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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.

CESAR ARTURO CASTANEDA,

Defendant and Appellant.

B269759

(Los Angeles County
Super. Ct. No. BA434991)

APPEAL from a judgment of the Superior Court of Los Angeles County, C.H. Rehm, Jr., Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Ilana Hercovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Cesar Castaneda appeals from a judgment which sentences him to 10 years in state prison for stalking and threatening his girlfriend and for unlawfully possessing a semi-automatic rifle, ammunition, and body armor. Castaneda contends insufficient evidence supports the stalking conviction and his girlfriend's preliminary hearing testimony was erroneously admitted at trial. We affirm the judgment.

FACTS

Castaneda began a relationship with G.E. in 2003. They have an eight-year-old daughter named Sasha and lived together with G.E.'s mother. Toward the end of August 2014, G.E. asked her mother for help. G.E. told her mother she was afraid of Castaneda and wanted to call the police. G.E.'s mother often heard Castaneda scream at G.E. G.E. told her mother that Castaneda threatened to kill her if she left him. Although she did not speak English fluently, G.E.'s mother heard Castaneda threaten her daughter, warning her during a recent argument, "You will see, you will see." G.E.'s mother had observed a rifle, ammunition, and a bulletproof vest in the house. She believed they were Castaneda's, along with a black bag could hold a firearm.

G.E. reported to the police that Castaneda threatened her on August 28, 2014. That morning, they argued about ending their relationship. He told her, "You are not going to get a smooth transition out of this; I am going to leave a mark; I am going to point something at you." G.E. became frightened and left for work. Later that morning, Castaneda attempted to take Sasha out of school, citing a family emergency. According to the school employee, Castaneda appeared unusually agitated and nervous, pacing while he waited to speak to the principal. G.E.

called the school while Castaneda was there and she was able to prevent Castaneda from taking Sasha.

At 12:00 p.m., Castaneda arrived at G.E.'s workplace. Surveillance video showed him entering at 12:09 p.m., carrying a black duffel bag. He asked to speak with G.E. at the front desk. G.E. told police he threatened her, asking, "This is your last chance. What is it going to be?" He pulled on the zipper of the black bag as he spoke to her. G.E. walked away and hid in the building, crying. At 4:00 p.m., G.E. left her building and saw Castaneda sitting in her car.

The police were called and officers discovered Castaneda sitting in a white Nissan parked in the parking structure next to G.E.'s workplace, "messing" with the wiring in the steering column. The officers searched the white Nissan and a blue Infiniti parked outside of the parking structure. In the blue Infiniti they recovered a backpack containing magazines from a rifle with ammunition in it. The officers also searched G.E.'s home and recovered a semi-automatic assault-type rifle, a bulletproof vest, and one round of ammunition. In total, four magazines and 129 rounds of ammunition were recovered. G.E. told officers the rifle, ammunition, and bulletproof vest belonged to Castaneda.

Castaneda was charged with stalking (count 1; Pen. Code, § 646.9),¹ criminal threats (count 2; § 422, subd. (a)), possession of an assault weapon (count 3; § 30605, subd. (a)), felon in possession of body armor (count 4; § 31360, subd. (a)), unlawful possession of ammunition (count 5; § 30305, subd. (a)(1)), unlawful possession of a firearm with prior violent conviction

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

(count 6; § 29900, subd. (a)(1)), and child abuse (count 7; § 273a, subd. (a)). As to count 1, it was further alleged Castaneda was armed with a Norinco SKS semi-automatic rifle within the meaning of section 12022, subdivision (a)(2). As to count 2, it was alleged Castaneda suffered a prior serious felony conviction within the meaning of section 227, subdivision (a)(1). As to all counts, it was further alleged Castaneda suffered one prior serious and/or violent felony that subjected him to sentencing pursuant to the Three Strikes law under sections 667, subdivisions (b)-(j) and 1170.12, subdivision (b).

Castaneda continued to live with G.E. after his arrest. G.E. recanted her story to the police at the preliminary hearing. She testified she exaggerated the threats by Castaneda because he cheated on her. In her interview with the police, G.E. told officers she drove to work in a white Nissan and that the blue Infiniti containing the ammunition was Castaneda's. At the preliminary hearing, however, she testified she drove to work in the blue Infiniti. She refused to answer questions about who owned the rifle, ammunition, and vest. At trial, G.E. repeatedly invoked her Fifth Amendment right against self-incrimination and refused to testify at all despite being offered immunity by the prosecutor. As a result, her testimony from the preliminary hearing was read to the jury.

Additionally, her statements to the police were admitted at trial. The jury heard testimony about a handwritten note she signed, which stated: "This is my boyfriend, he threatened me on 8/28/14. I am very afraid of him. He made multiple threats towards me. I have never done nothing because I am afraid of what he might do out of anger. When he is in a good state of mind, he tells me he is sorry, but it never gets better."

My situation has gotten worse, and I am afraid of what he can do to me or my daughter, even family. He is very revengeful.”

The jury found Castaneda guilty of counts 1 through 6, but found the gun enhancement allegation to be not true. He was acquitted on count 7 and it was dismissed. Castaneda admitted to suffering one prior strike conviction and one serious felony conviction. After the trial court granted his *Romero*² motion, he was sentenced to the upper term of three years for count 2, plus five years for the prior serious felony conviction, plus two years total for counts 4, 5, and 6 (one-third the midterm for each count). Sentence was stayed as to counts 1 and 3 pursuant to section 654. His sentence totaled 10 years in state prison. Castaneda timely appealed.

DISCUSSION

Castaneda’s appeal rests on two grounds. One, he contends the trial court erroneously admitted G.E.’s preliminary hearing testimony in violation of his Sixth Amendment right to confront a witness against him. Two, he asserts there was insufficient evidence to support the stalking conviction. We find neither argument has merit.

I. Preliminary Hearing Testimony

A. Proceedings Below

At the preliminary hearing, G.E. indicated she needed an attorney. The trial court directed her to proceed, stating, “we will see what happens.” During her testimony, G.E. denied Castaneda made any threats against her and claimed she lied to the police because she was angry that Castaneda cheated on her. On cross-examination, G.E. asserted her Fifth Amendment right against self-incrimination when asked if the firearm, the

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

ammunition, and the bulletproof vest found belonged to her. Defense counsel requested the trial court compel her to respond on the ground he was not able to fully confront the witness. His request was denied. The only topics to which G.E. asserted the privilege were those involving the ownership of the firearm, ammunition, and bulletproof vest.

During trial, G.E. was appointed an alternate public defender to aid her in asserting her right against self-incrimination. A hearing was conducted pursuant to Evidence Code section 402, during which G.E. invoked her Fifth Amendment rights and refused to answer any questions, not just the ones involving the rifle, ammunition, and bulletproof vest. As a result, defense counsel declined to question her at the Evidence Code section 402 hearing. Noting that G.E. could be subject to prosecution for child endangerment, filing a false report, perjury, and possession of an assault rifle, the trial court found G.E. met her burden of demonstrating that the questions might elicit testimony that would tend to incriminate her. The prosecutor subsequently agreed to grant her immunity, forestalling her Fifth Amendment concerns. When she again refused to testify, the trial court found her in contempt.

G.E. continued to refuse to testify on any topic and the trial court found she was an unavailable witness within the meaning of Evidence Code section 240. G.E.'s preliminary hearing testimony was read to the jury over defense objections.

B. Analysis

Castaneda contends on appeal that the trial court improperly admitted G.E.'s preliminary hearing testimony into evidence at trial. As a result, he was denied the opportunity to confront a witness in violation of his Sixth Amendment rights.

“A criminal defendant has a constitutionally guaranteed right to confront and cross-examine the witnesses against him or her. [Citations.] The right of confrontation is not absolute, however, and may ‘in appropriate cases’ bow to other legitimate interests in the criminal trial process. [Citations.]” (*People v. Carter* (2005) 36 Cal.4th 1114, 1172 (*Carter*).) For example, “a defendant’s constitutional right to confront witnesses against him does not supersede a witness’s constitutional privilege against self-incrimination.” (*People v. Smith* (2007) 40 Cal.4th 483, 521.) Where a witness refuses to testify on this basis, the witness may be found to be unavailable. (*People v. Seijas* (2005) 36 Cal.4th 291, 303; Evid. Code, § 240, subd. (a)(6).) Thus, an “exception to the confrontation requirement exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant. [Citations.]” (*Carter, supra*, at p. 1172; *Crawford v. Washington* (2004) 541 U.S. 36, 68; Evid. Code, § 1291, subd. (a)(2).)

In *People v. Zapien* (1993) 4 Cal.4th 929 (*Zapien*), a case addressing similar facts, our Supreme Court held the admission of an unavailable witness’s preliminary hearing testimony “is permitted under Evidence Code section 1291 and does not offend the confrontation clauses of the federal or state Constitutions—not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of cross-examination at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant’s right to effective cross-examination against the public’s interest in effective prosecution.” (*Id.* at p. 975.) While a defendant’s motive for cross-examining a witness during a

preliminary hearing will often differ from his motive for cross-examining that witness at trial, the court explained that “these motives need not be identical, only ‘similar.’” (*Ibid.*)

Here, G.E. was unavailable to testify; she repeatedly refused to testify at trial despite the offer of immunity by the prosecutor and a finding of contempt by the trial court. Castaneda does not contest the trial court’s finding of unavailability.

Further, G.E. was subject to cross-examination at the preliminary hearing. Castaneda’s motive in cross-examining G.E. during the preliminary hearing was similar to his motive at trial: to place her credibility into question. Indeed, Castaneda acknowledges “[t]he unrestricted cross-examination of [G.E.] regarding whether the prohibited items found in her home belonged to her would have significantly altered the jury’s impression of [her] credibility.” There is no doubt that G.E.’s credibility was at issue at the preliminary hearing and at trial. On cross-examination, G.E. admitted she lied to the police about Castaneda’s threats because he cheated on her. She testified she was not afraid of Castaneda and he had never threatened her, not Castaneda. She also admitted the blue Infiniti, where the ammunition was found, belonged to her. She testified Castaneda did not live with her at the time of the incident, leaving open the question whether the items found in the home actually belonged to him.

Contrary to his contentions, Castaneda had the opportunity to confront G.E. at the preliminary hearing and had the same motive for his cross-examination at the preliminary hearing as at trial. That he was unable to cross-examine G.E. as effectively as he wished does not implicate the confrontation clause. (*Delaware*

v. Van Arsdall (1986) 475 U.S. 673, 679 [Sixth Amendment “ ‘guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’ ”].) Accordingly, the admission of G.E.’s preliminary hearing testimony was permitted under Evidence Code section 1291 and did not offend the confrontation clauses of the federal or state Constitutions. (*Zapfen, supra*, 4 Cal.4th at p. 975.)

II. Substantial Evidence Supports the Stalking Conviction

Next, Castaneda contends his conviction for stalking in violation of section 646.9 must be reversed because there was insufficient evidence to establish that he engaged in a course of harassing conduct occurring over a period of time. We review Castaneda’s argument under a substantial evidence standard. (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) Under section 646.9, “[a]ny 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 . . .” (§ 646.9, subd. (a).) Section 646.9 clarifies “harasses” as “engag[ing] 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).) Further, “course of conduct” is defined as “two or more acts occurring over a period of time, however short, evidencing a continuity of purpose.” (§ 646.9, subd. (f).)

Castaneda acknowledges he argued with G.E. in the morning and then “did go to his girlfriend, [G.E.’s] place of work at noon that day, to his own daughter’s school in the afternoon, spoke to [G.E.] at approximately 4:00 p.m., and was found in the parking structure of [G.E.’s] place of work in the late afternoon[.]” He contends, however, “the acts do not constitute a course of harassing conduct over a period of time.” We fail to see how Castaneda’s conduct does not constitute harassment as defined in section 646.9, subdivisions (e) and (f).

People v. McCray (1997) 58 Cal.App.4th 159 (*McCray*) provides ample support for our conclusion. In *McCray*, the victim’s ex-husband made three threatening phone calls and showed up at her doorstep threatening to shoot her if she did not allow their daughters to speak to him. This course of conduct occurred over two hours one evening. (*Id.* at pp. 164-165.) The *McCray* court rejected the defendant’s argument that his stalking conviction could not stand because it was based on harassment occurring over a single day rather than conduct spanning days, weeks, or months, as was typical of other stalking cases. (*Id.* at p. 171, fn. 3.) The court reasoned, “the Legislature plainly intended to penalize a single series of separate acts constituting harassment.” (*Id.* at p. 171.) As a result, the evidence supported the jury’s determination that the defendant harassed the victim within the meaning of section 646.9. (*Ibid.*)

Castaneda’s conduct likewise constituted harassment within the meaning of section 646.9. First, Castaneda threatened G.E. in the morning when they argued. G.E. became frightened and left. Then, he attempted to take Sasha out of school without G.E.’s consent. He later showed up at G.E.’s workplace and threatened her again, stating it was her “last chance” while

pulling on the zipper of a duffle bag, insinuating there was a firearm in it. G.E. ran into the building and cried. He was found “messaging” with the steering column in G.E.’s car that afternoon. This evidence is sufficient to demonstrate Castaneda seriously alarmed G.E. by engaging in two or more acts in a knowing and willful manner which demonstrate a continuity of purpose. (§ 646.9, subds. (e)-(f).) Substantial evidence supports the jury’s finding.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.