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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID I. BLACK,

Defendant and Appellant.

B269956

(Los Angeles County
Super. Ct. No. BA431225)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Bernie C. LaForteza, Judge. Affirmed.

Murray A. Rosenberg, under appointment by the Court of
Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant David Black appeals from the judgment entered after a jury found him guilty of two counts of stalking. We affirm.

PROCEDURAL BACKGROUND

In a second amended information, the People charged defendant with two counts of felony stalking in violation of Penal Code¹ section 646.9, subdivision (a). In count one, they alleged he stalked Shannon Knight. In count two, they alleged he stalked Trisha P. Following a jury trial at which he represented himself and called no witnesses, defendant was convicted of both counts. After denying his post-trial motions, the court suspended imposition of sentence, placed defendant on formal probation for five years, and ordered him to complete 180 days in a residential treatment program. Defendant waived his 890 days of custody credit for purposes of allowing him to complete the program.

Defendant filed a timely notice of appeal, and we appointed counsel to represent him. Defendant's appellate counsel filed a brief in which he raised no issues and asked us to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) After we notified defendant that his counsel had failed to find any arguable issues, he filed a timely supplemental brief. Thereafter, we augmented the record on our own motion to include additional transcripts and documents from the proceedings.

¹ All undesignated statutory references are to the Penal Code.

FACTUAL BACKGROUND

1. Shannon Knight

Shannon Knight is a former deputy district attorney.² In 2011, she prosecuted a case against Darius Gant before Judge Frederick Wapner. Julia Dixon represented Gant. Defendant was a juror in the Gant trial. After the jury rendered its verdict, Knight spoke to some of the jurors, including defendant. At defendant's request, Knight gave him her business card.

In early July 2011, defendant left two phone messages for Knight. Defendant's messages were bizarre, and Knight was alarmed by his hostile tone of voice. Knight returned defendant's second message and spoke to him for about 45 minutes before she ended the call. During their conversation, defendant rambled about being sexually abused as a child, requested legal advice, asked Knight why she turned away from him after the Gant trial, and asked Knight whether she had information about defendant's aliases and personal history. According to Knight, defendant was incoherent and unstable. After their telephone conversation, Knight was so concerned about her safety that she asked an investigator in her office to walk her to her car. Knight never contacted defendant again.

Defendant tried to contact Knight sporadically over the next few years. For example, in late July 2011, he sent her an email asking for help in applying to law schools. In October 2014, more than three years after the Gant trial, defendant sent Knight, Dixon, and Judge Wapner a packet of letters and

² Knight became a judge in 2015.

documents. In one of the letters, defendant threatened “the fire of hell will be against you for not doing what I’m saying. In the vernacular, that translates to ‘go to hell’ if you do not do what I am requesting.” In one of documents, defendant stated that there had been “heavy romantic tension” between himself and Knight during the Gant trial.

In late October 2014, defendant showed up at the District Attorney’s Office. Brian Schirn, Knight’s supervisor, was called to the front desk to speak with defendant about issues stemming from his jury service in the Gant case. Defendant appeared agitated and angry. During their discussion, defendant told Schirn he was upset by his prior jury experience, asked about Knight, and told Schirn he knew Knight was now working in San Fernando. After defendant spoke with Schirn, defendant asked to speak to a prosecution investigator, Vittorio Racowschi. Defendant told Racowschi that defendant was being stalked by gang members, his computers were hacked, and that he needed to get in touch with Knight to get her to return some paperwork.

On October 30, 2014, Knight received a letter at her home from defendant. In that letter, defendant identified himself as a former juror and stated he “found a sure-fire way of contacting [Knight].” Defendant also stated that he and Knight “need to meet and talk.” Defendant emphasized that it was in Knight’s best interests to talk to him, and that their meeting would not be a romantic date. Although the letter implied defendant would sue Knight for legal malpractice, defamation, or slander, he was “highly compelled to work something out with [Knight] outside of court.”

Knight was terrified by the October 30, 2014 letter because defendant had found a way to contact her at her home. After this

incident, investigators discovered photographs of Knight and Trisha P., as well as internet searches involving both victims, on defendant's laptop computer. Defendant told one of the investigators that defendant was attracted to Knight, had obtained her college transcripts, and had located her home address by conducting research. As a result of defendant's actions, Knight obtained a permit to carry a concealed weapon, sold her house, and got a civil restraining order against him.

2. Trisha P.

Trisha attended Rosemead High School from 2010 until she graduated in 2014. Defendant was her music teacher in 2011 and 2012.

In late May 2013, defendant emailed Trisha and asked her if she wanted a piano; Trisha responded that she already had a piano and would not need a new one. Defendant then emailed Trisha that she was in his "closest inner circle of relationships," he sensed her presence like an "invisible person or ghost," and it "blows [defendant's] mind away what [they] could accomplish in the world if [they] were in the same room again." The email troubled Trisha.

Defendant continued to send Trisha emails in June 2013. In those emails, defendant stated, among other things, that he feels "very heartfelt" about Trisha, and that Trisha could legally marry an older man. Defendant also emailed Trisha that he wanted to propose a question to her with a ring in his pocket. After Trisha wrote defendant and asked him to stop emailing her, defendant threatened Trisha with legal action. He wrote, "To say that you never felt anything for me beyond just admiration as a teacher would not only be duplicitous of you, but will be a legal nightmare for you, considering all that's happened to me."

Defendant wrote that he felt “so castrated that [he] may as well just pull [] a Kurt Cobain and wear a lady’s dress around after finally giving up acting like a man to the female species.” Defendant also accused Trisha of leaving an “extremely sexually suggestive” drawing of him in his desk at school. Trisha considered defendant’s last email to her as a threat and was frightened.

In late June 2013, Trisha began blocking defendant’s email account. At the time of her email exchanges with defendant, Trisha was 17 years old and had never expressed any romantic interest in defendant.

After Trisha blocked defendant’s email account, defendant began communicating with one of her friends, Quiynh Tran. Defendant gave Tran gifts to give to Trisha for him. Trisha disposed of some of those gifts, and told Tran that Trisha wanted nothing to do with defendant.

In November 2014, the People obtained a search warrant and seized defendant’s laptop computer. An investigator for the Los Angeles District Attorney’s Office obtained photographs of Trisha, defendant’s written plan to propose marriage to Trisha, a letter from defendant to Trisha’s father requesting her hand in marriage, and a video of defendant professing his love for Trisha from defendant’s laptop. The investigator also obtained 150 pages of emails from defendant to Trisha. After the investigator told Trisha what he discovered on defendant’s laptop, she became upset and started to cry.

DISCUSSION

In his supplemental brief, defendant contends: (1) there is insufficient evidence to support the fear element on count two; (2) the court erred in denying his request for personnel records of

a prosecutor and an investigator; (3) a witness's testimony and behavior in court supports defendant's entrapment claim; (4) section 646.9, subdivision (a), is unconstitutional under the overbreadth doctrine; and (5) the prosecutor made improper and biased remarks during argument. We reject all of defendant's contentions. We have also reviewed the entire record and found no arguable issues.

1. Trisha's Fear

Defendant argues his conviction for count two should be reversed because Trisha's fear was not caused by him; it was caused by the investigators after they told her what they discovered on defendant's laptop. We disagree. While section 646.9 requires the victim to become aware of the stalker's conduct, the awareness need not be contemporaneous with the course of conduct that constitutes the stalking. (See *People v. Norman* (1999) 75 Cal.App.4th 1234, 1241.) Indeed, since the stalking conduct can occur by the use of an "electronic communication device," including a computer, the statute necessarily encompasses situations in which there is a delay between the defendant's harassment and his victim's awareness of the defendant's conduct. (§ 646.9, subds. (g), (h).) In any event, Trisha testified she was frightened by defendant's June 2013 email threatening her with legal action and accusing her of leaving him a sexually suggestive drawing. She received that email before she was contacted by the investigators.

2. Motion for Disclosure of Personnel Records

Before trial, defendant filed a motion for disclosure of Schirn's and Racowschi's personnel records. Defendant sought to discover "records of any previous misconduct, even allegations

thereof, involving entrapment or misconduct at a similar level of seriousness” in order to support a defense of entrapment. The motion, however, did not contain a proof of service. On appeal, defendant contends the court improperly denied his motion because he used Schirn’s incorrect job title. Defendant is mistaken. At the hearing on his motion, the court noted that there was no evidence defendant had served the motion, and denied it on that basis. Because there is no evidence in the record that the motion was served, or that defendant sought a continuance to allow him to serve it, we find no error. (See Evid. Code, § 1043, subd. (a).)

3. Racowski’s Behavior in Court

Defendant argues that Racowski’s visible nervousness on the witness stand shows that he was being deceptive and makes defendant’s entrapment claim look credible. Even if Racowski appeared nervous at trial, that fact does not undermine defendant’s conviction. It is the exclusive province of the jury, not this court, to determine Racowski’s credibility and the truth or falsity of the facts on which that determination depends. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) Further, there is no evidence in the record that Racowski engaged in conduct that caused defendant to stalk Knight or Trisha.

4. Defendant’s Constitutional Challenge

Defendant’s next argument is difficult to discern. It appears that he believes section 646.9 is overbroad and unconstitutional because it infringes on the free speech rights guaranteed under the First Amendment to the United States. Previous over-breadth challenges to section 646.9 on this basis have failed, however. (See, e.g., *People v. Halgren* (1996)

52 Cal.App.4th 1223, 1231 (*Halgren*).) Quite simply, section 646.9 does not encompass every kind of threat or the mere expression of anger or emotion; thus, the statute does not implicate a substantial amount of constitutionally protected conduct. (See *People v. Borrelli* (2000) 77 Cal.App.4th 703, 719.) “The statute provides notice a person is guilty of a felony if he or she willfully, maliciously, and repeatedly follows or harasses another person and also makes a credible threat with the intent to place the victim in reasonable fear for personal safety or the safety of immediate family members.” (*Halgren, supra*, p. 1231.) Because an ordinary person can reasonably understand what conduct is expressly prohibited by the statute, section 646.9 is sufficiently narrowly tailored to survive constitutional scrutiny. (*People v. Tran* (1996) 47 Cal.App.4th 253, 260.)

5. The Prosecutor’s Argument

Finally, defendant contends the prosecutor committed misconduct in making certain arguments that he believes reflect age and gender bias. He failed, however, to object to any portion of the cited argument or seek a curative admonition at trial. He therefore has waived the issue on appeal. (*People v. Ashmus* (1991) 54 Cal.3d 932, 989.)

DISPOSITION

We have examined the entire record, and are satisfied appellate counsel has fully complied with his responsibilities and no arguable issues exist in the appeal before us. (*Smith v. Robbins* (2000) 528 U.S. 259, 278–284; *Wende, supra*, 25 Cal.3d at p. 443.) The judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

JOHNSON, (MICHAEL) J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.