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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK ANTHONY KUCHLER,

Defendant and Appellant.

H038371

(Santa Cruz County

Super. Ct. No. F20659)

Defendant Mark Anthony Kuchler appeals from an order imposing probation after a jury found him guilty of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) and misdemeanor child abuse (Pen. Code, § 273a, subd. (b)). On appeal, defendant contends: (1) there was insufficient evidence to support his conviction of misdemeanor child abuse; (2) the prosecutor committed misconduct in referring to his prior booking photograph; (3) the probation condition ordering him to stay away from certain individuals was unconstitutionally vague and overbroad; and (4) the trial court erred in imposing the restitution fine beyond the statutory maximum.¹ We conclude that the stay-away condition must be modified to include a knowledge requirement and the restitution fine as well as the probation revocation restitution fine must be reduced to the statutory maximum. As modified, the order is affirmed.

¹ Defendant also contended that the trial court erred in failing to award him presentence custody credits. This issue is now moot.

I. Statement of Facts

A. Prosecution Case

In 2011, Neftali Espino and his then 10-year-old daughter Isabella were living in Davenport where Espino owned a surf shop. Espino shaped and repaired surfboards. He had made two surfboards for defendant, and defendant had also given him a surfboard to repair. Espino eventually concluded that the surfboard could not be repaired. Espino and defendant then discussed whether defendant would purchase a new surfboard and receive credit for the money that he had already given Espino. However, the issue was never resolved.

In February 2011, Espino and other community members had cleared some land near the parking lot at Davenport Landing and installed a swing set, a barbecue pit, and a picnic table for public use. Espino maintained the area with a lawn mower that he borrowed from the Davenport Community Center.

At about 4:30 p.m. on March 4, 2011, Espino began mowing the vegetation in the area. He had brought Isabella with him. Meanwhile, defendant was standing next to Roland Edwards in the upper parking lot. After Espino started the lawn mower, defendant said that he “was going to go down there and kick [Espino’s] butt.” Defendant went down the trail and stood in front of the picnic table. When defendant arrived, Espino was alternating between “do[ing] a couple pushes on the lawn mower” in front of the swing set and pushing Isabella on the swing. Defendant asked Espino what he was doing. Espino replied that he was doing some landscaping and maintaining the area. Defendant stated that he liked the weeds and pointed to the mustard seed grass. When Espino said he was not mowing that area, defendant became angry and said, “You just don’t get it.” He yelled at Espino, telling him that he was “a maggot” and he was “introducing more maggots” to the area. Defendant also told Espino that he “was making it a more popular surfing spot” which was “ruining the area.” Defendant was “[s]uper

angry” and yelling “full blast.” Espino did not respond. As he was arguing with Espino, defendant was facing the swing set.

Defendant kicked a Weber barbecue, and then picked up a picnic bench and threw it five feet towards the ocean. Espino stepped away from the lawn mower, which was 10 feet from the swing set, and took two or three steps back. While Isabella was sitting sidesaddle on the swing, defendant threw the lawn mower four and a half feet into the air towards her. The lawn mower, which was still running, landed upside down, with the blade still spinning, two feet from Isabella. When the lawn mower landed, Isabella was in the backwards loop of her swing cycle.

Espino lunged towards his daughter and said, “What are you doing? . . . My daughter is right there.” At that point, defendant struck Espino in the face. Espino’s lip was split open, and he felt “really woozy” and thought he was going to pass out. Defendant then grabbed Espino’s head, picked him up off the ground, and drove his knee into Espino’s head. Espino fell to the ground and tried to get up and run away. However, defendant repeatedly kicked the side of Espino’s head as Espino tried to shield his face with his hand. “[E]verything turned black” for Espino and then he heard Isabella screaming at defendant to leave him alone. Several local surfers arrived and formed a “human barrier” between Espino and defendant. Defendant was yelling and he grabbed the swing set and tried to break it. When Edwards told defendant to stop or he would end up in jail, defendant replied, “I don’t give a shit if I end up in jail. Fuck jail. I don’t care.” Defendant eventually left the area.

Espino called the police about 10 minutes after the incident. He waited for the police to arrive, but they responded to another emergency. Since it was getting dark, he went to the bakery next to his surf shop. After Espino’s friends persuaded him to get medical care, an ambulance was summoned. Espino suffered bruises and a broken bone in his wrist. He was unable to work for two to three weeks and experienced serious wrist problems for one and one-half months.

Meanwhile, defendant fled to Mexico. After his return a few days later, he went to Edwards' house. Defendant told Edwards that he would give him \$5,000 to say that Espino tried to run his feet over with a lawn mower. Though Edwards told defendant that he would think about it, he had no intention of making such a statement.

Defendant also spoke to Kenneth McCrary, Espino's landlord, about Espino and gave him several reasons why he should terminate Espino's lease. Defendant also went to Espino's residence and told him that he needed to drop the charges against him or he would file his own charges. Defendant left only after Espino threatened to call the police.

Michael Schultz, Espino's former friend, approached him after the incident with defendant and said, "If you were a real man, you would have just took that beating like a man and not called the cops."

B. Defense Case

Schultz testified that he had been defendant's friend for 30 years and had known Espino for seven or eight years. Three or four months before March 2011, Schultz had a conversation with Espino about defendant. Schultz told Espino that defendant was upset about not getting his surfboard back. Espino said, "Fuck that fag. If he gets me, I'll get him. You watch. I'm going to do this community a favor."

Birol Sabankaya, defendant's neighbor, testified that he was present during the altercation between defendant and Espino. Defendant and Espino were arguing about money. Espino said, "Get out of my face, you fucking faggot," and defendant "blew up." Defendant threw the lawn mower towards the bushes. On cross-examination, Sabankaya admitted that he had been convicted of contracting without a license.

II. Discussion

A. Sufficiency of the Evidence

Defendant contends that there was insufficient evidence to support his conviction for misdemeanor child abuse.

“The law we apply in assessing a claim of sufficiency of the evidence is well established: “““[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.””” [Citation.] The standard is the same under the state and federal due process clauses. [Citation.] ‘We presume “in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] This standard applies whether direct or circumstantial evidence is involved.” [Citation.]’ [Citation.]” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294.)

Penal Code section 273a, subdivision (b) provides: “Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.” When the harm to the child is indirectly inflicted, the requisite mental state is criminal negligence. (*People v. Valdez* (2002) 27 Cal.4th 778, 781.)

“Criminal negligence is aggravated, culpable, gross or reckless conduct that is such a departure from that of the ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life. [Citation.] A defendant may be deemed to be criminally negligent if a reasonable person in his position

would have been aware of the risk. [Citation.]” (*People v. Burton* (2006) 143 Cal.App. 4th 447, 454.)

Here, the prosecution’s theory was that defendant was criminally negligent when he threw a running lawn mower, blades facing Isabella, in the direction of the swing set while she was swinging.

Defendant argues that since the jury acquitted him of assaulting Isabella with a lawn mower, the jury did not believe that he intentionally threw the lawn mower at her or intended to cause unjustifiable harm to her. There is no merit to this argument. “[T]he law is clear that each count of a jury verdict stands alone; a verdict as to one count has absolutely no bearing as to another. [Citations.]” (*People v. Becker* (2000) 83 Cal.App.4th 294, 298; Pen. Code, § 954.)

Defendant also contends that there was insufficient evidence that he “acted with criminal negligence toward Isabella when he threw the lawn mower, as there [was] no evidence to suggest that [he] was aware of Isabella’s presence, or of her relationship to Espino (as his daughter), prior to actually throwing the lawn mower.” We disagree. Here, the evidence established when defendant arrived, Espino was alternating between “do[ing] a couple pushes on the lawn mower” in front of the swing set and pushing Isabella on the swing. As he was arguing with Espino, defendant was facing the swing set. At that point, the lawn mower was 10 feet away from the swing set and still running. After defendant became enraged and threw the lawn mower four and a half feet into the air towards Isabella, it landed two feet from her. Thus, there was substantial evidence that defendant was aware of Isabella’s presence when he threw the lawn mower.

Defendant next contends that there was insufficient evidence “that the act of throwing the lawn mower would result in unjustifiable mental suffering on Isabella.” There was evidence that Isabella was upset and crying during the incident. She was also described as “scared,” “freaked-out,” and “traumatized” afterwards. Though Isabella was upset by defendant’s attack on her father, the jury could have also reasonably inferred

that some of her mental suffering was caused by defendant's throwing a running lawnmower at her and missing her by only a couple of feet. Accordingly, we reject this contention.

B. Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct by referring to his prior booking photo.

Prior to trial, the trial court ruled that evidence of defendant's past convictions were inadmissible unless he testified or introduced evidence of the victim's propensity for violence.

During direct examination of the investigating officer, the prosecutor asked how he identified defendant prior to his arrest in this case. The following exchange occurred: "Q: Did you pull a booking photo, or did you have a picture from somebody else, that you received from his family, or how did you get -- [¶] A. Yes, I did. [¶] Q. -- a picture -- [DEFENSE Counsel]: Objection; relevance. [¶] [THE PROSECUTOR]: I can rephrase it, I think. [¶] THE COURT: Rephrase the question, please. [¶] [THE PROSECUTOR]: Q. This is just a yes-or-no question; Did you have a picture of him? [¶] A. Yes. [¶] [DEFENSE COUNSEL]: Objection; relevance. [¶] THE COURT: No, that will be allowed. [¶] THE WITNESS: Yes. I retrieved a picture -- "

Following the prosecutor's examination of the investigating officer, the trial court held a sidebar conference and stated, "We have to deal with the booking photo issue, Mr. Peinado. That was a question that borders on misconduct. Absolutely unacceptable." The trial court then asked defense counsel what he would like to do about it. Defense counsel stated that he wanted to address the issue later. When the prosecutor stated that he had immediately withdrawn the question, the trial court disagreed and stated a slightly inaccurate representation of the exchange: "THE COURT: Actually, you didn't. He went on and answered it, and later on he started to say, 'I looked for the

booking photo.’ [¶] So, Mr. Peinado, I don’t know how long you’ve been practicing, but that’s unacceptable, and I won’t tolerate that behavior in my courtroom.”

In further discussions regarding the prosecutor’s reference to the booking photo, the trial court told the prosecutor that it believed his conduct was intentional. Defense counsel then made a motion for a mistrial. The trial court denied the motion, finding that the reference to the booking photo did not deprive defendant of a fair trial and that the jury would not give the remark “inappropriate weight.” The parties discussed possible remedies and agreed that the prosecutor would draft an instruction to give the jury. The jury was subsequently instructed: “In all cases, including this case, the jury is not to consider any suggestion that the defendant may or may not have been previously arrested or charged in the past with any other crime.”

“It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.] . . . A defendant’s conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.]” (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

Here, the prosecutor engaged in misconduct by attempting to elicit inadmissible evidence in violation of the trial court’s order. However, the misconduct was not prejudicial. First, the prosecutor’s question was compound and the jury could have interpreted the officer’s answer in a manner that would not have referenced inadmissible evidence. While the jury could have concluded that the officer obtained a booking photo of defendant, it could also have concluded that a photo was obtained from someone else or from his family. Thus, though the question suggested the possibility that defendant had been previously arrested, the officer’s response did not confirm or deny how he had obtained a photo. Moreover, the officer’s response did not provide the jury with any details about the existence or nature of any prior arrests or convictions. Defendant argues,

however, that “the prosecutor’s reference to [his] previous booking photo served to vilify [him] as an individual with a criminal past and to make up for the absence of evidence of [his] criminal negligence in support of the child abuse allegations.” We disagree. The reference to a booking photo was fleeting and the evidence of child abuse, as previously discussed, was very strong. In addition, the trial court gave an admonition during its closing instructions. We must presume that the jury understood and followed those instructions. (*People v. Panah* (2005) 35 Cal.4th 395, 492.) Accordingly, it is not reasonably probable that defendant would have received a more favorable verdict if the prosecutor had not referred to a booking photo in his question to the officer.

C. Constitutionality of Probation Condition

Defendant contends that the probation condition that he stay away from Espino, Isabella, and McCrary is unconstitutionally vague and overbroad. He requests that the condition be modified to state: “Stay at least 100 yards away from any spot where you know _____ be, from any place that you know to be _____ residence, school or place of employment, and from any vehicle in which you know _____ is an occupant.” The Attorney General concedes that the condition must be modified to include a knowledge requirement.

Pursuant to the oral and written probation conditions, defendant was ordered to stay 100 yards away from McCrary, Espino, and Isabella.

“In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1. [Citations.]” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121.) However, a probation condition may be challenged on the grounds that it is unconstitutionally vague and overbroad. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630.) Though defendant failed to object on constitutional grounds to this condition, we may consider his facial, constitutional challenge because it presents purely a question of law. (*In re Sheena K.*

(2007) 40 Cal.4th 875, 888 (*Sheena K.*.) Accordingly, our review of this probation condition is de novo. (*Id.* at p. 889.)

In examining whether a probation condition is void for vagueness, courts have considered whether the condition is “‘sufficiently precise for the probationer to know what is required of him [or her]’” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890, quoting *People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) “[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’” (*Sheena K.*, at p. 890.)

The overbreadth doctrine focuses on other, though related, concerns. Under this doctrine, “‘a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’” [Citations.]” (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497.) “‘A law’s overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.’ [Citation.]” (*Ibid.*) Defendant argues that the stay-away condition is not narrowly drawn, because it prohibits him from being in public places.

In *People v. Rodriguez* (2013) 222 Cal.App.4th 578 (*Rodriguez*), this court recently considered the constitutionality of a similar stay-away condition.² *Rodriguez* stated: “No reasonable law enforcement officer or judge can expect probationers to know where their victims are at all times. The challenged condition does not require defendant to stay away from all locations where the victim might conceivably be. It requires defendant to remove himself . . . when he knows or learns of a victim’s presence.” (*Id.* at p. 594.) *Rodriguez* remanded the matter to the trial court, stating: “The trial court may

² The stay-away condition in *Rodriguez*, *supra*, 222 Cal.App.4th 578 stated: “Stay away at least 100 yards from the victim, the victim’s residence or place of employment, and any vehicle the victim owns or operates.” (*Id.* at p. 584.)

modify the condition to require that defendant not knowingly come within 100 yards of a known or identified victim. It would be even more clear and informative if the condition actually named the victims and described any locations and vehicles that defendant is to stay 100 yards from.” (*Id.* at p. 595.) Here, unlike in *Rodriguez*, the victims have been identified. However, given the Attorney General’s concession, we will modify the condition to include a knowledge requirement.

D. Restitution Fine

Pursuant to former Penal Code section 1202.4, the trial court imposed a restitution fine of \$10,000 for the felony assault conviction and a restitution fine of \$1,000 for the misdemeanor child abuse conviction. Defendant contends, and the People concede, that the trial court erred. “[T]he maximum [restitution] fine that may be imposed in a criminal prosecution is \$10,000 “regardless of the number of victims or counts involved.” [Citation.]’ [Citations.]” (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534.) Accordingly, we will modify the judgment to reduce the restitution fine under former section 1202.4 to \$10,000 as well as the stayed probation revocation fine, which should reflect “the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.” (Pen. Code, § 1202.44.)

III. Disposition

The order is modified to state: “Stay at least 100 yards away from any place where you know Espino, McCrary or Isabella to be, from any place that you know to be the residence, school, or place of employment of Espino, McCrary or Isabella, and from any vehicle in which you know Espino, McCrary or Isabella is an occupant.” The order is also modified to reduce both the restitution fine (former Pen. Code, § 1202.4, subd. (b)) and the probation revocation restitution fine (Pen. Code, § 1202.44) to \$10,000. As modified, the order is affirmed.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Grover, J.