat of violence." Defendant characterizes his conduct toward Lemke as "juvenile and harassing" and "paternalistic (and patronizing)," and describes himself as a "persistent but harmless eccentric" engaged in an "unconventional courtship."

To find defendant guilty of both stalking and stalking with a court order in effect, the jury had to find that defendant made a credible threat with the intent to place Lemke

in reasonable fear for her safety or the safety of her immediate family. (CALCRIM No. 1301.) A credible threat consists of “a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat.” (§ 646.9, subd. (g).)

The totality of the evidence presented at trial supports the jury’s conclusion that defendant made a credible threat sufficient to constitute stalking in count 1. Defendant contacted Lemke through Facebook messages, e-mails, and personal contact at karaoke bars. He repeatedly sent packages to her home and to her previous employer. Defendant left gifts on Lemke’s seat at the bar and on her car. All of these efforts were in pursuit of a romantic relationship with Lemke. Defendant focused single-mindedly on the goal of making Lemke his wife.

These efforts continued even though defendant knew they disturbed Lemke and even though he realized his behavior was not normal. Defendant thoroughly researched Lemke’s past and present life. He wrote songs about her personal life. Defendant sent letters to Lemke’s former husband encouraging him to pursue full child custody based on Lemke’s purported mental health issues. In addition, defendant threatened to speak to Lemke’s boss and get her fired.

Lemke repeatedly tried to dissuade defendant, stressing she was not interested in a romantic relationship with him. She asked him to stop contacting her, to no avail. Defendant continued his unrelenting efforts to convince her they belonged together.

Taken together, defendant's words and actions support the finding of a credible threat against Lemke in count 1. He followed Lemke to the karaoke bars, found out where she worked, and eavesdropped on her conversations, all in an effort to convince her to become involved with him romantically. As time passed, defendant's behavior became more pointed and his intrusions into Lemke's life more personal and threatening. This pattern of conduct put Lemke in the position of reasonably fearing for her safety.

The evidence is also sufficient to support count 2, stalking with a court order in effect. After he was served with the temporary restraining order, defendant sent a letter to Lemke. He pleaded with her to seek mental health counseling to treat her schizophrenia. Defendant also contacted Lemke's sister-in-law about Lemke's mental health. In a letter seeking discovery he stated Lemke's friends were hostile witnesses against her and said she would have to subpoena them to testify in court. Notwithstanding the court order, defendant continued unabated in his pursuit of Lemke, leading her to fear for her and her family's safety.

Courts have found such dogged patterns of conduct by defendants toward the objects of their romantic obsessions to constitute credible threats sufficient to support stalking verdicts. In *People v. Falck* (1997) 52 Cal.App.4th 287 (*Falck*), a defendant became obsessed with a young woman. He once sent her a dozen black roses and sent her two or three letters every day describing his desire to be with her through eternity. (*Id.* at p. 291.) For years, the defendant researched the victim's life and began calling her home, sending her pictures with pornographic images meant to depict her. (*Id.* at pp. 291-292.) One letter outlined his prowess with an automatic weapon. (*Id.* at p. 298.) The defendant took out a personal ad professing his love for the victim and declaring his matrimonial intent. (*Id.* at p. 292.)

The court found the defendant's actions revealed a credible threat. (*Falck, supra*, 52 Cal.App.4th at p. 298.) The defendant's actions revealed an obsessive desire to marry the victim despite her rejection of his advances. Such cases, the court noted, sometimes

result in an obsessed defendant harming the object of his or her obsession even while stating he or she means no harm. (*Ibid.*)

In *People v. Uecker* (2009) 172 Cal.App.4th 583 (*Uecker*), the defendant stalked two different women. He followed the first woman every workday for months, placed notes on her car, and tried to talk to her. The victim tried to avoid him, but the defendant became angry and continued to follow her. (*Id.* at pp. 586-588.) The court found this persistent behavior implied the defendant would do anything to convince the victim to become involved with him, and a reasonable jury could have found the victim feared for her safety. (*Id.* at pp. 594-595.) The defendant continually called the second victim, a real estate agent, and rebuffed her attempts to stop him. He left disconcerting and strange messages. The second victim felt afraid and trapped. (*Id.* at pp. 588-590.) In one message, after the second victim found out he was a sex offender, the defendant told her he wanted her to “ ‘handle [his] issues’ ” and he “wanted ‘out of Dodge and by now, [she] probably kn[e]w why.’ ” (*Id.* at p. 596.) The court found the defendant’s actions toward the second victim implied a threat to her safety: “Simply put, this pattern of unrelenting conduct over the course of three weeks that toward the end became hostile and demanding, perpetrated by someone who is a sex offender and had no legitimate interest in real estate, was sufficient” to establish a credible threat. (*Ibid.*)

Here, defendant’s conduct both before and after the issuance of the temporary restraining order rose to the level of a credible threat against Lemke. Defendant protests that, unlike the defendants in *Falck* and *Uecker*, he never implied he was interested in having forcible sexual contact with Lemke. Instead, defendant argues “his unconventional courtship did not appear intended to put Lemke in fear for her safety, even if that was the effect it had. Hunt was continually trying to prove he cared for Lemke, and wanted the best for her.”

To the contrary, for over a year and a half, despite Lemke’s pleas to be left alone, defendant pursued Lemke. He followed her, looked into her past, contacted her friends

and family, and smothered her with unwanted gifts, and when rebuffed, defendant increased his pressure on Lemke to enter into a romantic relationship with him.

While defendant insists that “being creepy” is not the same as being threatening, there is a point at which creepy behavior can reasonably be regarded by someone of normal sensibilities as threatening behavior, intended to place the person in fear of harm. That point was reached here when defendant defied Lemke’s requests to be left alone and instead uncovered alternate ways to contact her, including e-mail and her home address, after she blocked his access on Facebook. These measures were not those of an eccentric paramour but of a predator intent on demonstrating his power to upset Lemke’s understandable efforts to protect her privacy. Notes and gifts deposited on a doorstep from a legitimate suitor might be a sign of affection, but from defendant they were a sign that he was watching her and knew where she lived. And then, after Lemke succeeded in gaining the protection of a restraining order, defendant defied the order in a clear effort to demonstrate that not even the power of the state could stop him from reaching her. Lemke was terrified, as any single woman living alone with children would be. Lemke did not know what defendant was capable of and feared for her safety, especially after she saw a picture of defendant on a CD cover holding a gun. Defendant might not have made overt or physical threats, but the totality of his treatment of Lemke supports the jury’s finding that Lemke experienced a credible threat.

Request for Appointment of Counsel

Defendant argues that in denying his request to withdraw his waiver of counsel and appoint counsel to represent him, the trial court violated his right to counsel under the Sixth Amendment to the United States Constitution. He made two such requests: one in the middle of trial, and the second following the verdicts.

Background

Prior to trial, the trial court granted defendant’s request to represent himself at trial. The court recommended that defendant be represented by counsel, but defendant

stated he had represented himself in other cases and felt confident in his ability. Defendant said he would represent himself at the preliminary hearing, but if the case went to trial he would request counsel.

The court understood defendant was reserving his right to counsel at a future time and told defendant his waiver of the right to counsel was not irrevocable. The court explained that the subsequent granting of a request to appoint counsel depended on the proceedings. A timely request for counsel would be generally granted, but an untimely request could be refused. Defendant repeatedly stated he was giving up his right to counsel “[a]t this point in time.” The court again reminded defendant that, although defendant could later request counsel, whether the request would be granted “would depend on the circumstances present at the time of your request.”

Defendant represented himself at the preliminary hearing and through the prosecution’s case-in-chief at trial. After the prosecution rested its case, defendant, in front of the jury, told the court he would like to invoke his right to counsel. The prosecution argued the request was an effort to sway the jury and was a disrespectful action against the court.

After a recess and outside the presence of the jury, the court noted that at the preliminary hearing defendant had examined witnesses and tried to introduce matters into evidence. At trial, defendant questioned jurors, exercised peremptory and for cause challenges during selection, and cross-examined the prosecution’s witnesses. Based on these observations, the court found defendant had researched the law and was fully engaged in his self-representation.

The court inquired as to why defendant sought counsel at that time. Defendant responded that he believed most of what he did was being objected to and he would not get a fair trial if he continued to represent himself. According to defendant, the jury was confused and it would be better if someone else represented him. Defendant told the court: “I think that it would be best if I kept my mouth shut and had somebody else

represent me. And it would be in a more organized fashion and probably less lengthy and to my benefit to have defense.” The court disagreed with defendant’s gloss on the trial, noting that having objections sustained during trial was one of the pitfalls of self-representation.

In denying the motion, the court stated: “I’m finding that the reasons that you gave, the length and the stage of the trial proceedings, the fact that in my mind this is part and parcel of various efforts that you’ve made during the course of trial to disrupt things. I’m sensing that there might be an ulterior motive in your request, given the fact that you did such things as serve a witness during the course of this trial.

“You have asked questions you’ve known -- I’ve ordered you not to ask. You disobeyed orders of the Court. There has been discussion about remanding you after those things happened. You did not request a lawyer. You are only now requesting a lawyer to try to disrupt this case.

“And that is the way I’m viewing this. I recognize that you have given other explanations, but tactically speaking, I’m seeing this as something that you’re doing -- you’re staging to disrupt the proceedings.

“I also believe that you have been effective in terms of presenting your case. The problem is that you go off on tangents and start asking questions that are not relevant to witnesses.

“So your request at this late stage of the case is denied.”

Following the jury’s verdict, the court ordered defendant remanded to custody. As the court was setting a date for sentencing, defendant requested a public defender. The court asked defendant to read the probation and sentencing report and then the court would consider the request. The court told defendant it would grant his request for counsel if, after reading the reports, defendant still desired appointed counsel. In addition, the court reminded defendant he was entitled to counsel on appeal. However, if defendant wanted counsel appointed immediately, the trial court would appoint counsel,

but based on defendant's previous self-representation the court would "hold back on that order."

Defendant responded: "I'm not being clear. I have to notify other people, which I don't have" The court told defendant he would have to deal with it; defendant said he did not have anyone's phone numbers and he was afraid his dogs were going to die at his house. The court ordered defendant be allowed to make two or three calls from jail, even if that was against jail protocol.

Defendant, at sentencing, stated he had read the probation report. Defendant made no reference to his prior request for counsel, nor did he make a new request for appointment of counsel.

Discussion

When a criminal defendant who previously waived his or her right to counsel and has elected self-representation seeks, during trial, to revoke that waiver, the trial court exercises its discretion under the totality of the circumstances. (*People v. Lawrence* (2009) 46 Cal.4th 186, 188 (*Lawrence*)). In ruling on such a request, among the factors the court may consider are "(1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney." (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993 (*Elliott*)). These factors are not absolutely necessary for a court to consider, nor is any one factor necessarily determinative. (*Lawrence, supra*, 46 Cal.4th at p. 196.)

The court may also consider the defendant's motive for requesting appointment of counsel. (*People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1125 (*Ngaue*)). A trial court may deny a defendant's request to terminate self-representation when it determines the

request is an attempt to manipulate the court system. (*Id.* at pp. 1124-1125; *People v. Clark* (1992) 3 Cal.4th 41, 115.)

Midtrial Request for Counsel

Defendant argues the trial court denied his midtrial request for counsel because it believed it was “simply a disruption tactic and that he was being effective in trial” and failed to inquire as to the availability of counsel so as to ascertain whether granting the request would be disruptive. According to defendant, the factors the court relied on do not support the court’s conclusion.

Defendant contends the trial court’s “subjective ‘sense’ ” that defendant was being obstructionist was not enough to deny him his right to counsel. Appointing counsel, defendant reasons, would have stemmed the very disruptive conduct the court found objectionable. In addition, defendant asserts that the record belies the court’s determination that he was effective in terms of presenting his case.

The totality of the circumstances supports the trial court’s denial of defendant’s request for appointment of counsel during trial. Defendant had previously represented himself in prior litigation and represented himself in the current case up until he made his request. Defendant expressed frustration with complying with court procedures, but as the trial court noted, defendant had been effective in presenting his case. Although defendant experienced difficulty in focusing his questioning of witnesses, he was able to cross-examine witnesses and present his version of events. Moreover, defendant waited until well into trial to make his request. The trial court had warned defendant that an untimely request might be refused. The timing of his request, made in the jury’s presence, underscored the trial court’s belief that it was yet another of defendant’s delaying tactics. Nor did defendant present any compelling reason for counsel to be appointed. Although the trial court did not specifically inquire into the availability of counsel, the fact that defendant waited well into trial to make his request would have resulted in a significant delay as new counsel prepared for trial.

As the Supreme Court noted: “[W]e do not agree with either of the argument’s premises that the trial court must review on the record each factor mentioned in *Elliott* or that any one factor is necessarily determinative. The standard is whether the court’s decision was an abuse of its discretion under the totality of the circumstances [citation], not whether the court correctly listed factors or whether any one factor should have been weighed more heavily in the balance.” (*Lawrence, supra*, 46 Cal.4th at p. 196.) Here, the totality of the circumstances does not support a finding that the court abused its discretion in denying defendant’s request for appointment of counsel during trial.

Posttrial Request

Defendant also argues the trial court denied his request for appointment of counsel for sentencing. According to defendant, he made an unequivocal request for counsel and there was no reason for the court not to rule on his request.

We review the trial court’s denial of a request for appointment of counsel under the harmless error standard of review. We consider whether it was reasonably probable that defendant would have obtained a more favorable result at sentencing if he had been represented by counsel. (*Ngaue, supra*, 229 Cal.App.3d at pp. 1126-1127.)

We find no such error. At sentencing, the court, after carefully considering the record, determined probation would be inappropriate. After considering the threat of harm involved, the callousness of defendant’s acts, and the planning and sophistication of defendant’s actions, the court imposed the upper term. It is not reasonably probable, given the facts, that appointed counsel would have obtained a more favorable outcome.

Instructional Error

The trial court, defendant contends, violated his constitutional right to present a complete defense when it instructed that discovery did not apply to the restraining order proceedings. Defendant argued at trial that he was conducting discovery when he contacted Lemke after the issuance of the temporary restraining order.

Background

After defendant was served with the temporary restraining order, he sent Lemke three letters for the purpose of discovery in preparation for the hearing on the injunction. Defendant testified he sent the letters after researching restraining orders and discovery rules pursuant to Code of Civil Procedure section 2016. The prosecution objected on the ground of relevance. The trial court allowed defendant to testify about his research, but the testimony would be limited in order to prevent jury confusion. In addition, the court told the jury to disregard defendant's or the prosecution's version of the law if it conflicted with the court's instructions.

Defendant testified he researched the discovery rules and the prosecution again objected. The court sustained the objection and instructed the jury that "[d]iscovery does not apply in a restraining order matter like this." Defendant's subsequent statement disagreeing with the court was stricken.

Discussion

Defendant argues he was entitled to discovery regarding the restraining order Lemke obtained against him. By instructing the jury that defendant's communications to Lemke were not privileged as discovery, the court "eviscerated" defendant's defense that he was entitled to contact her as part of the restraining order defense.

However, there is no provision for discovery in Code of Civil Procedure section 527.6 proceedings involving temporary restraining orders and injunctions prohibiting harassment. As expressed in *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 650, footnote 11, "There is no provision under section 527.6 allowing for discovery, and in any case, under the civil harassment scheme there is insufficient time in which to conduct discovery." Section 527.6 provides a swift and truncated summary procedure for the limited scope of preventing harassment, in contrast to normal injunctive procedures that allow time for discovery, investigation, pleadings, and the opportunity for a full trial. (*Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 811-812.) Section 527.6 provides an

opportunity for the restrained person to file a cross-petition and present a case at a hearing before the trial court, which must find unlawful harassment by clear and convincing evidence before issuing the injunction. (§ 527.6, subds. (h), (i).)

Nothing in Code of Civil Procedure section 527.6 authorizes discovery. Discovery in situations involving restraining orders in response to harassment would undercut the statute's efforts to protect victims from unwanted contact by the restrained person. Defendant fails to cite any authority in support of his claim that under section 527.6 he was entitled to contact Lemke in an effort to conduct discovery.

Juror Misconduct

Defendant argues the trial court violated his constitutional right to an impartial jury in failing to excuse a juror. The juror in question asked the court bailiff if he should be concerned for his safety because of "this nut job," referring to defendant.

Background

During the prosecution's case, juror No. 10 approached the bailiff and expressed concern for his safety. Juror No. 10 asked the bailiff if he should be "concerned for his safety and of this nut job," a reference to defendant.

Prior to questioning the juror, the court stated: "[I]t strikes me that because of the things that you are doing during the course of the trial even, which no lawyer would be allowed to do, you may be planting some seeds of concern within the mind of the jurors. Now, that is completely, I think, a normal human response. However, they are required by law to maintain the presumption of innocence as well as not considering or coming to a conclusion, not reaching an opinion, expressing that opinion and so on. However, I think that you are the one -- you are the one that is causing the trouble potentially, if there is trouble and I want to nip it in the bud."

The court then questioned juror No. 10 about his comments to the bailiff. Juror No. 10 explained, "I didn't use the right words. It was just something that came out because it was something that I was thinking about." When asked by the court if he

could be fair and listen to the rest of the evidence, had retained in his mind the concept of the presumption of innocence, and whether he would remain open-minded and not come to any conclusions prior to the deliberation process, juror No. 10 responded in the affirmative.

The court allowed defendant to voir dire the juror. The juror testified that he did not ask the bailiff if he needed protection. Juror No. 10 was unsure exactly what he had said but testified it had been a “poor choice of words,” blurted out in jest. He approached the bailiff because the trial court had instructed the jurors to go to the bailiff and not to the other jurors. Juror No. 10 did not mention the incident to the other jurors. Following the questioning of juror No. 10, the trial resumed.

Discussion

Defendant argues the trial court erred in failing to excuse juror No. 10. Under defendant’s analysis, juror No. 10 committed misconduct by forming an opinion about the defendant, that he was a “nut job,” and by being influenced by external matters, such as fear for his safety. At the outset, the People contend that by failing to object at trial, defendant has forfeited the claim on appeal. However, defendant claims the juror misconduct deprived him of his right to an impartial jury and we shall consider the issue.

Section 1122, subdivision (b) provides that the court must instruct jurors not to form or express any opinion about the case until the cause is finally submitted to them. The admonition requires jurors to consider all the evidence before them and precludes jurors from ignoring “further evidence, argument, instructions, or the views of other jurors.” (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 73.) However, it would be unrealistic to expect jurors not to think about the case during trial. A juror who reaches a preliminary opinion about the evidence does not violate the court’s instructions if the juror remains open to a fair consideration of the evidence, instructions, and other juror’s opinions during deliberations. (*Ibid.*)

Here, juror No. 10's comments did not reflect an improper opinion formed about the case. Instead, juror No. 10 made a brief comment about defendant's demeanor during trial, labeling him a "nut job" and inquiring about his own safety. While it is troubling that a juror would describe defendant in such negative terms, juror No. 10 did not express any opinion about whether or not defendant committed the crimes he was accused of or any opinion as to defendant's veracity.

The court questioned juror No. 10 to ascertain whether the juror could be impartial. Juror No. 10 reassured the court that he could impartially review the evidence, acknowledged the presumption of innocence, and stated he would not reach any conclusion as to defendant's guilt or innocence until the deliberation process.

Section 1089 authorizes the trial court to dismiss a juror on a showing of good cause that the juror is unable to perform his or her duty. We review the trial court's decision as to whether to discharge or retain a juror under the abuse of discretion standard. We uphold the trial court's exercise of discretion as to whether good cause exists to dismiss a juror if it is supported by substantial evidence. (*People v. Bennett* (2009) 45 Cal.4th 577, 621.) It is within the trial court's purview to judge the credibility of witnesses and to resolve conflicts in the testimony, and we uphold this determination if supported by substantial evidence. (*In re Carpenter* (1995) 9 Cal.4th 634, 646.)

Here, the trial court was in the best position to evaluate the nature and seriousness of juror No. 10's comment regarding defendant. Juror No. 10 answered the court's questions and admitted his remarks had been a "poor choice of words," blurted out in jest. The trial court accepted this explanation, evaluated juror No. 10's responses and demeanor, and declined to excuse juror No. 10. Given the evidence before us, we cannot find the trial court's decision an abuse of discretion. Substantial evidence supports the court's determination that juror No. 10 could remain impartial.

Sex Offender Registration

In a supplemental brief, defendant challenges the trial court's imposition of a lifetime sex offender registration requirement and also argues the registration requirement violates his constitutional rights. The People agree the case should be remanded to ensure the trial court properly exercised its discretion but contend the registration requirement does not constitute a violation of defendant's right to a jury trial.

Imposition of Lifetime Sex Offender Registration Requirement

Pursuant to section 290.006, the court may order a defendant to register as a sex offender "if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification." In addition, the court "shall state on the record the reasons for its findings and the reasons for requiring registration." (*Ibid.*) Defendant was convicted of two counts of section 646.9. Section 646.9, subdivision (d) provides that the court may order a defendant to register as a sex offender under section 290.006.

In the present case, the probation report recommended defendant be ordered to register as a sex offender. The report states: "Penal Code Sections 290.006 and 646.9(d) allow the Court to order the defendant to register as a sex offender if the Court finds on the record at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. It appears the crimes against the victim were perpetrated for those very reasons." The court considered the report and without any further discussion stated: "You are ordered to register with the appropriate law enforcement agency in accordance with the provisions of Penal Code Section 290."

In sentencing a defendant to sex offender registration, a trial court must engage in a two-step process. First, the court must determine whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification and state the reasons for those findings. Second, the court must state the reasons for requiring lifetime

registration as a sex offender. “By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case.” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197 (*Hofsheier*).)

In the present case, the court did not make either finding on the record. One of the reasons for requiring such findings is to assist review of such decisions. (*Hofsheier, supra*, 37 Cal.4th at pp. 1208-1209.) Therefore, we set aside the trial court’s order requiring defendant to register as a sex offender and remand the matter to the trial court to fully comply with the requirements of section 290.006.

Registration Requirement and Constitutional Safeguards

Finally, defendant claims that requiring him to register and restricting his residency are punitive penalty provisions which require a jury trial and proof beyond a reasonable doubt. He argues *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] requires these constitutional safeguards before the court can impose the registration requirement or residency restrictions. As both defendant and the People acknowledge, this issue is currently before the California Supreme Court in *People v. Mosley*, review granted January 26, 2011, S187965.

An order to register as a sex offender and enforcement of a residency restriction are collateral consequences of a defendant’s conviction. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 337-338.) Sex offender registration does not constitute punishment for the defendant’s crime. (*Hofsheier, supra*, 37 Cal.4th at p. 1197.)

Defendant also argues at length that the registration requirement’s intent and effect are punitive. However, the United States Supreme Court has found that the duty to register and the residency restriction do not trigger the right to a jury trial under *Apprendi*. Registration and residency requirements are “accoutrements,” not part of the sentence itself. (*Oregon v. Ice* (2009) 555 U.S. 160, 171-172 [172 L.Ed.2d 517].) A

factual determination by the trial court that a defendant must register does not violate *Apprendi* because “no erosion of the jury’s traditional role was at stake.” (*Ice*, at p. 170.) Accordingly, defendant does not have a right to a jury trial on the issue of sex offender registration.

DISPOSITION

The trial court’s order requiring defendant to register as a sex offender is vacated and the matter remanded for compliance with section 290.006. In all other respects, we affirm the judgment.

_____ RAYE _____, P. J.

We concur:

_____ NICHOLSON _____, J.

_____ ROBIE _____, J.