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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.

CHARLES JOSEPH PEARSON,

Defendant and Appellant.

G050010

(Super. Ct. No. 11HF2652)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Marta I. Stanton, 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, Anthony DaSilva and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The operative information charged defendant Charles Joseph Pearson with one count of felony vandalism on February 26, 2011 (Pen. Code,¹ § 594, subds. (a), (b)(1); count one), one count of felony vandalism on August 18, 2011 (count two), and one misdemeanor count of violating a court order on May 9, 2012 (§ 166, subd. (a)(4); count three). The information also alleged defendant had two prior serious or violent felony convictions within the meaning of the “Three Strikes” law. (§§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A).) The jury found defendant not guilty of the felony vandalisms, but guilty of a misdemeanor vandalism as a lesser included offense in count two, and guilty of violating a court order. The trial court placed defendant on three years of informal probation on the condition that he serve 30 days in the county jail, and stayed 240 days in jail pending successful completion of probation, in addition to other standard terms and conditions. Defendant contends the evidence does not support his conviction on count three and that he was denied due process by the prosecution witnesses repeated references to irrelevant evidence. We affirm the judgment.

I

FACTS

A. Prosecution Evidence

Defendant took over what had been his mother’s house in Newport Beach, next door to Bill and Margo O’Connor, in February 2011. Defendant had “a lot” of workmen working at the residence and was frequently present with the workmen. He eventually moved into the residence in the first week of August 2011. The O’Connors did not have a good relationship with defendant and Margo O’Connor (O’Connor) was not on speaking terms with defendant’s mother when she lived there.

The O’Connors had eight 20-foot podocarpus trees next to the wall they shared with defendant. The trees were there for privacy. Upon returning home from a

¹ All undesignated statutory references are to the Penal Code.

boat trip on February 26, 2011, the O'Connors saw that eight to 10 feet had been cut off the top of seven of their trees. The eighth tree, the one by defendant's balcony, had not been cut. O'Connor telephoned their gardener of approximately 20 years, Raul Cardenas, and told him what had happened to the trees. Cardenas had been at the O'Connors' residence the day before and the trees were their normal height. Cardenas said he did not cut the trees. A few days later, the O'Connors called the police and approximately two weeks later, the O'Connors had Cardenas replace the seven trees that had been cut.

In July 2011, the O'Connors were planning to be away from their residence for a few days, and fearing more vandalism, had four motion sensor security cameras installed. The cameras were linked to the O'Connors' computer. On August 18, 2011, the O'Connors took their anticipated trip. The next day, O'Connor received a telephone call from Cardenas. He said the trees had been cut again. The O'Connors returned home the next day and found two feet had been cut from the top of the seven replacement trees. They called the police again.

Newport Beach Police Officer Kent Eischen responded to the O'Connors' residence. He spoke with the O'Connors and took photographs of the trees. Five days later, he returned to obtain the O'Connors' surveillance video. The video showed defendant climbing the shared wall and cutting the trees within a couple of hours of the O'Connors leaving their residence. It appears on the video that two of defendant's workers, Chris Cox and John Bradley were working with defendant.

Cardenas owns a landscaping company and has been a landscaper for approximately 30 years. He has learned about a large number of trees from experience and has a great deal of experience working with podocarpus trees. If the top of the tree is cut, it will not continue to grow as desired. In the year following the cutting of the replacement podocarpus trees, they had not grown in height.

The O'Connors obtained a restraining order against defendant in December 21, 2011. The order was subsequently modified. O'Connor saw defendant served with

the modified order in court at the time the modified order issued. Pursuant to the restraining order, defendant was ordered—among other things—to “not harass, . . . follow, stalk, molest, destroy or damage personal or real property, . . . keep under surveillance or block movements of the [O’Connors].” Additionally, defendant was ordered not to come within 10 yards of the O’Connors.

After defendant was served with the modified restraining order, O’Connor saw Cox installing a camera on defendant’s exterior wall. The camera pointed toward the window in her master bathroom. She photographed Cox installing the camera. Bradley was holding the ladder on which Cox was standing. O’Connor saw a conduit running from the camera into defendant’s house. O’Connor’s observations were confirmed by Officer Paul Sarris, who responded to the O’Connors’ residence and observed the camera about 10 feet from the Connors’ bathroom, and pointing into the bathroom window.

B. *Defense*

Craig Thornsley was at defendant’s residence on February 26, 2011, for about four or five hours working on screens at the house. He said he did not remember anyone cutting the trees or loading branches into a truck while he was there. Neither did he see any sawdust.

II

DISCUSSION

A. *Substantial Evidence Supports Defendant’s Conviction on Count Three.*

Defendant contends the evidence does not support his conviction for violating the restraining order. Generally, “[w]hen considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’

[Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) We may reverse for lack of substantial evidence only if “‘upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) In other words, the fact the evidence *could* “‘‘reasonably be reconciled’’” with innocence does not permit an appellate court to reverse a conviction. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.)

Section 166, makes it a misdemeanor for one to willfully disobey the terms of a lawfully written court order, including orders pending trial. (§ 166, subd. (a)(4).) A defendant must have had knowledge of the order. (*People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979.) Defendant had knowledge of the restraining order in this matter. He was present in court when the order was issued and he was provided a copy of the order while in court.

Defendant argues there was “[n]o evidence” he hired the workers or directed the workers to install the camera. He further hypothesizes the camera *may* have been installed to protect him from further accusations from the O’Connors. First, there was no evidence the camera only 10 feet from the O’Connors’ bathroom window and pointed into that window was installed for the purpose of protecting defendant from further accusations.

Second, the jury was entitled to find defendant had the camera installed and the installation was for the purpose of harassing the O’Connors. Cox worked for defendant. As a general rule, workers do as directed by the homeowner. A conduit ran from the camera into defendant’s house. Presumably, like the security cameras installed by the O’Connors, defendant’s camera connected to a computer inside his house and he

was able to view the video feed from the camera. There is no reason to believe Cox installed the camera and pointed it at the O'Connors' bathroom for any reason other than he was instructed to do so by defendant. Moreover, with the camera only 10 feet from the O'Connors' bathroom window and pointed *into* the window, the jury could reasonably conclude the intent behind the placement of the camera and the direction in which it was pointed was to be able to observe activities inside the bathroom, or at least to make the O'Connors think that.

It would seem evident the reasonable and substantial inference that defendant had Cox install the camera was why defense counsel argued to the jury that defendant had the camera installed, not to harass the O'Connors, but to protect himself. The evidence that the camera was placed where it was for purpose of keeping the O'Connors under surveillance or for the purpose of harassing them was substantial and supports the conviction.

B. Defendant was Not Denied Due Process.

Defendant argues that despite the court ruling certain propensity evidence was inadmissible, the witnesses repeatedly referred to that inadmissible evidence, denying him a fair trial in violation of the United States Constitution. Evidence that the defendant has committed other crimes to prove the defendant has a bad character or a criminal disposition is inadmissible. (Evid. Code, § 1101, subd. (a).) However, due process is not offended by the admission of evidence “unless the evidence is so prejudicial as to render the defendant’s trial fundamentally unfair.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) For purposes of the federal constitution, only actions that violate “those “fundamental conceptions of justice which lie at the base of our civil and political institutions,” [citation], and which define “the community’s sense of fair play and decency,” [citation]” (*Dowling v. United States* (1990) 493 U.S. 342, 353), violate due process.

The present matter does not involve the trial court admitting inadmissible evidence. Rather, the complained of statements were either stricken from the record, not objected to by defendant, or were invited by defendant. In any event, we cannot say the statements denied defendant a fair trial.

Prior to the jury hearing testimony, the court conducted an Evidence Code section 402 hearing concerning the admissibility of certain evidence of incidents involving defendant and his neighbors. The prosecutor claimed the evidence—including a prior incident in which defendant purportedly cut another neighbor’s trees in 2010, was admissible to show identity, and common plan or scheme. (Evid. Code, § 1101, subd. (b).) The court excluded evidence of the 2010 tree trimming incident under Evidence Code section 352,² based on considerations of undue consumption of time and confusion of issues.

The prosecutor also sought to introduce evidence of defendant’s behavior with past neighbors, including Collett Kim. Purportedly Kim had obtained a restraining order against defendant and defendant then intentionally installed bright lights pointed directly at Kim’s residence for the sole purpose of harassing her. The court excluded this evidence as well as other incidents, including one in which defendant’s dog bit another dog. The court suggested the prosecutor advise her witnesses not to volunteer testimony concerning the excluded evidence: “Okay. I’m sensing a lot of displeasure with [defendant] from his current neighbors as well as his prior neighbors. . . . These things might have been talked about with the current alleged victims, as well as other people. I think the D.A. would be prudent to admonish all the witnesses, including law enforcement witnesses, that they need to listen very carefully to the questions and not to

² “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.)

volunteer any negative things about the defendant. Because if they blurt out something about him growing marijuana or, you know, he vandalized the neighbor's car in the past, I mean those are bells that the court may not be able to unring. So I'm sure that the O'Connors have a truckload of things that they would love to talk about in front of the jury. You would need to admonish them they're not to volunteer things, not to, you know, throw in negative things that they either heard or saw concerning this defendant."

In his opening brief, defendant claims "multiple prosecution witnesses eagerly volunteered negative information about [defendant] in an effort to assassinate [defendant's] character and taint the jury against him." He then set forth a number of incidents he claims denied him a fair trial. These include O'Connor stating her grandchildren were no longer permitted to visit her because she felt threatened by defendant, she stated she could not talk about her first contact with defendant, and that defendant did not appear for two small claims court appearances. Defendant further points out that another neighbor of the O'Connors testified she was aware of problems between defendant and the O'Connors and that she does not like defendant based on her experiences with him, a former neighbor of defendant's said he first met the O'Connors in court when he was involved in an issue with defendant. Additionally, when the former neighbor was given a document with which to refresh his recollection, he said it was from his lawsuit against defendant for cutting his (the former neighbor's) trees down.

Contrary to defendant's assertion, none of the above comments violated the court's order. The court did not order the individual witnesses not to make the statements. Rather, as noted above, the court advised the prosecutor to instruct the witnesses and prohibited the prosecutor from eliciting the excluded evidence. The prosecutor agreed to advise her witnesses and it appears she did.

Defendant makes a number of complaints about statements made by "[t]he prosecution's key witness, [O'Connor]," on the witness stand. The prosecutor asked O'Connor when she first had contact with defendant. She answered, "In 2011. Well, I

think I've been told I can't talk about that." Defendant did not object to her response, so the issue was not preserved for appeal. (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428, 433-434.) In any event, it appears O'Connor believed the question called for evidence she did not think she was permitted to discuss, and she stated so. The jury was not informed what that information was.

Defendant also complains that O'Connor stated she did not allow her grandchildren to visit because she felt threatened. The prosecutor asked O'Connor whether her relationship with defendant in 2011 was good or bad. O'Connor said, "No. I was fearful. I felt threatened. I didn't – my grandchildren were no longer allowed to come to our home." Defense counsel objected to her answer. The court ruled her statement that she was fearful and felt threatened was admissible, but the statement about her grandchildren was nonresponsive and stricken. The court then immediately admonished the jury to disregard the stricken statement. We presume the jury followed the admonishment. (*People v. Edwards* (2013) 57 Cal.4th 658, 745.) The stricken statement could not have prejudiced defendant in any event. The court admitted into evidence the statement that O'Connor was fearful of defendant and felt threatened by him. That her grandchildren were not longer permitted at her house added nothing to the statements admitted into evidence. Moreover, defendant does not claim the trial court erred in admitting into evidence O'Connor's statement about being fearful.

Defendant was charged in count three with violating a restraining order prohibiting him from harassing or keeping the O'Connors under surveillance. He complains he was denied due process by O'Connor's testimony that the restraining order she had obtained against him had been modified because there had been incidents of harassment. When O'Connor testified a restraining order issued stating defendant "must not harass, strike, threaten, assault, sexually or otherwise, follow, stalk, molest, destroy or damage personal or real property, disturb the peace, keep under surveillance or block movements of the [O'Connors]," defense counsel objected because the restraining order

had subsequently been modified. Based on the defense objection, the prosecutor then established the restraining order had been subsequently modified. She asked O'Connor if she knew why the order had been modified. Prior to O'Connor answering the question, defendant objected that any answer would be speculative. The court overruled the objection because O'Connor was in court at the time the order was modified. It was only after O'Connor testified the reason for the modification was other acts of harassment, that counsel objected the answer violated the court's pretrial evidentiary ruling. The court then sustained the objection. Defendant did not request the answer to be stricken. The issue has not been preserved for appeal. (*People v. Vigil* (2011) 51 Cal.4th 1210, 1249 [failure to request answer be stricken and jury instructed to disregard it precludes a finding of error].)

The prosecutor also asked O'Connor about the officer who responded to her residence and who came to her house to review her video feed of the trees being cut. She asked how many times O'Connor had seen the officer, and O'Connor said it was three times. The first time was when he responded to the O'Connors' residence about the cut trees and the second time was about five days later when he went to view the video feed. The prosecutor then asked when the third time was, and O'Connor said he was the responding officer to her house when somebody made a "phony police call" to her house. The answer was stricken because O'Connor did not know the date of that occasion. This did not prejudice defendant, because the evidence did not implicate him. There was no suggestion defendant was the person who made the call that caused police to respond to the O'Connors' residence.

The last complaint defendant has with O'Connor's testimony was her statement that defendant did not appear for the two small claims appeals he filed. That statement occurred during O'Connor's testimony about the costs incurred due to defendant's vandalism. Evidence of the small claims action and the manner in which the loss was calculated were admitted, but the court struck the statement that defendant did

not appear on his appeals. Defendant does not explain how the stricken statement prejudiced him. After all, evidence that there had been a small claims action was admitted. That he did not appear added nothing to the evidence of the small claims action, and he does not contend the court erred in admitting evidence of the small claims action.

Defendant also complains about testimony given by Marion Jordan, the O'Connors' neighbor and friend. She testified she and her husband were walking their dog on February 26, 2011, when they saw defendant and Cox "piling branches into a red pickup truck" at the front of defendant's house. She said there were "a lot of branches." The branches were from the type on trees the O'Connors had. She said that at the time she made the observation, she commented to her husband that she wondered whether the branches came from the O'Connors' trees because she knew there had been problems between the O'Connors and defendant. The court overruled defendant's objection as to having known there had been problems between the O'Connors and defendant. Defendant does not now argue the court erred in its ruling, so we do not consider the statement in connection with defendant's due process argument. Even if we did, it is clear the evidence did not prejudice defendant. The jury acquitted defendant of the February 26, 2011 vandalism to which Jordan testified.

Lastly, defendant argues Roger Malcom, defendant's former neighbor, made statements that denied him a fair trial. Prior to trial, the court ruled inadmissible evidence that defendant had cut Malcom's trees in August 2010. At trial, Malcom said he saw a truck "overflowed with tree trimmings" in front of defendant's house in Capistrano Beach, on February 27, 2011, at 10:30 a.m. Defendant and Cox were by the truck, involved in a dispute with a third male.

Defendant complains that Malcom testified he first met the O'Connors in court when he was involved in a matter with defendant, and that Malcom testified a declaration he used to refresh his recollection was from his lawsuit against defendant for

cutting his trees. First, the statement about when he met the O'Connors was made in direct response to a question by defense counsel: "Q. When did you first meet Bill and Margo O'Connor? [¶] A. I met them in court when I was involved with an issue with [defendant]." Defense counsel invited the answer and did not object to it once the answer was made. He cannot now claim the answer was improper.

Second, as to Malcom stating the declaration he reviewed was from his lawsuit against defendant, that too may have been invited by the defense. On cross-examination, defense counsel asked Malcom if he had signed a declaration. The prosecutor's relevance objection to the question was overruled. Thus, the subject would never have come up if the defense did not pursue a particular line of cross-examination. Malcom was then asked whether he had received a telephone call from O'Connor, he said he did not remember. Defense counsel asked him to review a declaration to refresh his recollection. The prosecutor asked to see the document. Defense counsel then stated, "It appears to be a document with —," when Malcom stated, "It's from my lawsuit against [defendant] for cutting my trees—" Defendant did not object to the statement and did not ask that it be stricken. The issue was not preserved for appeal. (Evid. Code, § 353, subd. (a) [verdict may not be set aside based on erroneous admission of evidence without objection or motion to strike].)

The statements made by the witnesses did not deny defendant a fair trial. Defendant further argues the prosecutor exacerbated the prejudicial effect of the complained of testimony by emphasizing the evidence in closing. However, the prosecutorial misconduct argument was not made under a separate heading or subheading as required by the California Rules of Court, rule 8.204(a)(1)(B), and defendant did not object to any of the prosecutor's statements. (*People v. Pearson* (2013) 56 Cal.4th 393,

426.) The issue of prosecutorial misconduct has not, therefore, been persevered for appeal and we do not consider it.³

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.

³ Defendant did object to the prosecutor's statement to the jury that she found defense counsel's argument about Abraham Lincoln "asinine," but the court sustained the objection.