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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SALEH SHEIKH KHAZALY, Defendant and Appellant.	B275346 (Los Angeles County Super. Ct. No. GA096041)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Affirmed.

Stanley Dale Radtke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Saleh Sheikh Khazaly (defendant) of stalking (Pen. Code, § 646.9 subd. (b) (count 1))[1] and disobeying a prior domestic violence protective order (§ 273.6, subd. (d) (count 2)). He was sentenced to the three-year midterm on count 1 with a concurrent two-year term on the count 2.

On appeal, defendant challenges the sufficiency of the evidence to support the stalking conviction. The Attorney General contends the sentence imposed on the second count should have been stayed rather than imposed and ordered to be served concurrently. We find no error on either score and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Between March 12, 2014 and March 14, 2014, defendant's former girlfriend, Aurora P. (the victim), received a telephone call from defendant; three emails from him, and "30 calls throughout the night to the morning, just over and over" that she did not answer. At the time, a domestic violence protective order was in place prohibiting defendant from all contact with the victim. That protective order was issued after defendant was convicted in April 2013 of violating an earlier protective order.

Defendant was charged in a two-count information with stalking (§ 646.9, subd. (b) and disobeying a domestic violence protective order with a prior (§ 273.6, subd. (d).) In his trial to a jury, the prosecution offered evidence of uncharged acts "for the limited purpose of deciding whether or not: [¶] The defendant acted with the intent to place [the victim] in reasonable fear for her safety." (CALCRIM No. 375.)

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[1] All statutory citations are to the Penal Code.

The prosecution's uncharged acts evidence included the following: Defendant and the victim dated during 2011 and 2012. Defendant angered easily, was controlling, and threatened violence toward the victim more than once. The victim is less than five feet in height; defendant is over six feet tall. She ended her relationship with defendant the day after he "yanked" on her pants, pulled her to the floor, and then removed the pants and "literally tore them in half with his strength."

After the relationship ended, defendant continued to appear at the victim's place of employment and apartment where she lived with her mother. She changed her cell phone number several times because defendant continued to phone and text. One evening, defendant followed her to several bars and told the victim's male friends who were with her to leave her alone.

After several articles of clothing she left at defendant's parents' home during their relationship were ripped into pieces and deposited on her doorstep, the victim contacted police and obtained an emergency protective order. She then obtained a three-year protective order requiring defendant to stay at least 100 feet from her.

Despite the protective order, defendant still came to her family's apartment and tried to reach her by phone. Even though she changed her phone number, defendant said "he could find anything." He was upset she had contacted the police. One morning, her mother's car, parked outside their apartment, had a broken window. Defendant appeared in restaurants and bars she frequented and "would walk up to the person that was with [her], pull them aside and start talking to them."

All these events occurred while defendant and the victim lived in Northern California. Finally, in the fall of 2013, the

victim left her family and friends and moved to Los Angeles County. The victim changed her telephone number at least once after the move.

The prosecution narrative then turned to the charged acts. On March 12, 2014, the victim answered a phone call from a number she did not recognize. As soon as defendant identified himself, the victim asked how he found her number and hung up. Then the victim received approximately "30 calls throughout the night to the morning, just over and over"; she did not answer them. She believed the calls came from defendant because previously, while they were dating, "[i]f he was upset at someone[,] . . . he kept calling and calling and calling and calling their phone and threatening them."

The three emails were received into evidence and the victim testified concerning them in detail. The "to" line contained the victim's correct email address "@yahoo.com." The "from" line bore the victim's name and the victim's email name, but "@gmail.com." The victim did not have such a gmail account. She believed defendant sent the emails based on the content and writing style.

The first was dated March 13, 2014, at 3:54 a.m. The victim found the following statements threatening: "Do you really think I would let go of what you did? All you did was make things worse. You need to apologize ["with like 30 exclamation marks"] or talk it out with me and be kind." "This time I won't be writing any letters." "You are lucky I didn't do anything when I saw you at the bar last [time]. So lucky! This time I ain't holding back unless you grow up and communicate you selfish human being." [¶] "I can't let it go. I know where you live exactly. [¶] "Your number and address is in public records."

She testified she feared defendant would harm her. "[H]e is writing me that he is—if I didn't apologize or communicate or talk to him that he is going to do something to me or hurt me. And then I still had the restraining order, but it's like I felt like it wasn't doing anything. So I was just scared." She felt he could hurt her "[b]ecause of his temper. And . . . he is bigger than me."

A second email was sent late the same day, March 13, 2014, at 11:58 p.m. This email stated, "I just want you to forgive me." It was complimentary, but the victim thought it was "creepy."

A third email was sent approximately 30 minutes later, on March 14, 2014 at 12:23 a.m. This email had the subject heading, "I [won't] call you anymore." The email expressed hope the victim would get back together with another former boyfriend, Greg, and congratulated her on moving and doing well. The text included, "I got more closure from Greg than you" and "I want you to stop with the slander." Although he wrote of his happiness with his current girlfriend, he ended the email, "I will never lose hope. Goodnight." The statement about never losing hope made the victim uneasy because no matter what she did, she felt defendant was "still going to keep hoping that it's going to change."

The victim reported the phone calls and emails to the Los Angeles County Sheriff's Department. Defendant was arrested and charged.

The investigating detective obtained a search warrant and determined the emails were all sent from the same IP address. Counsel stipulated the IP address was connected to a device located in the home of defendants' parents.

The defense presented the testimony of three witnesses—defendant's sister, father, and current girlfriend. The girlfriend testified defendant, whom she had known since middle school, was never violent or threatening and had never acted in an intimidating manner toward her.

Defendant's sister testified she, and not her brother, authored and sent the three emails to the victim. She was able to include some of the intimate details because she and the victim were close and often confided in each other.

Defendant's father testified his daughter admitted to him she wrote the emails. He instructed her to delete the account.

The jury convicted defendant of both counts. As to count 1, the jury found the allegation that defendant committed the offense while subject to a protective order prohibiting contact with the victim to be true. On count 2, the jury found defendant had been convicted within the past seven years of disobeying a domestic violence protective order and that offense "involved an act of violence or a 'credible threat' of violence."

The trial court originally imposed defendant's sentence on June 6, 2016. On her own motion, the trial judge recalled the sentence and resentenced defendant to a total of three years, consisting of a three-year term for stalking, plus a two-year concurrent term on count 2, stayed under section 654.

Defendant filed a timely notice of appeal.

DISCUSSION

I. Sufficiency of the Evidence

Defendant contends the stalking conviction was not supported by substantial evidence of a credible threat in violation of his right to due process. We disagree.

A challenge to the sufficiency of the evidence requires this court to review the record for "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. . . . We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Clark* (2011) 52 Cal.4th 856, 942-943, internal quotation marks omitted.) We "resolve[] neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

"To commit the offense of stalking, a defendant must 'willfully, maliciously, and repeatedly [follow] or willfully and maliciously [harass] another person and ... [make] a credible threat with the intent to place that person in reasonable fear for his or her safety . . . .' (§ 646.9, subd. (a); [citation].)" (*People v. Zavala* (2005) 130 Cal.App.4th 758, 766-767.) Section 646.9, subdivision (g) defines "credible threat" as a "verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety . . . and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety . . . . It is not necessary to prove that the defendant had the intent to actually carry out the threat."

Substantial evidence supports defendant's stalking conviction. Despite a domestic violence protective order and a previous conviction for violating such an order, defendant telephoned and emailed the victim. At the time the victim received the emails, she had no way of knowing they were sent from an IP address in Northern California. But even if she knew that, she also knew defendant was employed and had money and a car—all giving him the apparent ability to harm her in Southern California.

The emails were received into evidence and the victim testified about them. A reasonable interpretation of the emails is that defendant intended them to cause the victim to fear for her safety. That, coupled with evidence of the uncharged acts—which the jury was properly instructed to consider only insofar as they demonstrated defendant acted with the intent to instill fear—was sufficient to support the conviction.

Defendant contended in the reply brief that "a conviction for stalking requires proof of a credible threat of death or great bodily harm" and "there is clearly insufficient evidence that appellant made a credible threat of death or great bodily harm." However, as the Court of Appeal noted in *People v. Zavala, supra,* 130 Cal.App.4th at page 767, the Legislature removed those elements of the offense decades ago.

Defendant also proffered benign explanations for some of the statements in the emails. But those explanations were appropriate for the trier of fact, not this court, to weigh. (*People v. Young, supra,* 34 Cal.4th at p. 1181.)

II. Sentencing

Citing *People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1239, the Attorney General observed, where "section 654, subdivision (a) requires that a sentence be stayed, then concurrent terms pursuant to section 669 may not be imposed." Our analysis in *People v. Hernandez*, *supra*, 134 Cal.App.4th 1232 is not applicable here. Mr. Hernandez was a defendant who pleaded guilty, but was then found not guilty by reason of insanity. (*Id*. at p. 1235.)

The proper procedure for defendant's sentence was succinctly explained by our Supreme Court in *People v. Duff* (2010) 50 Cal.4th 787, 796: "[w]hen a court determines that a conviction falls within the meaning of section 654, it is necessary to *impose* sentence but to stay the *execution* of the duplicative sentence . . . ." (See also, *People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1415, *People v. Niles* (1964) 227 Cal.App.2d 749, 754-756.) The trial court did precisely this. There is no sentencing error.

DISPOSITION

The judgment is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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