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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL A. GARCIA,

Defendant and Appellant.

D061571

(Super. Ct. No. SCD234612)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed.

A jury convicted Miguel Garcia of one count of stalking with a court order in effect (Pen. Code, § 646.9, subd. (b)) and four counts of disobeying a court order (Pen. Code, § 273.6, subd. (a)). Garcia admitted two prior stalking convictions and one prison prior (Pen. Code, § 667.5, subd. (b)). Garcia was sentenced to a determinate term of five years in prison, plus an additional consecutive one-year term for the prison prior.

Garcia appeals contending that the trial court abused its discretion in permitting the prosecution to introduce evidence of prior uncharged conduct involving the victim of

the charged offenses pursuant to Evidence Code¹ sections 1101, subdivision (b) and 1109. Garcia further contends that section 1109 is facially unconstitutional. We will reject both contentions and affirm.

STATEMENT OF FACTS

Given that the events which occurred in this case are largely undisputed, as distinguished from the issue of Garcia's intentions, we will adopt the statement of facts from the respondent's brief as an accurate summary of the record.

A. Background and Prior Conduct

In April 2009, victim Kimberly Rivera leased an apartment with appellant. After moving in together, they began having relationship problems. Appellant became very obsessive and possessive, and would not let Rivera go anywhere by herself. If Rivera tried to go somewhere by herself, appellant would follow her. He even accompanied Rivera on her way to work. On the evening of June 5, 2009, Rivera was drinking and wanted to call a crisis center to get help for her drinking problem. However, appellant would not let her call for help because he was afraid they would take her away from him. Appellant took the phone from Rivera, threw her on the ground and pinned her down. After appellant finally let Rivera up, she went to her sister's house and appellant followed her there. Rivera sustained bruises on her arms where appellant held her down. She called 911 after arriving at her sister's house and appellant was later arrested at the

¹ All further statutory references are to the Evidence Code unless otherwise specified.

apartment he shared with Rivera. A couple hours after the arrest, Rivera moved out of their apartment and into her sister's house. She also immediately obtained a temporary restraining order against appellant.²

On June 11, 2009, Rivera met appellant in the parking lot of her sister's house to discuss the lease and to break up with him. Rivera's sister called the police because she did not want Rivera to talk to appellant. Rivera talked to the police and explained that appellant had not done anything wrong at that time.

In August or September 2009, Rivera moved out of her sister's house and into her own apartment. On one occasion, Rivera invited appellant to her apartment to discuss their previous lease. Appellant started coming onto her sexually. Rivera got mad and asked appellant to leave, but he refused. Rivera then walked out of her apartment as if to leave. Appellant grabbed Rivera's phone and headed toward the elevator to follow her. Once Rivera saw appellant heading to the elevator, she ran back into her apartment, locked the door, and called the police. Rivera never invited appellant to her apartment again.

However, appellant continued to contact Rivera. He frequently followed her on the trolley. At times he would speak to Rivera and ask if she was seeing anyone else. Other times appellant would just sit and stare at Rivera, and this made her nervous. One time, while on the trolley, Rivera called the police to report appellant for following her

² Rivera obtained a permanent restraining order in December 2009 and appellant was served by a police officer.

and appellant backhanded Rivera on the corner of her face. Appellant would also walk up and down the street outside Rivera's apartment, whistling and sliding at least 20 notes under her door. One note read, "If you want me out of your life, call me when you get home." Another read, "And by the way, we're not dead yet. The only time where it's too late for us to work things out is after we're both dead." On several occasions, appellant followed Rivera to MCRD where she worked as a chef. One time, appellant asked Rivera if he could hug her and she responded no. He then asked if he could kiss her goodbye and she again said no. Appellant then said, "Well can I shoot you goodbye then?"

Appellant's behavior caused Rivera to fear for her safety. She became a homebody and did not want to be out because she did not know what appellant was going to do. She was afraid to end up dead because appellant was so angry with her for leaving him. Additionally, Rivera was concerned because appellant, who is larger and stronger than her, had a black belt in martial arts.

Appellant was prosecuted for stalking Rivera in 2009 and pleaded guilty in January 2010. Appellant continued to walk by Rivera's home and follow her on the trolley. He was again arrested for stalking and pleaded guilty in September 2010. Rivera testified she was aware of both arrests and convictions.

B. Charged Offenses

Between May and June 2011, appellant began following Rivera again on the trolley, and whistling outside her apartment (count 1). Around 8:30 a.m. on May 9,

Rivera got on the trolley to go to work. She saw appellant standing outside at one of the stops and he gestured to her as if to say, "What are you doing?" However, appellant did not get on the trolley.

On May 16, appellant got on the trolley and glared at Rivera (count 2). He started mumbling something and shook his head back and forth. After appellant got off the trolley, Rivera called the police.

On May 23, Rivera left for work at her usual time around 8:30 a.m. (count 3). She noticed appellant was already on the trolley so she did not get on it and waited for the next one. When Rivera was on the second trolley, appellant was waiting at the trolley station two stops away. Appellant got on that second trolley and Rivera called the police. Appellant followed Rivera when she got off but did not follow her into the undercover passageway leading to the buses.

On May 27, Rivera was on the trolley to go to work at MCRD, where she was a chef. Appellant got on the same trolley, sat across from Rivera, and asked, "Can I just have a few minutes of your time?" (Count 4.) Rivera did not answer him. She got up, walked away, and immediately called the police. Before appellant got off at the next station, he stood by the door, pointed his cell phone directly at Rivera, and uttered something. Rivera testified it looked like appellant was trying to take her picture.

On June 2, Rivera got on the trolley at her usual time around 8:30 a.m. (count 5). At this time, appellant and three undercover officers were already on the trolley. One of the officers asked Rivera to positively identify appellant, which she did. Appellant was

wearing dark sunglasses, black pants, a black shirt, and a black backpack. Rivera testified that when she saw appellant on the trolley, he was generally dressed in the same manner. Before appellant got off the trolley, he stood at the doorwell and stared at Rivera. The officers followed appellant off the trolley and one identified himself as San Diego Police. Appellant initially said he was not doing anything and was just getting off the trolley. But then he said, "I'm just going back. Just tell me--I know I'm going back. Just tell me how long." The officers took appellant into custody and recovered two cell phones. One of the cell phones had a picture of Rivera sitting on the trolley in her chef's outfit.

C. Defense

Appellant testified he met Rivera in 2008 and knew she had a drinking problem. They began dating and eventually moved in together. At some point in 2009, Rivera told appellant she did not want to be in a relationship with him, but he remained concerned about her drinking.

Appellant testified he was homeless in early May 2011. He got on a list for a bed at St. Vincent De Paul's, but there were about 200 people ahead of him. Appellant had to check in every morning at 8:00 a.m. in order to move up on the list. He testified he took the trolley about 10 to 15 times a day.

Appellant testified on May 9 he was on the platform at a trolley stop and he saw Rivera was on the trolley. He gestured his hands as if to say, "Why?" He did not get on the trolley. He claimed he got on the same trolley as Rivera on May 16 without knowing

she was on it. He remembered shaking his head back and forth and thinking he needed to get off the trolley. He claimed on May 23 he was already on the trolley when Rivera got on. He recalled that Rivera immediately got off the trolley and waited for the next one. He claimed on May 27 he again got on the trolley Rivera was already on. He sat across from Rivera and asked, "Could you just give me two minutes of your time?" Appellant testified he did not intend to annoy, harass, or scare Rivera, and that his intent was closure. He wanted to tell Rivera, "Look, I'm not mad at you. Good luck, God bless you, good-bye." Appellant testified he took a picture of Rivera on this day because he needed closure. Appellant testified on June 2 he got on the trolley and did not realize Rivera was already on it. He testified he did not intend to harass her, to behave in a malicious way, or place her in fear. Appellant testified it was a coincidence he was on the same trolley as Rivera on May 16, May 23, May 27, and June 2.

DISCUSSION

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

Garcia contends the trial court abused its discretion in allowing the prosecution to introduce evidence of his prior conduct involving the victim, for which he had been convicted. Garcia concedes the evidence was relevant and otherwise admissible under section 1109, however, he argues it was unduly prejudicial and failure to exclude it denied him due process and rendered the trial unfair. The People respond that the evidence was admissible both under sections 1101, subdivision (b) and 1109 and that the

probative value of the evidence outweighed any prejudicial effect. We agree with the People's analysis.

A. Standard of Review

The parties agree that when we review the trial court's decision to admit evidence we apply the abuse of discretion standard. Under that standard we will not overturn the trial court's decision unless the record clearly demonstrates an abuse of the court's broad discretionary power. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805; *People v. Prince* (2007) 40 Cal.4th 1179, 1237.)

B. Sections 1101, subdivision (b), 1109 and 352

Under section 1101, subdivision (b), evidence of prior crimes or acts are admissible to prove facts relevant to the charged offense, such as knowledge, intent or absence of mistake. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400-402; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1223-1224.)

Section 1109 allows the introduction of the commission of prior acts of domestic violence in a criminal case charging an offense involving domestic violence. (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.) Stalking is a crime involving domestic violence within the meaning of section 1109. (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1143.)

The admissibility of evidence under either sections 1101, subdivision (b) or 1109 is conditioned upon an evaluation by the court of whether the probative value of the

evidence outweighs any prejudicial effect as directed by section 352. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313-1314.)

As we have noted, Garcia does not challenge the relevance of evidence of his prior conduct involving the victim. Thus, the question we must decide is whether, in light of the record, the evidence of prior crimes was so inflammatory, or prejudicial that it outweighed the conceded relevance of the evidence.

C. Analysis

In order to convict Garcia of stalking the prosecution had to prove:

"1. The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person; [AND] [¶]
2. The defendant made a credible threat with the intent to place the other person in reasonable fear for her safety; [AND] [¶] 3. A temporary restraining order prohibiting the defendant from engaging in this conduct against the threatened person was in effect at the time of the conduct." (CALCRIM No. 1301.)

Garcia's defense did not deny the occurrence of the events, but rather took the position that his appearance on the same trolley with the victim was a mere coincidence. Garcia denied any intent to harass or annoy the victim, thus he placed his mental state squarely in issue.

The trial court carefully evaluated the proffered evidence and considered its prejudicial effect. The court allowed the evidence and the fact Garcia had been convicted of the prior crimes following guilty pleas. Thus, the jury would not be required to speculate as to whether he committed the offenses. The court did not, however, permit the prosecutor to introduce evidence that Garcia had been sent to prison for the offenses.

The court found evidence of punishment for the offenses would be unduly prejudicial. The trial judge was in the best position to evaluate the prejudicial effect of the evidence, which must be resolved on the particular facts of the individual case. (*People v. Scott* (1980) 113 Cal.App.3d 190, 198.)

The prior acts involving the victim provided the jury with information about Garcia's intent as well as the reasonableness of the victim's fear, both elements of the crime of stalking. (*People v. Zavala* (2005) 130 Cal.App.4th 758, 770.)

On the other hand, the evidence was not confusing, unduly time consuming or inflammatory. Certainly the prior acts were more physical than the charged acts, but they were not excessively violent and the victim did not sustain serious injuries in those events. Garcia's prior behavior with the victim provided information for the jury from which it could evaluate Garcia's intentions at the time of the charged acts, and assess whether the victim was reasonably placed in fear. In short, we find nothing in the record to support Garcia's claim that the trial court abused its discretion.

II

SECTION 1109 IS CONSTITUTIONAL

Finally, Garcia contends section 1109 violates the due process clause by permitting the admission of propensity evidence. Thus, he argues the section is facially invalid. Garcia acknowledges the California Supreme Court resolved this issue in *People v. Falsetta* (1999) 21 Cal.4th 903, 917. Garcia also acknowledges we must follow the direction of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962)

57 Cal.2d 450, 455.) Garcia has raised this issue in the present case to preserve his constitutional challenge for federal review. (*Duncan v. Henry* (1995) 513 U.S. 364, 366.)

We will follow the direction of our Supreme Court and find that section 1109 is not facially unconstitutional under either the California or United States Constitutions.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.