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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE SEPULVEDA,

Defendant and Appellant.

B285428

(Los Angeles County
Super. Ct. Nos. TA140199,
TA142736)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael J. Shultz, Judge. Affirmed as modified.

John F. Schuck, 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, Margaret E. Maxwell, Supervising Deputy Attorney General, and Lindsay Boyd, Deputy Attorney General, for Plaintiff and Respondent.

* * * * *

After being placed on formal probation in two separate criminal cases for physically and verbally abusing his elderly and disabled father and his sister, Jose Sepulveda (defendant) admitted to violating probation in both cases and was sentenced to four years in prison. The trial court also issued an order prohibiting defendant from having any contact with his father, his sister, and their home for a period of 10 years. On appeal, defendant challenges the duration of the protective order. The trial court did not err in imposing a 10-year restriction and defendant's arguments to the contrary are baseless. However, the restraining order contains several clerical errors that must be corrected. Otherwise, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. May 2016 Incidents

Prior to May 9, 2016, defendant was living with his 67-year-old father, his sister, and her two children. Defendant suffers from mental illness but throws away his medications. He also gets high on air dusters and shoe polish.

On May 9, defendant told his sister, "Fuck you, bitch, you hole. I'll fucking stab your ass." He was holding two screwdrivers at the time. Defendant then proceeded to throw one of the screwdrivers at his father, and the screwdriver hit him in the face.

Just under two weeks later, on May 22, defendant returned to his father's house, from which he had been evicted after the May 9 incident. Defendant went into the backyard and grew upset when he discovered that a shed he was trying to open had a lock on it. When defendant's father went into the backyard to calm him down, defendant told his father that he was "going to send [him] to hell!" When he overheard his sister calling the

police, he threatened her by shouting, “I’m going to kill you and send you to hell!”

II. Prosecution, Plea, and Sentencing for May 2016 Incidents (Case Number 1)

On May 24, 2016, the People filed a complaint alleging elder abuse (Pen. Code, § 368, subd. (b)(1))¹ for throwing a screwdriver at his father, and two counts of making criminal threats (§ 422) for making threatening statements to his sister and father when he returned to their house on May 22. The People further alleged that defendant had personally used a dangerous and deadly weapon while committing elder abuse (§ 12022, subd. (b)(1)). At defendant’s arraignment on these charges, the trial court issued a protective order.

In December 2016, defendant entered a no contest plea to elder abuse and to making a criminal threat against his sister.² The remaining count and weapon allegation were dismissed. The trial court placed defendant on three years of formal probation, which included a jail sentence of time served as well as a requirement that defendant attend a 52-week outpatient drug program.

III. March 2017 Incident

On March 9, 2017, defendant moved back in with his father and sister. At that time, defendant’s father was confined to a

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² In the intervening six months, the trial court had declared a doubt about defendant’s mental competence, and the criminal proceedings were suspended. The mental health court later declared defendant to be competent to stand trial in December and reinstated the criminal proceedings.

wheelchair and was nearly blind from diabetes. Soon after moving back in, defendant started to “insult” his father by yelling at him and asking him, “Why don’t you just die?” On March 13, defendant pushed his father from behind as his father sat in the wheelchair. Defendant’s father did not fall out of the wheelchair, but instead curled himself into a fetal position as defendant stood over him yelling, “I’m going to kill you.” Defendant’s father was “afraid [defendant] would hit [him].”

IV. Prosecution, Plea, and Sentencing for March 2017 Incident (Case Number 2), and Probation Violation for Case Number 1

On March 15, 2017, the People filed a complaint alleging a single count of making criminal threats against defendant’s father (§ 422). Two weeks later, the trial court conducted a preliminary hearing on this charge, held defendant to answer for the charge, and found him to be in violation of his probation in Case Number 1. The People then filed an information charging defendant with making criminal threats against his father (§ 422).

In May 2017, defendant entered into a plea agreement with the People. The People added a count of felony elder abuse (§ 368, subd. (b)(1)) and a count of misdemeanor violation of a court order for violating the protective order issued by the court in Case Number 1 (§ 166, subd. (c)(1)). Defendant entered a no contest plea to the two new counts. The trial court then imposed a four-year prison sentence on the elder abuse count, but suspended execution of that sentence and placed defendant on formal probation for five years, including requirements that defendant (1) remain enrolled in and complete a 52-week residential treatment program, (2) complete a 52-week domestic

violence course, and (3) stay away from his father and his father's house.

At the same hearing, the trial court revoked and reinstated probation in Case Number 1 but modified the terms of probation to require defendant to adhere to the same three probation conditions imposed in the Case Number 2.

V. June 2017 Violation of Probation in Case Numbers 1 and 2

In June 2017, defendant walked away from the residential treatment program the day he arrived and then disappeared. The People moved to revoke defendant's probation in Case Numbers 1 and 2. The trial court found that defendant violated his probation in both cases, among other reasons, for failing to complete the residential treatment program.

The trial court executed the previously suspended four-year prison sentence on the elder abuse count and a concurrent sentence of 180 days for the violation of the restraining order count in Case Number 2. The court also revoked probation in Case Number 1 and imposed a concurrent sentence of four years for the elder abuse count as well as a concurrent three-year prison sentence on the criminal threats count in Case Number 1.

After dissolving a protective order it issued in March 2017, the trial court issued a new protective order. The trial court relied on section 273.5 as the statutory authority for the order. The court informed defendant that it was "going to issue a ten-year stay away order" and elaborated that defendant was "to have absolutely no contact with [father] or [the sister]" and was to "stay completely away from" father's house. The written restraining order listed section 273.5, subdivision (j) as its statutory basis and required defendant to have no contact with his father and to stay 100 yards away from his father. The

written restraining order did not name defendant's sister as a "protected person" and, while including father's address, did not check the box indicating that he was to "stay-away" from that location.

VI. Appeal

Defendant filed timely notices of appeal in each of the two cases.

DISCUSSION

Defendant argues that (1) the trial court erred in issuing a 10-year restraining order enjoining him from any contact with his father or sister, and (2) the order itself contains one clerical error. We have observed two other clerical errors and conclude—after soliciting further briefing from the parties—that all three errors must be corrected. We reject defendant's other arguments.

I. Duration of Protective Order

Defendant challenges the 10-year duration of the trial court's restraining order. To the extent his challenge requires us to construe the statutory authority underlying the restraining order, we engage in independent review. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 234.) We otherwise review the issuance of such a restraining order, including its duration, for an abuse of discretion. (See *S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1264 [noting how a "grant or denial of injunctive relief is generally reviewed for an abuse of discretion"].) A "trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

Where, as here, a defendant is convicted of elder abuse pursuant to section 368, subdivision (b), the trial court may issue

“an order restraining the defendant from any contact with the victim” and this order “may be valid for up to 10 years.” (§ 368, subd. (l).) In determining the duration of the order, our Legislature has specified that a court should examine (1) “the seriousness of the facts before the court,” (2) “the probability of future violations,” and (3) “the safety of the victim and his or her immediate family.” (*Ibid.*)

The trial court did not abuse its discretion in issuing a protective order for the maximum duration of 10 years in this case. By its terms, section 368, subdivision (l) authorized the trial court to issue a restraining order protecting defendant’s father and sister. Defendant was convicted of elder abuse in violation of section 368, subdivision (b), and his father and sister are victims of that crime because defendant’s threats “inflicted mental suffering” upon both of them. (*People v. Race* (2017) 18 Cal.App.5th 211, 218-219 [court may issue restraining order protecting person who is victimized by same conduct against named victim of crime]; cf. compare *People v. Delarosarauda* (2014) 227 Cal.App.4th 205, 211-212 [court may not restrain a person just because they are a “family member” of a named victim] with *People v. Clayburg* (2012) 211 Cal.App.4th 86, 91-92 [a family member “who suffered emotionally and who was traumatized by [defendant’s] conduct” is a “victim” and may be named as a protected person under section 646.9, which has language identical to section 368, subdivision (l)]; Cal. Const., art. I, § 28, subd. (e) [“The term ‘victim’ also includes the person’s spouse, parents, children, siblings, or guardian”].)

Further, the trial court did not act irrationally in concluding that the factors enumerated in section 368, subdivision (l) favored a 10-year restraining order. The facts

underlying both sets of crimes in these cases are serious: Defendant told his sister he was going to “stab [her] ass” with a screwdriver and then threw a screwdriver at his father’s face; two weeks later, he threatened to kill his father and sister and “send [them] to hell!” Less than three months after his release from custody in that prosecution, defendant nearly pushed his elderly father out of his wheelchair and stood over his father, as he cowered in the fetal position, and said he was going to “kill [him].” The first incident is so serious that it factually qualifies as a “serious felony”—and hence a “strike” under our Three Strikes law—because it involved the “personal[] use[of] a dangerous or deadly weapon.” (§ 1192.7, subd. (c)(23).) The probability of future violations is high. Defendant was given many “second chances”: He was placed on probation in Case Number 1 yet being on probation did not deter him from nearly pushing his elderly father to the ground or threatening to kill him (thereby giving rise to Case Number 2). And even when he was placed on a probation in Case Number 2 with the threat of a four-year prison sentence hanging over his head, he violated probation less than a week after his release from custody. Despite these strong deterrents from misbehavior, defendant continued to assault, batter, and threaten his family members. In light of defendant’s penchant for returning to his father’s house and engaging in criminal conduct victimizing his family members, despite being asked to move out and despite court supervision, the “safety of the victim[s]” also favors a stay away order of maximum duration.

Defendant levels three categories of arguments at this conclusion.

First, he argues that the trial court did not discuss the three factors relating to a restraining order's duration *on the record*, and that we must therefore presume that the trial court applied the maximum duration of 10 years because it thought it had no discretion to depart from the maximum duration.³ This argument has it backwards. To begin, the trial court's failure to conduct an on-the-record analysis of section 368's factors is of no moment because the statute does not require the court to do so. (§ 368.) Absent such a statutory mandate, "we apply the general rule 'that a trial court is presumed to have been aware of and followed the applicable law. [Citations.]'" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) Thus, while defendant is correct that a court's "failure to exercise discretion is [itself] an abuse of discretion" (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 99), we may not presume from the court's silence that it misunderstood the scope of its discretion. This is particularly true where, as here, the trial court elsewhere recognized its authority to "modify" and "lift" the protective order.

Second, defendant contends that the trial court abused its discretion in selecting a 10-year duration because (1) neither defendant's father, his sister, or the Probation Department requested a 10-year protective order, (2) the root cause of defendant's violent behavior was mental illness and/or drug abuse rather than "any innate evil," (3) a 10-year protective order "punishes" defendant's father because it is unlikely the father will still be alive when the order expires, and (4) "no one was seriously hurt."

³ Defendant also asserts that the People "tacitly concede[]" this point. This assertion is flatly contradicted by the People's brief.

Defendant's first three points address concerns beyond the three factors relevant to the duration of a protective order that are set forth in section 368, subdivision (*I*). Thus, those points are at most optional considerations.

Even if these facts are appropriate to consider, defendant is essentially asking us to weigh the pertinent facts differently—and to come to a different conclusion—than the trial court. This is beyond what we may do while reviewing a trial court's order for an abuse of discretion. (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 883 [“we do not reweigh the evidence’ in considering whether the trial court abused its discretion”].)

And even if we were to ignore the standard of review and to reweigh the facts, the facts defendant points to do not alter the propriety of a 10-year restraining order: Getting a screwdriver in the face is hardly a non-serious injury, particularly when it is accompanied by and followed up with death threats; defendant's refusal to seek treatment or to take his medication means that his mental illness remains unaddressed and thus a live risk to his family members; the Probation Department did not request a protective order because it recommended the much harsher sentence of prison from the outset; and the trial court has an independent duty to protect the victims from further injury, irrespective of what they may want.

Lastly, defendant argues that the entry of a 10-year protective order violates due process. To the extent his due process claim is based on a misapplication of the pertinent statute, we reject it because defendant has not carried his burden on appeal of showing any misapplication of section 368. (*Carmony, supra*, 33 Cal.4th at pp. 376-377.) To the extent

defendant's due process claim rests on a more general notion of a right to associate with family members, we decline to recognize a constitutional right of access to persons whom a defendant has repeatedly and consistently victimized by assault, battery, and death threats just because those persons happen to be related by blood or marriage.

II. Clerical Errors in Restraining Order

An appellate has the power to correct clerical errors in a trial court's orders. (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295.) The written restraining order in this case contains three such errors: (1) it lists section 273.5, subdivision (j) as its statutory basis (even though section 368, subdivision (l) is the provision that applies to defendant); (2) it lists only defendant's father as a "protected person" (even though the trial court named defendant's father and sister as protected persons while pronouncing sentence); and (3) it lists defendant's father's address next to the line for "stay-away orders from specific locations" but does not check the box activating that provision (even though the trial court orally ordered defendant to stay away from that location). Because the court's oral pronouncement governs over written orders in criminal cases (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750, fn. 2; *In re Malik J.* (2015) 240 Cal.App.4th 896, 905; *People v. Mesa* (1975) 14 Cal.3d 466, 471), we order that the trial court modify the protective order to correct the clerical errors in that order.

DISPOSITION

The trial court is ordered to modify the restraining order to specify that (1) the statutory basis for the order is section 368, subdivision (*l*); (2) Nancy Sepulveda is a “protected person”; and (3) the location on Atlantic Avenue is a “specific location[]” to which the “stay-away” order applies. The judgment is otherwise affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST