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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. VICTOR GARCIA, Defendant and Appellant.	B231936 (Los Angeles County Super. Ct. No. GA 081566)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dorothy L. Shubin, Judge. Affirmed.

Christopher Love, 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, Assistant Attorney General, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Victor Garcia of one count of stalking his estranged wife. Appellant contends that his conviction must be reversed because there was insufficient evidence that his acts were wrongful or unlawful, and in addition, he has a constitutional right to associate with his wife. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant and his wife, Geraldine Garcia (Garcia), married in 1993 and had four children together. On April 1, 2009, appellant came home intoxicated at approximately 5:30 p.m. He started arguing with Garcia and accused her of "fooling around." Appellant grabbed a 13-inch television and raised it to his head as though he was going to throw it at Garcia. She grabbed the television from him and turned her back to him to set it down. Appellant then hit Garcia on the face and everything "went black." Garcia called the police and was issued a temporary restraining order. Criminal charges were filed against appellant on April 3, 2009, and a three-year restraining order was issued in the case.

Garcia hoped that appellant would realize their relationship was over after he hit her, and she hoped she would not hear from him anymore. But appellant called her almost every day, and his first night out of the house, her phone rang all night because he was calling her. She would not speak to him when he called. Appellant called her cell phone so often that she had to turn off her phone while she was at work because it would not stop ringing.

Garcia testified at appellant's probation violation hearing in a felony drug case, and appellant was sentenced to prison for violating his probation in that case; the domestic violence case against him was dismissed. Garcia was aware that he had reached prison because the calls stopped and he started sending letters instead. At first, she received two or three letters a week. The letters so upset Garcia that she would tear them up. She wrote to him once in December 2009 to tell him that their relationship was over and he needed to stop calling and writing to her, and she would send him his possessions when he was released. Except for that one letter, Garcia never wrote to appellant in

prison. She also never visited him in prison and never accepted any of his calls from prison.

Appellant's letters did not stop coming even after she wrote him in December 2009. Between February 14, 2010, and October 7, 2010, she received many letters from appellant. She started saving them instead of tearing them up around July 23, 2010. From that point until appellant was released, she received and saved approximately 42 letters. The letters were admitted into evidence. Many of the letters contained pages that appellant had either photocopied or copied by hand from books of a religious nature. For example, one appeared to be a book advising married couples on the church's vision of marriage. Other letters consisted of appellant's own words. In them, appellant continually told Garcia that he would be returning to her and their children and suggested that it was God's will for them to be together. At other times, appellant wrote that he wanted to commit suicide; that the only way he would leave her was if she had another man; that part of him wanted to go to Garcia's work and look for the man in her life, but another part of him told him not to do that because too many people would be hurt; and that maybe it was best if he died because if he came back and she was with someone else, "well it[']s not going to be good for anybody."

Garcia decided to start saving the letters so that she had a record, which she used to file a report with the sheriff's department. She also presented the officers with a copy of the restraining order, which the sheriff's department was also able to find in their system. No one ever told Garcia that there was any problem with her restraining order.

On October 21, 2010, appellant called Garcia and said he had been released from prison and was coming home; he had been deported and was in Tijuana. Garcia told him the relationship was over and he could not come home. She also told him she had a restraining order. Appellant replied that the restraining order she had was only good for three days. Garcia told him he was wrong and the restraining order was valid. She believed the restraining order was good for three years.

On October 28, 2010, at approximately 6:00 a.m., Garcia was taking some trash out to the street and heard a car door open across the street. She saw a truck she did not

recognize. Someone got out of the truck and was walking up her driveway behind her. She reached her car and turned around, and saw appellant behind her. Garcia became frantic and was afraid. She told him again that it was over and to leave her alone. She ran upstairs to the door of her apartment, and appellant followed her. He told her that he was a changed man and had found God. Appellant pulled on her as she was trying to get inside the apartment, and she shoved him back. She managed to get inside and lock the door behind her.

On October 31, 2010, at approximately 7:00 p.m., Garcia's neighbor, Maria Enciso (Enciso), saw appellant on the sidewalk in front of the entrance to Garcia's apartment. Later that night she saw appellant knock on the door to Garcia's residence, and when no one answered, appellant came down the stairs to where Enciso and her husband were standing. Appellant spoke with Enciso's husband and asked if Garcia still lived there, whether anyone was living there with her, and whether they knew what time she would be home or what time she left. Enciso and her husband did not provide appellant with any information.

On November 1, 2010, at approximately 6:00 a.m., Garcia was leaving for work. As she pulled away from her apartment, she noticed the truck she had seen appellant get out of on October 28; she drove by the truck on her way down the street from her home. Appellant was driving the truck and followed her. She immediately dialed 911 and told the operator that she had a restraining order against her husband and he was following her. When she came to stops, appellant would pull alongside her car and yell at her to pull over. Garcia yelled at him to leave her alone. She was terrified that appellant was going to try to run her off the road or otherwise harm her. Eventually she saw the police, Officer Ramon Chavez, pull over appellant. Garcia also pulled over to be interviewed by the officer. She told Officer Chavez that she had a restraining order against appellant. Officer Chavez ran appellant's name through his computer, and after doing so, he arrested appellant for violating the restraining order. The restraining order that had been issued against appellant on April 3, 2009, was still in the Sheriff's Department system.

The parties stipulated that, on April 23, 2009, the domestic violence case against appellant was dismissed, and the three-year restraining order in that case was no longer valid as of that date. However, from April 3, 2009, to November 1, 2010, the restraining order remained in the computer system of the sheriff's department, and nobody was notified that the restraining order was no longer effective.

The jury convicted appellant of one count of stalking Garcia. The court sentenced appellant to three years in state prison. Appellant filed a timely notice of appeal.

STANDARD OF REVIEW

"Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

From that presumption, we "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." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Moreover, "[a]n appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

DISCUSSION

"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 . . . ." (Pen. Code, § 646.9, subd.

(a).)[1] "'[H]arasses' means engages 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." (§ 646.9, subd. (e).) "'[M]aliciously' import[s] a wish to vex, annoy, or injure another person, or an intent to do a wrongful act." (§ 7, para. (4); see also *People v. Uecker* (2009) 172 Cal.App.4th 583, 594, fn. 8; CALJIC No. 1.22; CALCRIM No. 1301.)

Appellant contends that there was insufficient evidence he acted maliciously, which he argues requires wrongful or unlawful conduct. He also argues that because the restraining order was not actually in effect during the period when he was calling Garcia, sending her letters, and going to the apartment, he was not acting wrongfully or unlawfully, and there was no legal reason why he should not have called, written to, or visited Garcia. We disagree.

The statute does not require a restraining order or any other legal order prohibiting the defendant's conduct.[2] The "malicious" component of the crime is satisfied if a defendant's harassment or following was done with the wish to vex, annoy, or injure. (§ 7, para. (4).) In this case, the evidence was sufficient to show that appellant "maliciously" harassed Garcia. Garcia told appellant that she did not want to be with him anymore, to stop calling and writing her, and/or to leave her alone on no less than four occasions. She wrote to him in December 2009 when he was in prison to tell him that their relationship was over and he needed to stop calling and writing to her. Despite her insistence, appellant sent her dozens of unanswered letters telling her he was coming back and suggesting that it was God's will that they be together. On October 21, 2010, when appellant called Garcia after his release, she again told him the relationship was

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[1] All further statutory references are to the Penal Code.

[2] Section 646.9, subdivision (b), increases the punishment for harassment if a restraining order has been issued. Appellant was not prosecuted under subdivision (b) as there was some question whether the restraining order was in effect at the time of these events.

over and he could not come home. Seven days later, on October 28, 2010, appellant showed up at the apartment, and she again told him that it was over and to leave her alone. Several days after that, he came over again and questioned her neighbors when he found she was not home. And the day after that, on November 1, 2010, appellant followed her car as she left home for work, and she told him once again to leave her alone, this time as he yelled at her from his car. Appellant never listened and continued to contact Garcia, and even during their last encounter in November, appellant only stopped following Garcia because Officer Chavez pulled him over. Additionally, appellant seemed fixated with the presence of another man in Garcia's life; he commented in his letters that he wanted to look for "the other man" and suggested that harm was going to come to them if he found him. When he went to the apartment after he was released, he asked the neighbors whether anyone was living there with Garcia. This all occurred, of course, after the 2009 domestic violence incident in which appellant nearly threw a television at Garcia and succeeded in striking her in the face. From appellant's violence, his repeated refusal to leave Garcia alone, his following her, and his comments regarding another man in her life, a reasonable jury could conclude that appellant wished to "vex, annoy, or injure" Garcia. To suggest that appellant was entitled to act as he did because the two were married and there was no valid restraining order is incorrect. A marriage certificate does not give an individual carte blanche to harass his or her spouse when the marriage has become troubled and the spouse has expressed a firm desire to be left alone.

Appellant's alternative argument that we must reverse the judgment because he had a constitutional right to associate with his wife is also unpersuasive. It is true that marriage is among the "highly personal relationships" protected by the constitutional right to freedom of intimate association. (*Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 624.) But the stalking statute does not criminalize mere marital association, and in fact, it expressly provides that "[c]onstitutionally protected activity is not included within the meaning of 'course of conduct'" for purposes of the statute. (§ 646.9, subd. (f).) Appellant does not seem to be arguing that the statute itself is

unconstitutional. Instead, his constitutional argument seems to be his first argument stated in a slightly different way -- because there was "no legal impediment" preventing him from communicating with his wife, he was not acting unlawfully or wrongfully, and thus he had a constitutional right to act as he did. As discussed, his foundational point that he did not do anything wrong because there was no restraining order in effect is without merit. The evidence was sufficient to support the finding that he acted maliciously.

DISPOSITION

The judgment of conviction is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.