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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE L. MOLINA,

Defendant and Appellant.

B229314

(Los Angeles County
Super. Ct. No. MA036768)

APPEAL from an order of the Superior Court of Los Angeles County, Charles Chung, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Blythe J. Leszkay, Deputy Attorney General, for Plaintiff and Respondent.

SUMMARY

Defendant and appellant Jose Molina was convicted of felony infliction of corporal injury on a child. He appeals from the order finding him in willful violation of his probation for failing to stay away from his victim. We affirm the order.

PROCEDURAL BACKGROUND

A complaint filed in November 2006 charged appellant with one count of felony corporal injury to a child, his son, Jacob M. (Pen. Code, § 273d, subd. (a).)¹ Appellant pleaded no contest to the charge. Imposition of appellant's sentence was suspended. On December 5, 2006, appellant was placed on formal probation for four years. The terms and conditions of his probation included an order not to "associate with/stay away from [Jacob]."

On October 26, 2010, the court found appellant in violation of his probation. He was sentenced to two years in state prison, and ordered to pay various fines and to stay away from Jacob for 10 years.

FACTUAL BACKGROUND

The underlying crime

On November 11, 2006, during the course of an argument with his 16-year-old son, Jacob, over a video game, appellant struck Jacob in the back with a baseball bat.

In early March 2007, appellant requested that his probation officer permit him to reunite with his family and to return to the family residence. The probation officer said it was too early for such a decision to be made. The trial court denied a similar request less than two weeks later, without prejudice, and ordered appellant to attend counseling. At a hearing on May 2, 2007, the trial court modified the terms of appellant's probation to permit him to attend counseling with Jacob, so long as he did not drive to or from the sessions with Jacob, sit by him during counseling sessions or live or associate with Jacob outside of counseling.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

The probation violation

Prosecution evidence—Mrs. Molina

When appellant and his wife came home on the evening of May 30, 2010, Jacob was in his room with a few of his friends talking about getting tattoos. Appellant and his wife said Jacob could not get a tattoo. Jacob and his friends went to hang out in the dining room, where Mrs. Molina was going to put on movies for them to watch. Appellant told Jacob his friends had to leave and, if they didn't, he was "'gonna kill Jacob.'" Appellant grabbed a kitchen knife with a blade nearly nine inches long and approached Jacob. Mrs. Molina screamed, "'he has a knife!'" Jacob hit his father in the face, breaking appellant's glasses and knocking him down. Mrs. Molina testified that Jacob, who is stronger than his father, initiated the physical altercation with appellant. He approached appellant with his fists up and threw a hard punch that broke appellant's glasses and sent him to the ground. Several days after appellant was arrested for making criminal threats against Jacob and threatening his wife with a knife, Mrs. Molina delivered to the police the kitchen knife appellant allegedly wielded during that incident.

As a result of a prior injury, Mrs. Molina takes medications that affect her memory. She sometimes has blackouts and blacked out for about 10 seconds during the fight between her husband and son.

Appellant and Mrs. Molina were going through a divorce and there were bad feelings between them. They lived under the same roof, but had slept in separate rooms for about 8 months before May 2010. Mrs. Molina testified that Jacob still had a room in the family home, but had moved out in December 2009 or January 2010. She also testified that appellant did not move back into the house until after Jacob moved out. Jacob visited occasionally, usually when appellant was at work.

Mrs. Molina was aware that the trial court had ordered appellant to stay away from Jacob. She made inquiries with the trial court to see whether that order remained in effect and testified that, at some point within the past year or two she had told appellant that the restraining/stay away order was no longer in effect. Mrs. Molina testified that

Jacob began coming back to the family home only after she told appellant the court order had been lifted.

Defense evidence

Jacob Molina

Jacob testified that he moved out of his family's house four years before the probation violation hearing (when he was 17) so that his parents would not have to separate. He also testified that he had moved out of the family home in December 2009 or January 2010 because of the order restricting his father from being within a certain distance of him. Jacob still had a bedroom at the house and frequently visited unannounced, usually when appellant was at work. On the day of the confrontation with his father, Jacob had not expected appellant to be at the house.

When his parents came home on May 30, 2010 to find Jacob and his friends—some of whom were under 18 years old—giving one another tattoos, appellant became upset and said Jacob's friends had to leave. Jacob refused and took a stand against his father. Jacob did not hear appellant say he would kill Jacob if his friends did not leave.

Jacob never saw appellant with a knife, but did hear his mother yell that appellant had a knife. Jacob was afraid he would be stabbed. Acting from instinct, he tried to knock appellant out. Later, Jacob wrestled appellant to the ground and searched him for a knife, which he never found. Jacob loves his father, and testified that appellant never pulled a knife on him that day. At the time of the confrontation with his father in May 2010, Jacob had not been taking his prescribed medication.

When Jacob does not take his medication he becomes impulsive and angry at everything. He has a history of violence toward his siblings and destruction of property at the house.

Jacob testified he would “do what [he had] to do to get [appellant] out.” Jacob's mother has lied to protect her son in the past, choosing to protect him over her husband.

DCFS social worker

According to the testimony of a DCFS social worker, the dependency court had ordered that Jacob, who had been physically violent with at least one of his sisters, move

out of the family home. Mrs. Molina disobeyed that order and allowed Jacob to remain in the home, resulting in detention of the Molinas' daughters. In the social worker's opinion Mrs. Molina was unreliable and her stories were often inconsistent. In addition, Mrs. Molina always protected Jacob and was very harsh with appellant, blaming him for everything. The social worker understood that Jacob lived at the family home, not appellant.

DISCUSSION

1. *Standard of review*

A court is authorized to revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation." (§ 1203.2, subd. (a).) The narrow inquiry in a revocation hearing is whether conditional release has been violated and whether, as a result, parole or probation should be terminated. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 479–480 [92 S.Ct. 2593, 33 L.Ed.2d 484]; *In re Eddie M.* (2003) 31 Cal.4th 480, 504.)

The standard of proof sufficient to give the court "reason to believe" that a probationer has violated the conditions of his or her probation is preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447 (*Rodriguez*).) "[T]he evidence must support a conclusion that the probationer's conduct constituted a willful violation of the terms and conditions of probation." (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982 (*Galvan*); *People v. Zaring* (1992) 8 Cal.App.4th 362, 375–379 (*Zaring*).) Trial courts have "great discretion in deciding whether or not to revoke probation." (*People v. Kelly* (2007) 154 Cal.App.4th 961, 965; *Galvan*, at pp. 981–982.) Absent a showing of an abuse of that discretion, we will not disturb the trial court's findings. (*Kelly*, at p. 965.)

Appellant claims the evidence presented against him was insufficient to warrant revocation of his probation. He is mistaken. The record contains sufficient evidence to support a finding of a willful violation. (See *Galvan, supra*, 155 Cal.App.4th at p. 982; *Zaring, supra*, 8 Cal.App.4th at pp. 378–379.)

2. *The record supports the trial court's findings*

The trial court found two probation violations. The court first found that appellant violated his probation when he came home, saw that Jacob was at the house and decided to stay there too. The court observed that appellant, who had been ordered not to associate with and to stay away from Jacob “had an immediate duty to leave that location,” but “did not.” There can be no doubt that appellant was aware of the stay away order. In early 2007 he twice took affirmative steps to try to obtain judicial permission to modify the term of his probation requiring that he stay away from Jacob.² There is no question that appellant was at the family home on May 30, 2010, or that he knew Jacob was there too and made no effort to leave or to get Jacob to leave once he learned his son was at the house. Regardless of whether Jacob was there at his mother’s invitation, his own discretion, or was living there, appellant had been ordered to stay away from Jacob and chose not to do so. That choice constituted a willful violation of his probation.

Mrs. Molina did testify that she had told her husband the stay away order was no longer in effect. But the trial court expressly found her testimony on that point not credible. It is the “exclusive province of the trial judge or jury to determine the credibility of a witness,” and an appellate court may not substitute its evaluation of a witness’s credibility for that of the fact finder. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) The record here supports the trial judge’s finding that Mrs. Molina lacked

² At the hearing the judge reviewed his files and noted that minute orders from February and March 2007 showed appellant filed a written request to modify his probation. A hearing was held on that request at which appellant “specifically asked [the judge] for permission to lift the stay away order. I told him that I would decline that because he had not been on probation for very long.” Another minute order showed the judge conducted a hearing on May 2, 2007 “to again reconsider whether or not I should lift the stay away order and I lifted it in part” to allow appellant to attend counseling with Jacob, so long as he did not travel with his son to or from the appointments or sit next to him during them, and did not “live with or associate with Jacob outside of the counseling.” The minute order stated that, in all other respects the “stay away and protective orders would remain in full effect,” but left appellant free to “petition the court at a later date regarding the stay away order.” The judge observed that appellant never made any subsequent effort to modify the terms of his probation.

credibility. Indeed, appellant's assertion that his probation violation was not willful does not rest on a claim that he mistakenly believed the stay away order was no longer in effect, but on the claim that the order "was being flouted by [his] wife and son." The record reflects that appellant was aware of but chose to ignore his obligation to stay away from Jacob.

The trial court also found that appellant violated probation by pulling a knife on Jacob. Viewing the evidence as a whole, the trial court made a credibility determination and found that Mrs. Molina saw appellant with a knife, with which he assaulted Jacob. The evidence supported this conclusion.

Both Mrs. Molina and Jacob testified that Mrs. Molina screamed that appellant had a knife in the heat of an argument between appellant and Jacob. Mrs. Molina told police she saw appellant with a knife and later turned that knife over to police. At the preliminary hearing, she testified she saw appellant with a knife and described its type and estimated length. At the probation violation hearing, Mrs. Molina testified again that appellant had a knife and threatened to kill Jacob. This evidence was sufficient to support the court's finding.

Appellant argues he cannot be held to have willfully violated the stay away order because his wife invited Jacob into the house where appellant lived. First, there is no evidence Mrs. Molina invited Jacob to the house on the night of the incident in question, or ever. According to Jacob, he occasionally went to the house when appellant was not there. He did not say his mother invited him. Mrs. Molina also testified that Jacob came to the house sometimes, but did not testify that he came at her invitation.

Second, there was no evidence that appellant made any effort to leave when he saw Jacob at the house that night. He also did not ask Jacob to leave (only Jacob's friends), or call the police or make any effort to have Jacob removed from the house. The trial court found that appellant was obligated under the terms of the stay away order to remove himself from the situation if Jacob was at the house and appellant chose not to ensure that either he or his son vacated the premises. If appellant had a right to be on the premises, he was obliged to seek help to have Jacob removed. Or, if appellant believed

his familial circumstances warranted having the stay away order lifted, he knew he was free to apply to the court to seek that very relief just as he had done in the past. Rather than pursuing these options, appellant chose to stay at the house with his son and engaged in a physical fight with him.

A trial court has “very broad discretion in determining whether a probationer has violated probation.” (*Rodriguez, supra*, 51 Cal.3d at p. 443.) We will not disturb a trial court’s discretionary determination to revoke probation, unless the defendant demonstrates an abuse of discretion. (*People v. Kelly, supra*, 154 Cal.App.4th at p. 965.) On this record, we find no evidence the trial abused its discretion in finding a willful violation of probation based on appellant both by being in Jacob’s presence and assaulting him with a knife.

Neither *Galvan, supra*, 155 Cal.App.4th 978, or *Zaring, supra*, 8 Cal.App.4th 362, on which appellant relies, advances his position. Those cases address the concept of “willfulness” in circumstances where it was physically impossible for a probationer to comply with the conditions of probation due to circumstances beyond the probationer’s control.

In *Galvan*, the trial court abused its discretion in finding a probationer willfully violated terms of his probation by failing to report to the probation department within 24 hours of his release from county jail. (155 Cal.App.4th at pp. 980–983.) The probationer had failed to report because, once released, he was immediately arrested and deported. It was physically impossible for him to report as required. (*Id.* at p. 983.) *Zaring* likewise involved a violation of probation that was not willful and therefore did not support revoking probation. In *Zaring*, the probationer lived 35 miles from the courthouse and needed to arrange a ride to an 8:30 a.m. court hearing. Her ride fell through at the last minute, however, because of child care problems, forcing her to make other arrangements, and delayed her arrival to the hearing by 22 minutes. (8 Cal.App.4th at pp. 366, 379.) A key distinction between *Galvan* and *Zaring* and appellant’s situation is that the probationers in those cases provided evidence that showed their noncompliance

was due to factors beyond their control. (*Zaring*, at pp. 376–377; *Galvan*, at p. 983.) Appellant made no similar showing.

We conclude the record contains sufficient evidence to support the trial court’s determination that appellant willfully violated his probation, and the court did not abuse its discretion in terminating appellant’s probation.

DISPOSITION

The order finding appellant in violation of his probation is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J