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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.

RICHARD MICHEAL MARGUECHO,

Defendant and Appellant.

E064389

(Super.Ct.No. RIF1404680)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez, Judge. Affirmed.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Richard Michael Marguecho was charged by felony complaint with lewd and lascivious acts on a child under the age of 14 (Pen. Code,¹ § 288, subd. (a), count 1) and oral copulation with a person under the age of 18 (§ 288a, subd. (b), count 2). Pursuant to a plea agreement, defendant pled guilty to count 1. In exchange, a trial court dismissed the remaining count and sentenced him to three years in state prison. The court also issued a criminal protective order (CPO) prohibiting defendant from having any contact with the victim for three years.

On appeal, defendant contends that the CPO was unconstitutionally overbroad since it did not state that violations had to be knowing and willful. The judgment is affirmed.

PROCEDURAL BACKGROUND

At the sentencing hearing, the court imposed the stipulated term of three years in state prison. It then stated that it was signing and imposing a CPO pursuant to section 136.2. The written CPO stated that defendant: (1) “must have no personal, electronic, telephonic, or written contact with the protected person”; (2) “must have no contact with the protected person . . . through a third party, except an attorney of record”; and (3) “must not come within 100 yards of the protected person.” The CPO was to expire in three years. The court addressed defendant and said: “No contact with the victim in this case. And the—can’t visit her, can’t Internet her, can’t text her, can’t use

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

modern technology. You have to stay a hundred yards away from her, where she lives, and where she goes to school.” Defense counsel objected to the issuance of the CPO because he did not believe it “conform[ed] to the hearing requirements that are set forth in the Penal Code.” The court asked what requirements he was talking about, and then defense counsel just submitted.

ANALYSIS

The Court Properly Issued the CPO Pursuant to Section 136.2

Defendant argues that the CPO was constitutionally overbroad since it did not require violations of its terms to be knowing and willful. He contends that the protective order must be modified to only prohibit knowing and willful violations. We conclude that the CPO was proper.

At the outset, we note respondent’s argument that defendant waived his claim by failing to raise it below. Defendant acknowledges that trial counsel did not object to any of the terms of the CPO below, but argues that the forfeiture rule does not apply to constitutional challenges. Assuming *arguendo* that defendant did not forfeit his claim, we will address the merits. Defendant specifically contends that the CPO prohibiting him from having contact with the victim did not require knowing and willful conduct. As such, he claims that he could be found to be in violation even if he was not the one initiating the contact or if he did not know he was within 100 yards of the victim. For example, he claims that he could be found in violation of the no contact order if the victim sent him a letter. We disagree. The court issued the order under section 136.2,

which provides, in relevant part, that a court may issue “[a]n order that a person described in this section shall have no communication whatsoever with a specified witness or a victim, except through an attorney under reasonable restrictions that the court may impose.” (§ 136.2, subd. (a)(1)(D).) A defendant may be prosecuted for contempt of a section 136.2 protective order under section 166, subdivision (c), which specifically states that “a *willful and knowing* violation of a protective order or stay-away court order described as follows shall constitute contempt of court, a misdemeanor: . . . An order issued pursuant to Section 136.2.” (§ 166, subd. (c)(1)(A), italics added.) In other words, to be prosecuted for contempt of the court order, a “willful and knowing violation” of the CPO is required. Thus, if defendant received a letter from the victim, his receipt of such letter would not constitute a “willful and knowing violation” of the CPO, since the victim initiated the contact and he did not willfully and knowingly commit a prohibited act. Any potential confusion was clarified by the juvenile court’s comments to defendant. The court explicitly told defendant, “[You] can’t visit her, can’t Internet her, can’t text her, can’t use modern technology. You have to stay a hundred yards away from her, where she lives, and where she goes to school.” The court’s statements expressly precluded defendant from initiating contact with the victim and made no mention that he could be found in violation of the CPO should she initiate contact with him, or should he unknowingly come within 100 yards of her. No modification of the CPO is necessary.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.