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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ALAN SCHLICHTER,

Defendant and Appellant.

E052751

(Super.Ct.No. FSB1000988)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Modified and affirmed with directions.

Robert V. Vallandigham, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Melissa Mandel and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Michael Alan Schlichter is serving two years nine months after being convicted of one felony and three misdemeanor charges resulting from his

actions in bullying two elderly neighbors. Defendant argues the evidence is insufficient to support the conviction for misdemeanor elder abuse as to one of his neighbors, and that the trial court erred in sentencing him to 270 days on each of the misdemeanor elder abuse counts when the maximum sentence is six months. As discussed *post*, we affirm the conviction, but direct the trial court to resentence defendant on the first misdemeanor elder abuse count to a maximum of six months in county jail.

FACTS AND PROCEDURE

On March 10, 2010, the San Bernardino County Sheriff's Department began to investigate complaints from residents of a senior citizen mobilehome park of elder abuse by defendant, who was then age 51, but was living in the park.

On May 6, 2010, the People filed an information charging defendant with two counts of felony elder abuse (counts 1 & 4, Pen. Code, § 368, subd. (b)(1)),¹ one count of making criminal threats (count 2, § 422), residential burglary (count 3, § 459), and misdemeanor theft from an elder (count 5, §368, subd. (d)).

At trial, the elderly manager of the mobilehome park testified that she had received “numerous” complaints about defendant over the last six months that he lived in the park, and that she had been in the process of trying to get him to move out when he was arrested.

Angela Culverhouse, a resident of the mobilehome park, testified that one night in early March 2010, she received a telephone call from another neighbor that there was a

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

“commotion” going on near the home of a disabled man for whom Culverhouse provided care. Wayne Hansen was 72 years old and lived next door to defendant, and down the street from the disabled man for whom Culverhouse provided care. As Culverhouse reached the area near Hansen’s home, she heard defendant pounding on Hansen’s door “yelling and so angry,” saying, “Let me in. Let me in . . . or I’m going to shoot you” and, “Let me in or I’m burning it down.” Culverhouse testified that this sounded like more than just a “small argument between tenants,” but “like it had escalated to the point [of] no return.” She was in fear for her safety. When defendant saw Culverhouse approach, he jumped off Hansen’s porch and hid behind some oleander plants. Culverhouse made sure the man for whom she provided care was ok, and then went home. She reported the incident to the park manager.

Another neighbor, Rayner Carmichael, testified that defendant sometimes did odd jobs for her, that she treated defendant as a son, and that she liked defendant a lot. She testified that she had warned defendant that he was treating Hansen badly. “I said I felt that he had crossed the line. That it was just a little bit too much because Wayne is I believe in his 70s and I just felt that it was just a little over the top.” Carmichael testified that defendant was disrespectful to Hansen. Defendant used “a lot of profanity” with Hansen and would get angry with Hansen if he could not give defendant a ride when asked. Carmichael believed “there were some threats” involved, and that defendant would get angry if he saw Hansen’s truck at home but Hansen would not answer when defendant knocked on the door of his mobilehome. Defendant acknowledged his actions

toward Hansen, but expressed contempt for him as a “washed up drug abuser,” whom defendant did not like but from whom he needed to get rides.

Carmichael approached Hansen one day and asked him why he allowed defendant to treat him so badly. Hansen acknowledged several incidents, but replied that he was intimidated by defendant and did not want to cause any problems.

Carmichael had called the Sheriff’s department after a break-in in her mobilehome in December 2009, for which she believed defendant was responsible.

Wayne Hansen testified that defendant asked him to drive him someplace “almost every day,” and that when Hansen did not want to, defendant would call him profanities, throw rocks at his mobilehome, or pound on his mobilehome. Sometimes defendant would come to Hansen’s house at 9:30 or 10:30 p.m., after Hansen was asleep, to ask for a ride to the grocery store. Hansen would get dressed and take him. Sometimes Hansen would give defendant a ride when he did not want to because defendant would “just yell and holler and just overpower me. I’d just take him to the store to shut him up.” One time, defendant did Hansen’s laundry for him. Hansen gave him the money, laundry soap, and 35 or 40 shirts. Defendant only returned about half the shirts. Hansen later saw defendant wearing one of the shirts.

Hansen testified that he was afraid of defendant because defendant was younger and stronger and he was always afraid defendant would do something to him. Defendant bragged to Hansen that he had done a lot of stealing, had broken a cop’s arm, and said he had a gun. Defendant introduced Hansen to a friend whom he said had just gotten out of

prison for killing someone. Hansen testified that he would be afraid if defendant came back to the mobilehome park because he believed defendant might hurt him.

Stuart Lessmueller testified that he lived next door to defendant. He lived on a fixed income of just over \$1,000 a month. On one occasion, he had agreed to pay defendant \$10 to do some yard work. Lessmueller had only a \$100 bill, so he gave it to defendant and asked him to bring back \$90 in change. Defendant at first gave him part of the change. Defendant eventually gave him most of the change back, but still kept about \$20 or \$30. Lessmueller did not remember telling a sheriff's deputy that he had woken up one night and seen defendant going through some property in his mobilehome. He remembered telling the deputy that he did not want to speak about defendant because he was afraid it would cause problems between him and defendant. He remembered telling the deputy something like, "[L]ife is like a playground when you're a kid. Some people get picked on and some people are the bullies." Lessmueller testified that defendant had never bullied him, and that he had not told the deputy otherwise. He stated, "If I said that I would take that back." He remembered telling the deputy that he really needed to get his change back from defendant, but did not remember telling her that he had to ask defendant about five times for the money he did receive.

Deputy Jennifer Wood testified that in March 2010 she investigated allegations that defendant had committed elder abuse against Hansen and Lessmueller. When she spoke with Lessmueller, he first asked her if defendant was still around. When she told him defendant was in custody, Lessmueller began to speak with her about defendant. Lessmueller told her that defendant had offered to help around the house, and

Lessmueller had agreed to pay defendant \$10 to rake leaves. Lessmueller had only a \$100 bill, so he gave it to defendant and asked him to bring \$90 change. Lessmueller told Wood that he had to repeatedly ask defendant for his change over a period of time, and that defendant eventually gave him \$70 of the \$90. Lessmueller appeared upset about this incident and concerned about not having enough money to make ends meet. This episode appeared to take an emotional toll on him. Lessmueller had told Wood that he woke up one night and saw defendant in his living room going through some papers. Lessmueller was not clear about when this happened. He told Wood that it had been a mistake to talk to other residents of the mobilehome park about defendant because he believed they had complained about defendant. When Wood asked Lessmueller if he considered defendant a bully, he nodded and said, "Yes." When asked if he had been bullied by defendant, Lessmueller said something like, "Life is like a playground, some people get bullied." Lessmueller refused to tell Wood about anything else that had occurred between him and defendant.

On October 29, 2010, the jury convicted defendant of the lesser included charge of misdemeanor² elderly abuse (§ 368, subd. (c)) in counts 1 and 4, acquitted defendant of residential burglary in count 3, and convicted him of making criminal threats and misdemeanor theft from an elder in counts 2 and 5.

² Felony elder abuse involves circumstances likely to produce great bodily harm or death. Misdemeanor elder abuse involves circumstances other than those likely to produce great bodily harm or death. (§ 368, subds. (b) & (c).)

On January 12, 2011, the trial court sentenced defendant to two years in prison on count 2, the only felony, and to 270 days on each of the three misdemeanors, to run concurrent with each other, but consecutive to count 2. This appeal followed.

DISCUSSION

1. Evidence to Support Misdemeanor Elder Abuse of Stuart Lessmueller

Defendant contends his conviction on count 4, misdemeanor elder abuse of Lessmueller, should be reversed because it is not supported by sufficient evidence. Specifically, defendant argues there was no testimony about any specific act he committed that constituted misdemeanor elder abuse.

“To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.

[Citations.]” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.)

Section 368, subdivision (c), imposes criminal liability on “[a]ny person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering.”

Defendant argues there is simply a total lack of evidence regarding any specific act he committed that could or did “willfully cause[] or permit[] [Lessmueller] to suffer . . . unjustifiable physical pain or mental suffering,” as required by section 368,

subdivision (c). The People respond that the specific act defendant committed that caused Lessmueller unjustifiable mental suffering was his failure to pay Lessmueller the money he owed him.

The evidence, viewed in the light most favorable to the prosecution, that defendant caused Lessmueller unjustifiable suffering when he refused to give Lessmueller the entire \$90 in change from the \$100 bill is as follows: (1) Lessmueller lived on a very limited income, somewhat over \$1,000 per month; (2) Lessmueller had to ask defendant for his money back repeatedly over a period of time before defendant eventually gave him back all but \$20 or \$30 that he owed him; (3) Defendant kept the \$20 or \$30 and never gave it back to Lessmueller; and (4) Lessmueller was concerned about not having enough money to make ends meet and this episode took an emotional toll on him. This is sufficient evidence that defendant caused Lessmueller unjustifiable mental suffering.

In addition, Lessmueller told Wood in response to her question about whether he had been bullied: “[L]ife is like a playground when you’re a kid. Some people get picked on and some people are the bullies.” He also nodded his head and said, “Yes,” when Wood asked him if defendant was a bully. This is enough evidence from which the jury could reasonably conclude that defendant had bullied Lessmueller. Wood testified that Lessmueller would only speak to her after he had confirmed defendant was in custody, which indicates he was afraid of defendant. Lessmueller also told Wood that he had woken up in the middle of the night and seen defendant going through Lessmueller’s papers, but refused to talk any further about the incident, which again indicates Lessmueller was afraid of defendant. The elder abuse statute focuses on the effect of the

crime on the victim, in this case, mental suffering. (*People v. Rae* (2002) 102

Cal.App.4th 116.) Both Lessmueller's and Wood's testimony was sufficient for the jury to have concluded that defendant caused Lessmueller mental suffering.

2. *The Maximum Jail Term for Count 1 is Six Months*

The trial court imposed a 270-day term on each of the three misdemeanors, counts 1, 4 and 5, to be served concurrent with one another, but consecutive to the felony in count 2. However, as both parties here agree, the maximum sentence for a first conviction of misdemeanor elder abuse is not specified in section 368, subdivision (c), so the punishment is set forth in section 19, which specifies: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months" Thus, the maximum sentence for count 1 is six months in county jail, not 270 days.

The 270-day sentence for count 4 is proper. Section 368, subdivision (c), provides in part: "A second or subsequent violation of this subdivision is punishable by a fine not to exceed two thousand dollars (\$2,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment." Count 4 is a second violation punishable by up to one year in prison and, thus, the 270-day sentence is authorized.

The trial court is directed to resentence defendant on count 1 to a term no longer than six months in county jail.

DISPOSITION

The matter is remanded to the superior court for the sole purpose of resentencing defendant on count 1 to a term no longer than six months in county jail pursuant to sections 368, subdivision (c), section 19. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

KING
J.

CODRINGTON
J.