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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD JOSEPH CARRARI,

Defendant and Appellant.

2d Crim. No. B276039
(Super. Ct. No. 1479312)
(Santa Barbara County)

A jury convicted Ronald Joseph Carrari of resisting an executive officer by means of threats (Pen. Code,¹ § 69²); stalking (§ 646.9, subd. (a)); and possession of a short-barreled shotgun (§ 33215). The trial court sentenced him to four years and four months in state prison for his crimes. It suspended

¹ All further statutory references are to the Penal Code.

² In 2015, the Legislature recodified this statute without substantive change at subdivision (a) of section 69. (Stats. 2015, ch. 177, § 1.)

execution of the sentence and placed Carrari on five years of formal probation.

Carrari challenges his conviction for resisting an executive officer based on insufficient evidence, incorrect jury instructions, and prosecutorial misconduct. He argues insufficient evidence and incorrect jury instructions on his stalking conviction. Carrari also contends his trial attorney rendered ineffective assistance because he did not file a motion to suppress or a motion to quash or traverse. We affirm.

BACKGROUND

In February 2015, doctors diagnosed Carrari's mother with cancer. His sister, Christina,³ flew back and forth from Kansas to help the family care for her. Christina eventually stayed in California full time to provide care.

Early the next month, Carrari arrived unannounced at his mother's house, despite requests that he not do so. Christina told him that their mother was asleep and that she would call him when she woke. Carrari spit on the door frame as he left. Christina reported the incident to law enforcement officials.

Three days later, Carrari drove up the driveway to his mother's house as Christina was trying to leave. He aimed at Christina's car, and swerved just before he hit it. He was angry and hostile. Christina again contacted law enforcement.

Three days after that, Carrari left "threatening" voicemails on his mother's phone. Christina contacted sheriff's deputies. The deputies told Carrari that he would be trespassing if he went to the family house uninvited again.

³ We refer to Christina Carrari by her first name for ease of identification.

Carrari left additional “disturbing” voicemails four days later. He put a planter box with threatening messages and bullet holes painted on it at his mother’s house. He also painted family members’ initials and a message that said, “You’re next, Tina” on the planter.

Four days after that, Carrari pulled his car onto the shoulder alongside Christina while she was driving. He angrily yelled and pointed at her. He drew his finger across his throat in a slashing motion. Christina pulled over to call law enforcement, but when Carrari also stopped she drove to the fire station. She reported the incident to the sheriff’s department from the fire station. A restraining order preventing Carrari from contacting Christina had issued by that time.

Later that same day, three sheriff’s deputies and a sergeant went to Carrari’s residence. Dispatch told them that Carrari had firearms inside. The deputies parked about one-quarter mile from Carrari’s house. Two walked to the front door, and two went to the backyard. No one answered when the two deputies knocked on the front door. They walked to the back of the house.

One deputy saw Carrari walking toward the back door of his house and asked him to stop to talk. Carrari refused and ran into the house. The deputies set up a perimeter in the yard around the house. They asked Carrari to exit, but he said that he would not go outside and that the deputies should come inside instead. He yelled, “You have guns. I’m going to get my own guns.” He appeared agitated and upset. He raised his middle finger at one of the deputies.

One deputy left to obtain an arrest warrant and a search warrant. The others maintained the perimeter. Once a

magistrate signed the warrants, the deputies entered the house and arrested Carrari. He posted bail the next day.

The following week, Christina and her sister were at a copy store to make arrangements for their mother's memorial service. Carrari walked into the store, made eye contact with Christina, threw up his arms, and left. After Christina finished her business there, she and her sister went grocery shopping. When they returned to their car, Christina saw that someone had spit on the windshield.

A few days later, the Carraris held a celebration of life for their mother. After the service, Christina drove by the hotel where family members were staying. The planter box with the threat painted on it was there. Christina was afraid.

Carrari's trial commenced in September. Prior to closing arguments, the trial court instructed the jury that a sheriff's deputy's duties include "lawfully detaining potential suspects, authoring arrest and search warrants, [and] executing arrest and search warrants." (CALCRIM No. 2651.) It further instructed that a deputy "is not lawfully performing his duties if he is unlawfully detaining someone," and defined an unlawful detention. (CALCRIM No. 2670.) The court refused to give the following special instructions Carrari requested: "The Fourth Amendment to the United States Constitution prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. [Citation.]" and "The First Amendment protects the right of a citizen to verbally criticize or challenge police officers. [¶] [Citations.]"

During his closing argument, the prosecutor stated that the deputies "were legally detaining [Carrari] when he made

the threat,” that they “acted lawfully the entire time,” and that “based on everything they knew . . . they could lawfully detain and eventually arrest [him].” He said that Carrari fled, “didn’t want [the deputies] to continue performing their duty of investigating a crime,” and did not want to be detained or arrested. He also said that Carrari could not tell the deputies to leave and that he would get his guns if they did not obey his demands. Carrari did not object during the prosecutor’s argument.

DISCUSSION

1. Sufficiency of the Evidence – Resisting an Executive Officer

Carrari argues there is not sufficient evidence that he resisted executive officers by means of threats because the sheriff’s deputies were not lawfully performing their duties when they detained him in his backyard without a warrant. (*In re Manuel G.* (1997) 16 Cal.4th 805, 815 [section 69 requires officer to perform duties lawfully]; *In re Chase C.* (2015) 243 Cal.App.4th 107, 114 [officer does not perform duties lawfully if he or she detains an individual without reasonable suspicion].) His failure to challenge his detention at trial does not preclude him from raising this claim on appeal. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020.) But it fails on the merits.

A rational jury could find Carrari guilty of resisting an executive officer because he threatened sheriff’s deputies with a gun when they lawfully detained him. (See *People v. Jones* (1990) 51 Cal.3d 294, 314 [test for sufficiency of the evidence claim].) Law enforcement officers “must be given the opportunity to secure [a] crime scene, investigate thoroughly, [and] detain suspects at the first opportunity . . .” (*People v. Gatch* (1976) 56 Cal.App.3d 505, 509.) The deputies here had reasonable

suspicion to detain Carrari when they surrounded his house because Christina reported Carrari to law enforcement four times over the prior two weeks (including earlier that day), Carrari violated a restraining order, and he ran from a deputy when asked to talk. These factors gave rise to reasonable suspicion that Carrari had committed a crime. (§ 136.2, subd. (b) [violation of a restraining order]; *People v. Souza* (1994) 9 Cal.4th 224, 235 [flight from officer]; *People v. Ramey* (1976) 16 Cal.3d 263, 269 [victim names suspect]; *People v. Leath* (2013) 217 Cal.App.4th 344, 354 [suspect matches description provided].)

Carrari was not seized in the yard surrounding his home because he did not stop when the deputy asked him to talk. Officers may not seize a person in “the ‘curtilage’ of a residence—‘the land immediately surrounding and associated with the home . . .’”—without a warrant. (*People v. Mayoff* (1986) 42 Cal.3d 1302, 1310, citation omitted.) But a seizure requires either some exertion of physical force or a show of authority to which the suspect yields. (*California v. Hodari D.* (1991) 499 U.S. 621, 625-626 (*Hodari D.*)). A show of authority to which the suspect does not yield is not a “seizure” for Fourth Amendment purposes. (*Id.* at p. 626.) Carrari did not yield but ran into his house.

2. *Instructional Error – Resisting an Executive Officer*

Carrari contends the trial court did not adequately instruct on the law relevant to the resisting charge because it omitted the portion of CALCRIM No. 2670 that explains when a warrantless home entry is unlawful, refused a special instruction on a warrantless home entry, and refused a special instruction on the constitutional right to verbally criticize and challenge police. (*People v. Martinez* (2010) 47 Cal.4th 911, 953 [duty to instruct on relevant principles of law]; *People v. Earp* (1999) 20 Cal.4th

826, 886 [duty to give requested pinpoint instructions on defense theory]; *People v. Seden* (1974) 10 Cal.3d 703, 716 [duty to instruct on defenses supported by evidence and consistent with defense theory], overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142, 175-176.) We disagree.

Our independent review demonstrates that the trial court properly instructed on the elements of resisting using CALCRIM Nos. 2651 and 2670, including an instruction that an officer “is not lawfully performing his duties if he is unlawfully detaining someone.” (See *People v. Guivan* (1998) 18 Cal.4th 558, 569 [jury instructions reviewed de novo].) Instructions on warrantless home entry were not relevant to the issues raised by the evidence because the deputies had a warrant when they entered Carrari’s home. (*Payton v. New York* (1980) 445 U.S. 573, 576.) And it was not necessary for the jury to decide whether the deputies unlawfully detained him in the curtilage of his home because he was not detained there. (*Hodari D.*, *supra*, 499 U.S. at p. 626.) Carrari’s special instruction on the right to criticize police was irrelevant because threats of violence are not constitutionally protected. (*People v. Monterroso* (2004) 34 Cal.4th 743, 776 (*Monterroso*); see *People v. McPheeters* (2013) 218 Cal.App.4th 124, 141 [threat to shoot]; *People v. Lopez* (1999) 74 Cal.App.4th 675, 679-680 [threat to get gun].)

3. Prosecutorial Misconduct – Resisting an Executive Officer

Carrari contends the prosecutor committed misconduct because he incorrectly stated the law during closing argument when he said that the deputies acted lawfully during his detention and arrest.⁴ Carrari forfeited this contention when

⁴ Carrari also argues that the prosecutor improperly commented on his exercise of constitutional rights during closing

he did not object during the prosecutor's closing argument. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another ground by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) He contends an objection would have been futile because the trial court approved the erroneous instructions on which the prosecutor's arguments were based. (*Monterroso, supra*, 34 Cal.4th at p. 781.) But the instructions were proper.

Even if Carrari had preserved the issue, he does not meet his burden of demonstrating prosecutorial misconduct. (*People v. Rhinehart* (1973) 9 Cal.3d 139, 154, disapproved on another ground by *People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) "[A] prosecutor commits misconduct by using deceptive or reprehensible methods of persuasion. [Citations.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.) But the prosecutor may argue vigorously, and has a "wide-ranging right to discuss the case in closing argument." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.) Here, the prosecutor's statements closely tracked the jury instructions in CALCRIM Nos. 2651 and 2670 and did not misstate the law. They were fair comments that invited the jury to make reasonable inferences. (*People v. Navarette* (2003) 30 Cal.4th 458, 520; *People v. Wharton* (1991) 53 Cal.3d 522, 567.)

argument, but provides no citations to such comments in the record. The argument is waived. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283.) We have nevertheless combed the record and find no comments during the prosecutor's closing argument on Carrari's refusal to consent to the deputies' warrantless entry into his home. (*People v. Keener* (1983) 148 Cal.App.3d 73, 78-79.) Quite the opposite: The prosecutor stated that Carrari did not break the law by running into his house.

4. *Sufficiency of the Evidence – Stalking*

Carrari contends his stalking conviction is not supported by sufficient evidence because he did not follow or harass his sister, did not intend to place her in reasonable fear of death or great bodily injury, and had a legitimate purpose for each contact with her. (*People v. Ewing* (1999) 76 Cal.App.4th 199, 210.) We disagree.

A rational jury could find Carrari guilty of stalking. Carrari harassed his sister when he showed up at his mother's house unannounced and spit on the door frame, swerved at his sister's car, left threatening messages for her, left "disturbing" and "threatening" voicemails on the family phone, and spit on his sister's car windshield. (§ 646.9, subd. (e); see *People v. Uecker* (2009) 172 Cal.App.4th 583, 594 (*Uecker*) [persistent contact and irate voicemails is harassment]; *People v. McClelland* (1996) 42 Cal.App.4th 144, 153 [repeated calls and leaving car at victim's house is harassment].) He followed her repeatedly: on the road, to a copy store, and to a grocery store. (*Uecker*, at p. 594.) He threatened her verbally, in writing, and with gestures. (§ 646.9, subd. (g).) The painted bullet holes and written note on the planter box evidence Carrari's intent to place Christina in reasonable fear of death or great bodily injury. (*Uecker*, at pp. 594-595.) His throat-slashing gesture amplified that intent. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1446.) Based on this evidence, a rational jury could find Carrari guilty of stalking beyond a reasonable doubt. (Cf. *People v. Lopez* (2015) 240 Cal.App.4th 436, 452-454 [defendant's conduct and persistent contact with victim despite her pleas to stop sufficient to sustain stalking conviction].) His belief that each of the contacts had a

legitimate purpose is irrelevant. (*People v. Tran* (1996) 47 Cal.App.4th 253, 260.)

5. *Instructional Error – Stalking*

Carrari contends the trial court should have given a sua sponte unanimity instruction because some jurors may have found him guilty of stalking based on following and others based on harassing. Carrari's failure to request a unanimity instruction at trial "does not preclude [him] from raising the issue on appeal." (*People v. Carrera* (1989) 49 Cal.3d 291, 311, fn. 8; *People v. Davis* (2005) 36 Cal.4th 510, 561 [trial court must give a unanimity instruction "when the circumstances so warrant"].) But the circumstances did not warrant such an instruction.

No unanimity instruction is required "when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time." [Citation.] (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) Stalking "is self-defined to require a course of conduct." (*People v. Zavala* (2005) 130 Cal.App.4th 758, 769; see § 646.9, subs. (a) & (e).) No unanimity instruction is required. (*People v. Zavala*, at p. 769.)

It is immaterial whether some jurors found guilt based on following and others based on harassment because they all found Carrari guilty of the single crime of stalking. The trial court need not give a unanimity instruction "merely because the jury may be divided on the exact way the defendant may be guilty of the charged count." (*People v. Varela* (2011) 193 Cal.App.4th 1216, 1220.) It is perfectly appropriate for the jury to "divide . . . as to the exact way the defendant is guilty of a single discrete crime." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135.)

6. *Ineffective Assistance of Counsel*

Carrari argues trial counsel provided ineffective assistance because he did not bring a motion to suppress the evidence and statements obtained after his detention and did not move to quash or traverse the search warrant. We disagree.

Carrari fails to prove, by a preponderance of the evidence, that counsel's performance was deficient and resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691-692.) He demonstrates no prejudice from his attorney's failure to file a motion to suppress evidence because the motion would not have been meritorious. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.) The sheriff's deputies had reasonable suspicion to detain him based on the reports from Christina, his violation of a restraining order, and his flight when one deputy asked to talk.

Carrari does not demonstrate his attorney performed deficiently when he did not move to quash or traverse the warrant because he does not provide us with copies of the search warrant or its underlying affidavit. "A defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) "If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, . . . the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.) The record here does not include the required evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Rogelio R. Flores, Judge

Superior Court County of Santa Barbara

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