Filed 5/8/17 P. v. Tomayo CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

NOE TAMAYO,

Defendant and Appellant.

2d Crim. No. B266258
(Super. Ct. No. BA431223-01)
(Los Angeles County)

Noe Tamayo appeals a judgment following conviction of misdemeanor disobeying a domestic relations court order, attempting to dissuade a witness from testifying, and two counts of misdemeanor contempt of court, with findings of two prior serious felony convictions, and one prior felony strike conviction. (Pen. Code, §§ 273.6, subd. (a), 136.1, subd. (a)(2), 166, subd. (c)(1), 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)[1] We affirm.

[1] All statutory references are to the Penal Code unless stated otherwise.

FACTUAL AND PROCEDURAL HISTORY

This appeal concerns the aftermath of an alleged domestic violence incident on May 3, 2014, between Tamayo and his wife, Hira.[2] The couple had a longtime marriage and three children, but separated in early 2014. Hira obtained a restraining order against Tamayo, but continued contact with him. Following his arrest for the domestic violence allegations, Tamayo telephoned Hira on four occasions from county jail. The conversations were recorded by jail authorities and provided evidence for the charge of attempted witness dissuasion. Tamayo was later acquitted of charges concerning the domestic violence incident.

In 2014, Hira lived in Los Angeles with her teenage son D., daughter Y., and an older teenage son. Tamayo lived with his girlfriend and his grandfather. Hira obtained a restraining order against Tamayo in April 2014.

In the morning of May 3, 2014, D. walked his dog near his maternal grandfather's home. D. saw Hira's automobile approach and stop; Y. left the vehicle and ran to D. She said that Tamayo had a gun and was going to kill Hira. Inside the vehicle, D. saw Tamayo pointing a gun at Hira. As Tamayo drove away, D. telephoned for police assistance. At trial, the prosecutor played the 911 call.

Los Angeles Police Officer Armon De'Launey soon arrived and interviewed D. and Y. D. was crying "hysterically" and "really uncomposed." The children informed De'Launey that Tamayo held a gun to their mother. Later that evening, police officers arrested Tamayo at his grandfather's residence.

---

[2] We shall refer to Hira Tamayo by her first name not from disrespect, but to ease the reader's task.

On May 30, 2014, and June 3, 2014, the trial court held a preliminary examination. At the hearing, Hira stated that she met Tamayo to discuss their children and that he did not have a weapon. On the second day of the preliminary examination, Hira refused to testify.

Recorded Jail Telephone Conversations

On May 27, 2014, Tamayo telephoned Hira from county jail, using another inmate's booking number. The prosecutor played the recorded conversation at trial.

During the telephone conversation, Tamayo acknowledged repeatedly that he had "fucked up," claimed that he loved Hira, and asked for another chance. Tamayo asked that Hira pick him up at jail when he made bail and stated that he intended to live with her, not his girlfriend. Tamayo also directed Hira to contact a particular attorney who would inform the trial judge that the prosecutor is threatening her: "[T]he fucking judge is gonna tell them . . . leave her alone . . . . [D]on't listen to the DA. That's why your lawyer's gonna be there . . . ." Tamayo also offered to pay attorney fees that Hira incurred in the earlier domestic relations matter.

On June 2, 2014, Tamayo again telephoned Hira from county jail. The prosecutor also played this recorded conversation at trial.

During the telephone conversation, Hira asked Tamayo to prevent his girlfriend from calling her. Tamayo directed Hira to ignore the calls. Tamayo asked if Hira would attend the preliminary examination scheduled for the next day. When she responded affirmatively, Tamayo asked: "You gonna help me, right?" Hira responded that she "already said yes." Tamayo then stated, "My lawyer . . . found . . . a law that you

cannot be forced to fucking testify if you don't want to, [and] your lawyer talked to my lawyer and they got hooked up and that's what's gonna happen . . . . You're not gonna fucking testify and you're gonna leave." When Hira stated that her attorney recommended that she "plead the fifth," Tamayo replied, "Exactly. That's what it is, you don't need to say nothing anymore." Tamayo also stated that their marriage deteriorated when Hira "grew some balls."

Tamayo also reminded Hira that she did not want to lose her children and that he "can tell [his lawyer] to lock [her] up . . . and [she] will lose the kids." Tamayo stated that his attorney was "an expert" who had successfully defended him "when [he] was guilty as a mother fucker."

Tamayo testified at trial and denied kidnapping Hira or holding a firearm to her. He admitted that he violated two restraining orders by contacting her. Tamayo testified that he did not intend to dissuade Hira from testifying and did not request her to lie on his behalf.

Conviction and Sentencing

In the first trial, the jury convicted Tamayo of disobeying a domestic relations court order, and two counts of contempt of court. It acquitted him of the kidnapping of Y., making criminal threats, and two counts of attempted witness dissuasion. The jury could not agree upon the kidnapping of Hira and a third count of attempted witness dissuasion. In the second trial, the jury convicted Tamayo of the third count of attempted witness dissuasion but it could not agree regarding the kidnapping count. The trial court later dismissed that count.

The trial court sentenced Tamayo to 19 years in prison, consisting of a doubled three-year term for the attempted

witness dissuasion count, one-year terms to be served consecutively for the remaining three misdemeanor counts, and 10 years for the two prior serious felony convictions. The court imposed a $300 restitution fine, a $300 parole revocation restitution fine (suspended), a $160 court security assessment, and a $120 court operations assessment, and awarded Tamayo 896 days of presentence custody credit. (§§ 1202.4, subd. (b) 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Tamayo appeals and contends that: 1) insufficient evidence supports his conviction of attempted dissuasion of a witness (§ 136.1, subd. (a)(2)), and 2) the trial court erred by not instructing sua sponte regarding the family member presumption of section 136.1, subdivision (a)(3).

DISCUSSION

I.

Tamayo argues that insufficient evidence supports his conviction of attempting to dissuade a witness, thereby denying him due process of law pursuant to the United States and California Constitutions. He also asserts that the trial court erred by denying his motion for judgment of acquittal based upon the lack of evidence of malice. (§§ 1118.1, 136.1, subd. (a)(2).) Tamayo contends that his recorded statements, properly interpreted, do not indicate or suggest that he attempted to discourage Hira from attending or giving testimony at the preliminary examination.

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212; *People v. Johnson* (2015) 60 Cal.4th 966, 988.) Our review is the same in a prosecution primarily resting upon circumstantial evidence. (*Johnson*, at p. 988; *People v. Watkins* (2012) 55 Cal.4th 999, 1020.) We do not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact"].) We must accept logical inferences that the jury might have drawn from the evidence although we would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Albillar*, at p. 60.)

Regarding a motion for judgment of acquittal, section 1118.1 provides: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." In determining whether the evidence is sufficient to support the trial court's ruling denying a section 1181.1 motion, we review the evidence "'as it stood at that point.'" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1183, overruled on other grounds by *People v. Rangel*, *supra*, 62 Cal.4th 1192, 1216; *People v. Houston* (2012) 54 Cal.4th 1186, 1215 [appellate review of denial of section 1181.1

motion uses standard of review of sufficiency of evidence to support a conviction, but focuses on evidence existing at time of motion].)

Section 136.1, subdivision (a)(2) punishes a person who "[k]nowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." The factual circumstances in which the defendant's statements are made, not just the statements themselves, must be considered to determine whether the statements amount to an attempt to dissuade a witness from testifying. (*People v. Wahidi* (2013) 222 Cal.App.4th 802, 806.) "If the defendant's actions or statements are ambiguous, but reasonably may be interpreted as intending to achieve the future consequence of dissuading the witness from testifying, the offense has been committed." (*Ibid.*)

Sufficient evidence and reasonable inferences therefrom support Tamayo's conviction of attempted dissuasion of a witness, i.e., attempting to prevent Hira from "giving testimony at any . . . proceeding." (§ 136.1, subd. (a)(2).) During the May 27, 2014, call, Tamayo claimed that he loved Hira, admitted that he had "fucked up," stated that they would be together, and promised to pay her attorney fees. During the June 2, 2014, call, Tamayo stated that his attorney and Hira's attorney had conferred and "that's what's gonna happen . . . . [Hira's] not gonna fucking testify and [she's] gonna leave." Tamayo also confirmed Hira's statement that her attorney recommended that she "plead the fifth." Finally, Tamayo informed Hira that his attorney could cause her to be arrested for perjury which would result in her losing custody of her children. In addition, Tamayo's calls to Hira were placed with another inmate's booking

number, permitting the reasonable inference that Tamayo intended to conceal the calls. Following the June 2, 2014, call, Hira refused to testify at the continued preliminary hearing.

The trial court also properly denied Tamayo's request for a judgment of acquittal because sufficient evidence and all reasonable inferences therefrom establish the elements of attempted dissuasion of a witness. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1344 [section 136.1 does not require that defendant use the talismanic phrase "Don't testify"], superseded by statute on other grounds as noted in *People v. Franz* (2001) 88 Cal.App.4th 1426, 1442.) Although other reasonable inferences might be drawn from the evidence, we do not substitute our views for those of the finder of fact. (*People v. Albillar*, *supra*, 51 Cal.4th 47, 60.)

II.

Tamayo contends that the trial court erred by not instructing sua sponte regarding the family member presumption of section 136.1, subdivision (a)(3): "[E]vidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice." (See *People v. Wahidi*, *supra*, 222 Cal.App.4th 802, 809, fn. 4 [section 136.1, subdivision (a)(3) concerns family members who attempt to dissuade a witness or victim from testifying not as part of an effort to interfere with the administration of justice, but from concern for the welfare and safety of the witness or victim].) Tamayo claims that the error denied him the right to due process of law, a fair trial, and a jury trial, pursuant to the United States and California Constitutions. He asserts that the error is not harmless beyond a reasonable doubt.

The trial court did not err by not instructing sua sponte regarding the family member presumption. Evidence regarding Tamayo's relationship to Hira and any "effort to protect [her]" raises a reasonable doubt as to an element of the offense. (§ 136.1, subd. (a)(3).) As such, the burden is upon defendant to request a "pinpoint" instruction. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669 [defining pinpoint instruction].) Pinpoint instructions are required to be given upon request when there is evidence supportive of the defendant's theory, but not required to be given sua sponte. (*People v. Rogers* (2006) 39 Cal.4th 826, 878.) Here Tamayo did not request a pinpoint instruction regarding section 136.1, subdivision (a)(3), and the court was not required to instruct sua sponte.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Frederick N. Wapner, Judge

Superior Court County of Los Angeles

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.