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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

NORBERTO PEREZ BARAJAS,

Defendant and Appellant.

F064735

(Super. Ct. No. F11906679)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Law Offices of Allen G. Weinberg, Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Gomes, J., and Detjen, J.

A jury found defendant Norberto Perez Barajas guilty of stalking (Pen. Code, § 646.9, subd. (a)),¹ battery (§ 243, subd. (a)), assault (§ 241, subd. (a)), corporal injury to former cohabitant (§ 273.5, subd. (a)), and assault with a firearm (§ 245, subd. (a)(2)) and found true the enhancement allegation that he personally used a handgun (§ 12022.5, subd. (a)) in the commission of assault with a firearm. He was sentenced to 17 years in prison.

On appeal, Barajas contends there was insufficient evidence that the victim had ever been his “cohabitant” to support the conviction for corporal injury to a former cohabitant. He raises two additional issues, which the Attorney General concedes: (1) Barajas cannot be convicted of both simple assault and simple battery for a single incident, and (2) the abstract of judgment incorrectly shows that he has 138 days of actual credit instead of 139 days.

We reject the claim of insufficient evidence. We accept the Attorney General’s concessions and reverse the conviction for simple assault. We will remand to the trial court to correct the abstract of judgment, but we affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL HISTORIES

On December 21, 2011, the Fresno County District Attorney filed a five-count information against Barajas alleging he committed the following offenses on the specified dates: (1) stalking (§ 646.9, subd. (a)) on about November 3, 2011 through November 4, 2011; (2) assault with a firearm (§ 245, subd. (a)(2)) on August 1, 2011; (3) corporal injury to a former cohabitant (§ 273.5, subd. (a)) on November 3, 2011; (4) assault with a firearm (§ 245, subd. (a)(2)) on November 4, 2011; and (5) possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) on November 20, 2011. As to count 4, the district attorney alleged that Barajas personally used a firearm in

¹Subsequent statutory references are to the Penal Code unless otherwise stated.

the commission of the offense. It was also alleged that Barajas had served two prior prison terms.

A jury trial began on February 24, 2012. The victim, Janet R., was a reluctant witness. She testified that she and Barajas had been in a boyfriend-girlfriend relationship. They first started dating romantically in 2004. They did not live in the same house, but Barajas stayed at her house. He would stay for as long as a week at a time, and he did this “many” times. She agreed with the characterization that Barajas “liv[ed] with [her] off and on at [her] residence” She also agreed that “Barajas would be living with [her] for weeks at a time” She said she loved Barajas as of the date of her testimony.

Janet had been the victim of violence by Barajas before. In November 2006, the police were called to her house after an argument between her and Barajas. In that incident, Barajas threw her to the ground and kicked her hard in the face. She thought he was going to kill her. She told him she loved him to get him to stop. Barajas threatened to kill himself and told Janet he loved her. Her face was injured, and she did not want her children to see her like that. The court took judicial notice of the fact that Barajas was convicted on January 17, 2007, of felony domestic violence against Janet.

After Barajas’s conviction, Janet did not see him for over four years. While he was incarcerated, Barajas did not call her. Janet and Barajas saw each other again in 2011. On cross-examination, Janet agreed that they were “dating” between May and November 2011. Barajas had some clothes at her apartment.

Janet testified about meeting with Barajas around June or July of 2011. They talked about their relationship and that she loved him and he loved her. Barajas expressed a desire to get back together with Janet, and she said she also wanted to get

back together. Barajas became angry, however, when she told him she had to continue seeing the father of a child she had had after Barajas went away in 2007.²

Janet met with Barajas in her car in August 2011. She told him she was not going to see him anymore. Barajas said, “No,” and hit her on the head. She testified that he had something in his hand, but she did not see what it was.

On November 3, 2011, Janet left work at 6:00 a.m., having worked a night shift. She saw Barajas outside her workplace. She told him that she did not want to see him anymore and she did not want Barajas to have problems with the father of her child. At trial, she said she could not remember what he said, but later testified that when she told Barajas she would not see him, “he told [her] no.” She testified, “[h]e bit me like a hickey” indicating the left side of her face. The bites left a mark on her jaw line and below her lower lip. Barajas had his hands around her, but it was not a romantic embrace and the bites were not “love bit[es].” The prosecutor asked if Barajas punched her that morning and she responded that she did not remember. She did not remember whether she called the police that day.

Janet worked another night shift and ended work at 6:00 a.m. on November 4, 2011. She drove home and saw Barajas on the street in front of her apartment complex. She saw him get out of a burgundy sports utility vehicle from the passenger side. Barajas walked toward her with a handgun in his hand. She indicated he was pointing the gun forward as he approached. She stepped on the gas to get away, and Barajas banged on the driver’s side window with the barrel of the gun. She was afraid, and she drove away to a store and called 911.

A Fresno police officer testified that he was dispatched to Janet’s apartment on the morning of November 4, 2011. The officer observed red marks on her face that were

²Janet had four children. At the time of trial, they were ages 15, 13, 10, and 3. Thus, her youngest child was born sometime in 2008 or 2009.

consistent with bite marks. In addition to describing her interactions with Barajas that day and the day before, Janet told the officer about an incident that took place in August 2011. Janet had told Barajas that she did not want to be with him, and he did not accept that. He began to threaten her and threatened to harm her family if she did not meet with him. Janet met with Barajas in her car. Barajas told her he wanted to get back together with her, and when she refused, he showed her a pistol and threatened her with it. Janet told the officer that Barajas struck her on the top of the head with the gun. She did not report this incident to the police at the time. The officer asked why, and she said that Barajas would eventually get her and kill her no matter what the police did.

On March 2, 2012, the jury reached a verdict. It found Barajas guilty of counts 1 (stalking), 3 (corporal injury to a former cohabitant), and 4 (assault with a firearm), and not guilty of count 2 (assault with a firearm) and 5 (possession of a controlled substance). As to count 2, the jury found Barajas guilty of two lesser-included offenses, assault and battery. Barajas admitted the allegations of two prior prison terms.

On April 6, 2012, the trial court sentenced Barajas to a total prison term of 17 years, consisting of an upper term of four years for count 4 and one year (one-third the middle term of three years) for count 3, plus two years for two prior prison terms and 10 years for the firearm enhancement.

Barajas filed a notice of appeal on April 13, 2012.

DISCUSSION

I. Sufficiency of evidence

Barajas contends there was insufficient evidence presented at trial to prove that he was a former cohabitant of the victim. We disagree.

“In reviewing a challenge to the sufficiency of the evidence, we examine the record in the light most favorable to the judgment to see if it contains reasonable, solid evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Belton* (2008) 168 Cal.App.4th 432, 437.)

Section 273.5 , subdivision (a), provides, in relevant part, “Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition is guilty of a felony”

“The term ‘cohabitant’ has been interpreted ‘broadly’ to refer to those “‘living together in a substantial relationship—one manifested, minimally, by permanence and sexual or amorous intimacy.’”” (*People v. Taylor* (2004) 118 Cal.App.4th 11, 18.) “The element of ‘permanence’ in the definition refers only to the underlying ‘substantial relationship,’ not to the actual living arrangement.” (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1334.) “Permanence does not require exclusivity in either the relationship or the living arrangement.” (*Taylor, supra*, at p. 19.) “[F]or purposes of criminal liability under section 273.5, a defendant may cohabit simultaneously with two or more people at different locations, during the same time frame, if he maintains substantial ongoing relationships with each and lives with each for significant periods.” (*Moore, supra*, at p. 1335.)

For example, in *People v. Holifield* (1988) 205 Cal.App.3d 993, the victim alone paid the rent on a motel room where she had lived for approximately one year. She and the defendant “had been seeing each other off and on for four years.” (*Id.* at p. 995.) In the three months before the assault, the defendant stayed with the victim for a month, then stayed at rooms in two other motels, and stayed with her for the two weeks preceding the assault. (*Id.* at p. 996.) The defendant did not have a key to the victim’s room, and he took his clothes and other belongings each time he left. The victim testified that she cared about the defendant and was emotionally attached to him but he did not return her feelings. The victim testified they had “‘infrequent’” sex. (*Ibid.*) The appellate court concluded this was substantial evidence of cohabitation. (*Id.* at p. 1002.)

In *People v. Taylor, supra*, 118 Cal.App.4th at page 17, the defendant and the victim had been dating for about five months and lived together in the defendant’s car.

When they were not staying in his car, the defendant lived with his sister. According to the victim, she had been staying with her aunt and when she left and did not have anywhere to stay, she ““would meet up with [the defendant], and ... would just be with him for a while.”” (*Ibid.*) The victim was pregnant with the defendant’s child and testified that she loved the defendant. (*Id.* at p. 19.) “Taken in their totality,” the appellate court concluded, “these facts were sufficient to establish that [the victim] and [the defendant] were living together in a substantial relationship that was characterized by permanence and sexual or amorous intimacy.” (*Ibid.*)

Here, there was evidence from Janet’s testimony that Barajas was her boyfriend for over two years until he was convicted of domestic violence against her in 2007. During that time, he stayed with her for weeks at a time, living “off and on” at her house. This was sufficient evidence of living together. Janet characterized their relationship from 2004 to the end of 2006 as “boyfriend girlfriend.” During the incident that led to Barajas’s conviction for domestic violence, he told Janet he loved her and threatened to kill himself. In their more recent relationship, Janet agreed they were “dating,” they told each other they loved each other, and they spoke of “get[ting] back together.” Barajas appeared to be jealous of the father of her child, and Janet testified that she currently loved Barajas. This was sufficient evidence of a substantial relationship of permanence and amorous intimacy.

Barajas’s arguments to the contrary are not convincing. He argues there was no evidence that he had a key to Janet’s residence, received mail or calls there, gave out her address as his home, or kept anything at her home. None of these indicia of residence is required or dispositive, as demonstrated by the facts of *People v. Holifield, supra*, 205 Cal.App.3d 993. (In addition, there was evidence that Barajas kept some clothes at Janet’s apartment in 2011, which suggests he may also have kept clothes at her house during the 2004-2006 period when he lived with her “off and on.” Barajas further argues there was no evidence that Barajas slept in the same bed with Janet, and he was not the

father of any of Janet's four children. Still, even without express testimony that she and Barajas had sex, Janet's testimony provided sufficient evidence of an amorous and intimate relationship.

In sum, there was sufficient evidence of cohabitation for purposes of section 273.5 to support Barajas's conviction.

II. Convictions for assault and battery

The jury was instructed that simple assault and simple battery were lesser-included offenses of counts 2, 3, and 4. The jury found Barajas not guilty of count 2, assault with a deadly weapon, on August 1, 2011, but found him guilty of both simple battery and simple assault. On appeal, the parties agree that Barajas cannot be convicted of both offenses and that the assault conviction must be reversed.

“When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed.” (*People v. Sanders* (2012) 55 Cal.4th 731, 736.)

Here, since assault is a necessarily included offense of battery (*People v. Colantuono* (1994) 7 Cal.4th 206, 216-217), Barajas could not be convicted of both, and the battery conviction is controlling. As a result, the conviction for simple assault in count 2 must be reversed. As Barajas points out, \$40 of the \$200 court security fee and \$30 of the \$150 criminal conviction assessment must also be struck.

III. Correcting the abstract of judgment

The parties also agree that the abstract of judgment incorrectly indicates that Barajas had 138 days of actual time served. It should reflect 139 days served. Accordingly, we order the trial court to correct the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The conviction for simple assault is reversed. The matter is remanded for the trial court to amend the abstract of judgment to reflect a court security fee of \$160, a criminal conviction assessment of \$120, and Barajas's actual days served as 139.

The judgment is otherwise affirmed.