Filed 1/2/19 P. v. Ruhlman CA4/2

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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. JOHN RUHLMAN, Defendant and Appellant.	E069019 (Super.Ct.No. SWF1700063) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on December 24, 2018, be modified as follows:

1. On the top of page 9, the third full sentence, "Thus, to get the address of Deputy Waroff's residence, defendant had to either follow the deputy or obtain the information by fraudulent means," is deleted.

2. On the top of page 9, the fourth full sentence commencing with "Either of these possibilities strongly suggest …" is modified so the sentence now reads: "Absent evidence defendant obtained the deputy's address by lawful means, the record strongly suggests stalking activity, evidence of defendant's intent that was relevant at trial."

There is no change in the judgment.

The petition for rehearing is denied.

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RAMIREZ
P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.

Filed 12/24/18 P. v. Ruhlman CA4/2 (unmodified opinion)

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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. JOHN RUHLMAN, Defendant and Appellant.	E069019 (Super. Ct. No. SWF1700063) OPINION

APPEAL from the Superior Court of Riverside County. Stephen J. Gallon, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Andrew Mestman and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

After separating from defendant John Ruhlman, L.R., his wife, obtained restraining orders prohibiting contact. Nevertheless, defendant called and emailed her

continuously, showed up at her apartment complex, and rummaged through her car. On one occasion defendant went to the residence of the deputy sheriff who had served him with the restraining order, because he thought L.R. was having an affair with the officer. He was eventually charged and convicted of stalking in violation of Penal Code section 646.9, subdivision (b), driving without a license in his possession (Veh. Code, § 12500, subd. (a)), and driving on a suspended license (Veh. Code, § 14601.1, subd. (a)),[1] and placed on formal probation. Defendant appeals.

On appeal, defendant argues that (1) the trial court erred in admitting evidence of the incident in which defendant went to the home of the deputy sheriff under Evidence Code section 1101, subdivision (b); and (2) the trial court erroneously refused to instruct the jury on lesser included offenses of violation of restraining orders (Pen. Code, § 273.6), and violating a court order (Pen. Code, § 166, subd. (a)(4)). We affirm.

BACKGROUND

Defendant met L.R. in 2011, and they married in 2013. At some point in 2013, there was an incident of domestic violence when defendant straddled L.R. while she was on the floor, held her neck with his left hand, and slapped her with his right hand. In January 2015, the couple moved into an apartment complex with L.R.'s parents, along with L.R.'s teenaged son, but in September L.R. asked defendant to leave. After he moved, L.R. asked defendant to stop contacting her, but he continued to call her, would

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[1] Defendant was also charged with but acquitted of a misdemeanor charge of battery on an elder in violation of Penal Code section 243.25, so further references to the facts of this incident are provided for context only.

send her text messages of an accusatory and vulgar nature, and threatened to divorce her and malign her character. Some text messages asked if L.R. was "going to go open your legs to someone else," or was she going to sleep or live with someone else, or other sexual content. He also accused her of being a bad mother and threatened to divorce her and to call child welfare services.

On one occasion between September and November 2015, defendant came to the apartment with divorce papers that had not been properly filed. In October L.R. changed her phone number, but the telephone calls continued, although he did not threaten her with any physical harm. In December L.R. agreed to drive to Santa Barbara with defendant for the weekend, but they never made it to their destination because an argument broke out and defendant began throwing things in the car, punched the rear view mirror causing it to go flying, and he was driving recklessly.

In January 2016, L.R. filed for restraining orders prohibiting contact, which were granted after a hearing in February. Deputy Steven Waroff served the restraining order on defendant. Defendant resumed contacting her right after the hearing. While defendant had threatened to defame her or to call child welfare services, he never made any threats to harm her or her family.

Between March and April 2016, there were three incidents involving L.R.'s car. On March 9, L.R. opened her car to drive it to work and it appeared that someone had rummaged through it, moving things around, and taking her parents' handicapped placard. On March 31, as she got into her car to go to work she found a card placed in

the storage compartment of the driver's side door. L.R. called the sheriff's office before opening the card; Deputy Chris Ibrahim responded and opened the card. L.R. recognized defendant's handwriting on the card.

The third incident occurred on April 3, 2016, after L.R. received more emails and text messages from defendant ranging in content from sexual to abusive. On that day, L.R. attended services at her church and stayed afterwards to help an older gentleman, David Casey, clean the church. As L.R. was vacuuming, she saw defendant's car drive by outside and informed Casey and the Reverend. Casey locked the door. Defendant approached the door and knocked, then shook the door. Defendant then walked around the building, at which point Casey realized that the side door had not been locked.

Casey went to the side door arriving at the same time as defendant. As defendant tried to push open the door Casey tried to close and lock it. Defendant stated he wanted to see L.R. At some point, defendant managed to pull Casey out the door as Casey was trying to pull it shut, causing Casey's arm to get scraped by the door and it started to bleed. Casey managed to lock the side door from the outside. While they were outside defendant offered to give first aid to Casey and was insistent about helping, so Casey told defendant he was going to fix the Reverend's flat tire and would let defendant help.

In the meantime, L.R. called the police from inside the church. When the sheriff's deputies arrived, they found Casey and the defendant fixing a tire in the parking lot. Casey had a cut on his left arm that was bleeding freely, but declined medical attention and did not want to prosecute because the incident was a mutual combat situation.

Deputy Waroff was present when defendant was arrested but his partner Deputy Jared Melback transported defendant to the sheriff's station. There were no threats to anyone in the church incident.

Four or five days after this incident L.R. received a phone call from defendant, which surprised her because she had changed her phone number. A day or two later she received a voicemail message from defendant. Subsequently, L.R. received a phone call from a woman who was calling on defendant's behalf. L.R. hung up and the woman called back leaving a voicemail message telling L.R. that defendant was not with other women, that there were two sides to the story and that it was too bad there could not be closure so defendant could move on. Another voice message was left by the woman and L.R. could hear defendant's voice in the background.

On June 2, 2016, L.R. received a phone call that appeared to be from her mother's telephone number, so she answered the call, only to hear defendant on the other end. L.R. tried to call her parents to make sure they were all right, but they did not respond, so L.R. called 911. That same day, she received another voicemail message from defendant and turned it over to law enforcement. A district attorney's investigator explained how telephone calls can be easily spoofed by using a Web site program downloaded from the internet.

Between June 2 and October 2016, defendant came to L.R.'s apartment complex. On August 12, she saw him near the jacuzzi by the pool area, although the complex has security gates, the defendant did not communicate with her. L.R. contacted law

enforcement, who came and contacted defendant about the violation of the restraining order. In September L.R.'s mother saw defendant driving a white BMW in the parking lot of the complex, mother told L.R. who then reported it to law enforcement. Access to the parking lot of the complex requires a security card or a code.

On October 5, 2016, as Deputy Waroff and his family ate dinner, his dogs started barking and he became aware that there was someone outside their home. Deputy Waroff went to the garage door to see who was there and saw a white BMW parked in the driveway; defendant was standing there, peering in, and calling for the deputy by name. Deputy Waroff sent his family upstairs, grabbed his off-duty weapon and headed outside, but as soon as the deputy exited his front door the defendant was backing out of the driveway. Defendant did not make any threats.

On April 28, 2017, defendant was charged by way of information with one felony count of stalking when a restraining order prohibited contact (Pen. Code, § 646.9, subd. (b)), count 1), a misdemeanor count of battery on an elder (Pen. Code, § 243.25, count 2), and two misdemeanor violations of driving on a suspended license. (Veh. Code, § 14601.1, counts 3 & 4.) Following a trial by jury, defendant was convicted of count 1, the stalking violation; count 3, a violation of Vehicle Code section 12500, subdivision (a)[2]; count 4, driving on a suspended license (Veh. Code, § 14601.1,

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[2] The People made a motion to amend the information to reflect a violation of Vehicle Code section 12500, subdivision (a), prior to resting their case in chief.

subd. (a)); and was acquitted on count 2, the misdemeanor battery. Defendant was place on three years of formal probation with various terms and conditions. Defendant appeals.

DISCUSSION

1. *Admission into Evidence of the Incident in Which Defendant went to Deputy Waroff's Residence, Was Not an Abuse of Discretion.*

The People proffered the evidence of defendant's appearance at the residence of Deputy Waroff as a similar act pursuant to Evidence Code section 1101, subdivision (b), and the court ruled the evidence admissible over defendant's objection. The People's theory was that the defendant's action in going to the deputy's home was a "threatening gesture," intended to intimidate L.R. The trial court found that the evidence was relevant as to defendant's intent and whether defendant's conduct had an "innocent explanation or whether it constitutes a harassment with an intent for a threat." The trial court also found that the evidence involving Deputy Waroff was admissible as evidence of an overall pattern and course of conduct during the course of these incidents, explaining motivation, and whether the overall course of conduct constitutes harassment. On appeal, defendant challenges the ruling as an abuse of discretion. We disagree.

"We review the trial court's evidentiary rulings for abuse of discretion." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 405, citing *People v. Gonzales* (2012) 54 Cal.4th 1234, 1256.)

Evidence Code section 1101, subdivision (b), provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or

other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." "Instances of a defendant's conduct are inadmissible to prove a defendant's conduct on a specific occasion except where they are relevant to some fact in issue other than the defendant's disposition and their probative value outweighs any prejudicial value." (*People v. Gunder* (2007) 151 Cal.App.4th 412, 416; Evid. Code, §§ 352, 1101.)

Pursuant to Evidence Code section 1101, subdivision (b), "[e]vidence going to the issue of identity must share *distinctive* common marks with the charged crime, marks that are sufficient to support an inference that the same person was involved in both instances." (*People v. Prince* (2007) 40 Cal.4th 1179, 1271, citing *People v. Gray* (2005) 37 Cal.4th 168, 202.) However, a lesser degree of similarity is required to show a common plan or scheme (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402–403), and the least degree of similarity is required in order to prove intent. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.)

In *People v. Prince*, *supra*, 40 Cal.4th 1179, the People introduced similar acts of "evidence that defendant had followed other victims—including witnesses who testified at trial—to their homes during the middle of the day." (*Id*. at p. 1271.) Here, defendant appeared uninvited on at least two occasions within the gated compound where L.R. and

her family lived. He also appeared uninvited at Deputy Waroff's residence. Penal Code section 146e prohibits the unauthorized disclosure of addresses or telephone numbers of peace officers and their families. Thus, to get the address of Deputy Waroff's residence, defendant had to either follow the deputy or obtain the information by fraudulent means. Either of these possibilities strongly suggest stalking activity, evidence that was relevant at trial.

An essential element of the crime of stalking is whether the victim reasonably feared for his or her safety, as opposed to whether the defendant made verbal threats, or whether he intended to carry out a threat of harm. The statute defines "credible threat" as a verbal or written threat, "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." (Pen. Code, § 646.9, subd. (g).) Thus, evidence of other acts of stalking is relevant and admissible to show defendant's intent, which supports the reasonableness of the victim's fear. (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1141.)

Here, defendant was charged with stalking his estranged wife, L.R. Over the course of several months Deputy Waroff had two separate encounters with defendant; serving defendant with the restraining order in January 2016, and assisting in defendant's arrest at the church incident in April 2016. Defendant thought Deputy Waroff was having a relationship with L.R., which information was relayed to the deputy, causing concern for the safety of the deputy and his family when defendant showed up at the

deputy's house. The act was intended to intimidate, despite the absence of affirmative threats, and showed defendant's intent, habit, and custom, of stalking those who interfered with his efforts to contact L.R.

The evidence was relevant and admissible. The trial court did not abuse its discretion.

2. *Violation of a Restraining Order is Not a Lesser Included Offense Within the Crime of Stalking, Obviating the need for Sua Sponte Instructions.*

During trial, the parties and court discussed instructions for the jury. The defendant objected to certain instructions and requested certain modifications of some instructions. The defendant requested an instruction on self-defense respecting count 2, and an instruction on unanimity. Defendant did not request or object to any instructions relating to count 1, the stalking charge.

On appeal, defendant argues that the trial court erred by failing to instruct the jury sua sponte on the lesser offenses of violating a restraining order, in violation of Penal Code section 273.6, or section 166, subdivision (a)(4). We disagree.

The court's duty to instruct on general principles of law governing the case includes an obligation to instruct on lesser included offenses of the charged crime if there is substantial evidence supporting the conclusion that the defendant committed the lesser included offense and not the greater offense. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196, citing *People v. Breverman* (1998) 19 Cal.4th 142, 154–156; *People v. Shockley* (2013) 58 Cal.4th 400, 403.)

"The test for determining whether there is a necessarily included offense is whether one offense cannot be committed without necessarily committing another offense; the latter is a necessarily included offense." (*People v. Cortez* (2018) 24 Cal.App.5th 807, 816, citing *People v. Pendleton* (1979) 25 Cal.3d 371, 382.) There are two tests for determining whether an offense is necessarily included: the elements test, and or the accusatory pleading test. (*People v. Shockley* (2013) 58 Cal.4th 400, 404.) " 'Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense, the latter is necessarily included in the former.' " (*Ibid.*, citing *People v. Reed* (2006) 38 Cal.4th 1224, 1227–1228.)

The California Supreme Court has repeatedly held that there is no sua sponte duty to instruct on a lesser included offense unless there is substantial evidence that only the less serious crime was committed. (*People v. Williams* (1997) 16 Cal.4th 153, 227; see also, *People v. Bradford* (1997) 15 Cal.4th 1229, 1345.)

Defendant argues that violation of a court order (Pen. Code, § 166, subd. (a)(4)), and violation of a restraining order (Pen. Code, § 273.6, subd. (a)), are lesser included offenses within the crime of stalking in violation of a restraining order pursuant to Penal Code section 646.9, subdivision (b). However, the provisions relating to the violation of a restraining order do not define a crime; they merely create a punishment enhancement. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 576.)

Moreover, a violation of Penal Code section 646.9, subdivision (b), may occur without committing a contempt in violation of Penal Code section 166, subdivision (a)(4), or violating a restraining order in violation of Penal Code section 273.6, subdivision (a). Penal Code section 166 refers to knowing violations of protective or stay away orders issued pursuant to sections 136.2 (witnesses), 1203.097, subdivision (a)(2) (criminal court order protecting victims), 1201.3 (orders protecting minor victims of sexual assault), and 273.5 (domestic violence restraining orders). Penal Code section 273.6, subdivision (c)(1), refers specifically to violating restraining orders issued pursuant to sections 6320 or 6389 of the Family Code. The category of violations of court orders covered in Penal Code sections 166 and 273.6 is not coextensive with the class of violations covered by Penal Code section 646.9, because stalking may be committed by violating any court order, including violations of probation or parole conditions. (See *People v. Corpuz* (2006) 38 Cal.4th 994, 997.)

Thus, violations of Penal Code sections 166 and 273.6 are not necessarily included within the crime of stalking in violation of subdivision (b) of section 646.9. Instead, the violation of a restraining order may be considered a lesser *related* offense, for which there is no constitutional right of a defendant to compel the giving of an instruction. (*People v. Foster* (2010) 50 Cal.4th 1301, 1343–1344; see also, *People v. Birks* (1998) 19 Cal.4th 108, 136.) In fact, a trial court may not instruct the jury on a lesser related, but not included offenses without the prosecutor's permission. (*People v. Martinez* (2002) 95 Cal.App.4th 581, 586, citing *People v. Birks, supra,* at p. 136.)

The trial court had no sua sponte duty to instruct on the lesser related offenses of violating a court order (Pen. Code, § 166) or violating a domestic violence restraining order (Pen. Code, § 273.6, subd. (a)). Absent a duty to give such instructions, any challenge to the failure to instruct the jury on a theory in the absence of a sua sponte duty has been forfeited. (*People v. Valdez* (2004) 32 Cal.4th 73, 113.)

There was no error.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.