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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE MARIO GARZA,

Defendant and Appellant.

G045499

(Super. Ct. No. 10CF3264)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Carla Singer, Judge. Affirmed.

Eric Cioffi, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and
Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

In May 2011, a jury found defendant Jesse Mario Garza guilty of felony stalking and misdemeanor trespass related to a series of events that took place in November and December 2010. In a bifurcated proceeding, the court found defendant had prior convictions, including a serious and violent felony conviction. In July 2011, defendant was sentenced to a total of six years in prison and received 330 days of presentence credits pursuant to section 4019 of the Penal Code. (All further statutory references are to the Penal Code.)

Defendant contends there was insufficient evidence to support his felony stalking conviction pursuant to section 646.9, subdivision (a). The record shows sufficient evidence to sustain the stalking conviction; we therefore affirm.

Defendant also argues he is entitled to additional presentence conduct credits pursuant to section 4019, as amended in 2011. Because defendant committed the crimes and was sentenced before the operative date of the 2011 amendment to section 4019 (October 1, 2011), which operates prospectively only, he is not entitled to any additional presentence conduct credits.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In December 2010, Jessica Orellana lived in an apartment complex in Santa Ana, California, with her boyfriend, Cesar Esteban, and their two young children. The apartment complex consisted of two adjacent buildings, and a common area of approximately 40 feet. Orellana and her family lived on the third floor of one of the buildings. The apartment was only accessible via an adjacent stairwell and a bridge connecting the buildings, and was offset below the third level by a few additional stairs that led directly to the apartment. Access to each building in the complex was restricted by a perimeter key.

Sometime after Thanksgiving, Orellana, Esteban, and their children encountered defendant on the stairs leading to the apartment as they were leaving. Defendant had previously lived in the apartment complex, but was homeless at the time of the incident. Defendant told Orellana that he knew her and did not want any trouble because he had just been released from jail. Orellana had never seen defendant before that encounter.

The next time Orellana saw defendant pass by the apartment was in late November 2010. The inner front door was open, but the outer metal security door was closed and locked. According to Orellana, defendant stopped outside the apartment and said, "I want to fuck you." Orellana feared defendant would rape her, so she quickly closed the inner front door. Defendant repeated the same comment when passing by the apartment the following morning and Orellana again immediately shut the inner door. During those incidents, defendant did not attempt to open the security door or continue speaking to Orellana after she closed the door.

Orellana heard and saw defendant trying to open the locked security door to the apartment about 6:15 a.m. on December 1, 2010. Esteban looked through the peephole and saw defendant attempting to open the security door, so Esteban called the police. Defendant fled once the police arrived.

Orellana saw defendant once again outside the apartment during the afternoon of December 2. She watched him through the peephole as he walked back and forth outside the apartment. That night, Orellana, Esteban, and their children stayed with Orellana's mother out of "fear of [defendant] coming back."

The family returned to the apartment the morning of December 3. Around 8:00 p.m., Orellana again looked through the peephole and saw defendant outside the apartment. She called the apartment's security guard, who contacted the police. Police officers subsequently located defendant on the third floor of the other building. He was arrested for misdemeanor trespass and was released a few hours later.

The next morning, Esteban saw defendant outside the apartment about 5:50 a.m. Defendant pulled on the locked security door of the apartment for about five minutes. Once defendant stopped pulling on the door, Esteban opened the inner front door, asked defendant if he needed something, and told him to leave them alone. Esteban then called the police to report the incident.

Later that day, Orellana saw defendant again trying to open the security door about 12:00 p.m. Orellana called the police, but defendant was not located. Orellana told the police she was scared of defendant, but he had never actually threatened her. Orellana was scared to leave the apartment to take out the trash because of defendant's actions.

Defendant returned to the apartment around 9:00 p.m. on December 4. Orellana's mother and the apartment's security guard called Esteban and Orellana, who were not home at the time, to let them know defendant was outside their apartment. When the family returned home between 10:00 and 10:30 p.m., defendant was still outside the apartment, so Orellana called the police. Defendant was arrested later that night.

On April 15, 2011, the Orange County District Attorney's Office filed an amended information charging defendant with one count of felony stalking, in violation of section 646.9, subdivision (a); two counts of attempted first degree residential burglary with the intent to commit rape, in violation of sections 664, subdivision (a), 459, and 460, subdivision (a); and one count of misdemeanor trespass, in violation of section 602, subdivision (o). The amended information also alleged defendant had suffered two prior felony convictions pursuant to section 1203, subdivision (e)(4); a serious and violent felony conviction pursuant to sections 667, subdivisions (d) and (e)(1) and 1170.12, subdivisions (b) and (c)(1); and three prison priors pursuant to section 667.5, subdivision (b).

On May 31, 2011, a jury found defendant guilty of stalking and misdemeanor trespass. The jury acquitted defendant of the attempted burglary with the intent to commit rape charges. In a bifurcated proceeding, the trial court found defendant's alleged priors to be true beyond a reasonable doubt. Defendant was sentenced to a total of six years in prison and received 330 days of custody credits, comprised of 220 actual days and 110 conduct days.

DISCUSSION

I.

SUFFICIENT EVIDENCE SUPPORTS THE STALKING CONVICTION UNDER SECTION 646.9.

Defendant argues his conviction for stalking should be reversed because there was insufficient evidence to establish either harassment or a credible threat with the intent to place Orellana in fear for her safety. “In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if “upon no hypothesis whatever is there sufficient substantial evidence to support” the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Stalking is defined in section 646.9, subdivision (a): “Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in

reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking”

Section 646.9, subdivision (e) defines the term “harasses” as “engag[ing] in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.”

A “course of conduct” is “two or more acts occurring over a period of time, however short, evidencing a continuity of purpose.” (§ 646.9, subd. (f).) A “credible threat” is “a verbal or written threat, . . . or a threat implied by a pattern of conduct . . . , made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family.” (§ 646.9, subd. (g).)

For the following reasons, we conclude there was sufficient evidence to establish defendant harassed Orellana and made a credible threat with the intent to place Orellana in reasonable fear for her safety.

A.

Harassment

Defendant argues there is insufficient evidence to establish knowing and willful harassment directed at a specific person, as defined in section 646.9, subdivision (a). To establish harassment under section 646.9, subdivision (a), the prosecution must prove defendant engaged in (1) willful and knowing conduct, (2) at least two times, (3) directed at a specific person, (4) that seriously alarms, annoys, torments, or terrorizes the person, and (5) that serves no legitimate purpose. (§ 646.9, subds. (a), (e), (f).)

After reviewing the record, we conclude there was substantial evidence to establish the statutory requirements for harassment under section 646.9, subdivision (a). A reasonable trier of fact could conclude that defendant's repeated statement, "I want to fuck you," directed at Orellana, and subsequent attempts to open the locked security door, constituted willful and knowing conduct, occurring on more than two occasions, which was directed at Orellana, seriously alarmed her, and served no legitimate purpose.

Defendant argues his attempts to open the locked security door without directly speaking to Orellana could not be "directed at a specific person" because he did not know Orellana was home during any of the attempts. The jury could infer defendant's repeated presence outside the apartment and attempts to open the door after his vulgar statements directed at Orellana established the requisite knowledge that she was inside the apartment.

Defendant also argues his actions did not establish harassment of Orellana because she told the police defendant had not actually threatened her. Harassment under section 646.9, subdivisions (a) and (e), however, only requires a victim to be seriously alarmed, annoyed, tormented, or terrorized. The jury could reasonably conclude defendant's actions seriously alarmed Orellana, regardless of whether she thought defendant actually threatened her.

Orellana immediately closed the inner front door after defendant said, "I want to fuck you," because she feared he would rape her. She was scared to leave the apartment to take out the trash. Orellana and her family stayed with her mother the night of December 2, out of "fear of [defendant] coming back." On more than one occasion, Orellana called the apartment's security guard and/or the police.

There was sufficient evidence to establish defendant harassed Orellana as defined in section 646.9, subdivision (a).

B.

Credible Threat

Defendant also argues there is insufficient evidence to establish he made a “credible threat . . . ‘ . . . with the intent to place [Orellana] in reasonable fear for . . . her safety or the safety of . . . her family,’” as required by section 646.9. A credible threat “must be made with the specific intent to cause the victim to reasonably fear for personal safety or the safety of immediate family. ‘[I]t is clear that it is the perpetrator’s intent, rather than the definition of the conduct engaged in, which triggers the applicability of the statute.’ [Citation.]” (*People v. Halgren* (1996) 52 Cal.App.4th 1223, 1231.) “‘It is not necessary to prove that the defendant had the intent to actually carry out the [threat].’” (*People v. McClelland* (1996) 42 Cal.App.4th 144, 154, fn. 4.)

In sum, to constitute a credible threat under section 646.9, subdivision (a), the defendant must have intended to instill reasonable fear in the victim, regardless of the defendant’s intent to actually carry out the threat. Defendant argues he did not make a credible threat because he expressed a desire (*wanting* to have sex with Orellana), instead of affirmatively stating an intention. This distinction is irrelevant. (See *People v. Uecker* (2009) 172 Cal.App.4th 583 [the defendant left notes on the victim’s car with statements such as “‘‘If you want to go riding bicycles, give me a call’’” and “‘‘I want to go out with you’’” (*id.* at p. 586); this constituted a credible threat (*id.* at pp. 594-595)].) The jury could reasonably have concluded defendant’s statements were intended to place Orellana in fear that defendant would forcibly have sex with her, even though he argues he expressed a desire instead of an explicit intent.

Defendant contends he could not have intended to place Orellana in fear for her safety by attempting to open the security door if he did not know she was home. As explained *ante*, the jury could have inferred defendant knew Orellana was home, based on the evidence presented. Thus, defendant could have intended to instill in Orellana fear

for her safety and the safety of her family, through his attempts to open her apartment's locked security door on multiple occasions.

There was sufficient evidence to convict defendant of stalking under section 646.9, subdivision (a).

II.

DEFENDANT IS NOT ENTITLED TO ADDITIONAL PRESENTENCE CONDUCT CREDITS PURSUANT TO SECTION 4019.

Since 1976, section 4019 has offered prisoners in local custody the opportunity to earn conduct credit against their sentences for good behavior. (*People v. Brown* (2012) 54 Cal.4th 314, 317 (*Brown*)). Conduct credits encourage prisoners to conform to prison regulations, to participate in work and other rehabilitative activities, and to refrain from criminal and assaultive conduct. (*Id.* at p. 317; *People v. Austin* (1981) 30 Cal.3d 155, 163.)

Section 4019 was amended in 2011 to increase the accrual rate of good conduct credits. (Stats. 2011, ch. 15, § 482.) By its terms, the amended statute applies only to defendants whose crimes were committed on or after October 1, 2011. (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.) Because defendant committed the current crimes and was sentenced before October 1, 2011, he is not eligible for additional conduct credits under the current version of section 4019.

Defendant argues the prospective-only application of section 4019 violates the equal protection clauses of the federal and state Constitutions because (1) it creates two classes of inmates (those who committed crimes before and on or after October 1, 2011) who are similarly situated, but treated differently, and (2) there is no rational basis for treating those two classes differently.

The California Supreme Court's recent decision in *Brown, supra*, 54 Cal.4th 314, is instructive. The court in *Brown* concluded that a 2009 amendment to

section 4019, which also prospectively increased the rate of accrual of good conduct credits during a fiscal emergency, did not violate equal protection because the 2009 amendment did not create ““similarly situated [groups] for purposes of the law challenged.”” (*Brown, supra*, at p. 328.) “The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally.” (*Ibid.*) “[T]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after [the 2009 amendment] took effect are not similarly situated necessarily follows. . . . ‘Thus, inmates were only similarly situated with respect to the purpose of [the new law] on [its effective date], when they were all aware that it was in effect and could choose to modify their behavior accordingly.’ [Citation.]” (*Id.* at pp. 328-329; see also *In re Strick* (1983) 148 Cal.App.3d 906, 913-914 [inmates were not similarly situated until they were all aware of the new legislation changing the accrual rate of work credits, and had the ability to change their behavior to take advantage of the new accrual rate].)

The court held the prospective application of the 2009 amendment to section 4019 did not violate the equal protection clauses because the 2009 amendment created two distinct groups with regard to conduct credits—those aware of the incentive after its enactment, and those unaware of the incentive before its enactment. (*Brown, supra*, 54 Cal.4th at p. 330.)

The same analysis applies to the prospective application of section 4019 as amended in 2011. Defendants who committed crimes before section 4019 was amended in 2011 were unaware of the enhanced credit accrual scheme and could not modify their preamendment behavior to receive the benefits of the new law. The amendment to section 4019 thus created two distinct groups with regard to conduct credits, and does not trigger equal protection analysis.

Even if we assume for purposes of this opinion that the 2011 amendment to section 4019 creates a classification of similarly situated groups, we would conclude there is a rational basis for treating those classes differently, and that the statute, therefore, does not violate equal protection.

The Legislature's express purpose in changing the good conduct credit accrual rate in 2011 was to "address[] the fiscal emergency declared by the Governor." (Legis. Counsel's Dig., Assem. Bill No. 109 (2011-2012 Reg. Sess.)) Defendant argues the distinction between offenders who committed crimes before and after a certain date fails the rational basis test because it does not correlate with the remedial nature of the statute as amended. We disagree. The Legislature may have decided that the nature and scope of the fiscal emergency required granting additional credits to specified classes of prisoners, previously denied to them, only after the effective date of the amendment. Reducing prison populations by granting a prospective-only increase in conduct credits strikes a proper, rational balance between the state's fiscal concerns and its public safety interests. As the Attorney General argues, prospective-only application is "rationally related to the legitimate state interest of encouraging good behavior and work performance while inmates serve local custody time. Because a criminal defendant's past conduct cannot be motivated retroactively, a rational basis exists for applying the amendment prospectively only." The prospective application of section 4019 therefore does not violate equal protection.

In re Kapperman (1974) 11 Cal.3d 542, relied on by defendant, does not compel a different result. In that case, the California Supreme Court considered the constitutionality of section 2900.5, which provides for accrual of presentence credits based on the actual number of days served. Former subdivision (c) of section 2900.5 provided that the presentence credits could only be earned by those prisoners "who are delivered into the custody of the Director of Corrections on or after the effective date of this section [i.e. March 4, 1972]." (*In re Kapperman, supra*, at p. 544, fn. 1.) Because

the defendant was delivered to the custody of the Director of Corrections before March 4, 1972, he was not entitled to credit for actual days served before his sentence was imposed. (*Id.* at p. 545.) The court concluded section 2900.5, former subdivision (c) violated the equal protection clauses of the federal and state Constitutions because it treated two classes of similarly situated prisoners differently, without a rational basis for doing so. (*In re Kapperman, supra*, at p. 545.)

In re Kapperman, however, dealt with credit for time actually spent in confinement before sentence was imposed, rather than, as in this case, additional credit for a defendant's good conduct while confined. All prisoners affected by the statutory change addressed in *In re Kapperman* were similarly situated but were treated differently, meaning that some received presentence custody credits while others did not, based solely on the date their prison confinement began. No legitimate state interest justified the denial of actual days of credit to some prisoners but not to others. As explained *ante*, in the present case, a different conclusion results from a consideration of both prongs of the equal protection analysis. Until the operative date of the 2011 amendment to section 4019, the affected prisoners were not similarly situated, and the legitimate purposes of the statute—to encourage good behavior while reducing the fiscal stress on the prison system—justified a prospective-only application of the statute.

We do not address whether the 2011 amendment to section 4019 would violate the equal protection clauses if a defendant committed a crime before October 1, 2011, but was sentenced on or after October 1, 2011, such that the defendant's presentence conduct might be influenced by the new credit scheme of the statute.

Defendant is not entitled to additional presentence conduct credits because the 2011 amendment to section 4019 only applies prospectively, not in situations where the crimes were committed and the sentencing occurred before the operative date of October 1, 2011.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.