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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. ALFONSO LUIS GARZA, Defendant and Appellant.	B235546 (Los Angeles County Super. Ct. No. KA092268)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M. Daniels and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

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After jury trial, appellant Alfonso Garza was found guilty of battery on a spouse in violation of Penal Code[1] section 243, subdivision (e)(1), a misdemeanor (as a lesser offense of the charged offense of corporal injury to a spouse under § 273.5, subd. (a)); violation of section 646.9, subdivision (a), stalking, a felony; and two additional misdemeanor charges, one for violation of section 653m, subdivision (b), annoying telephone calls, and one for violation of section 273.6, subdivision (b), disobeying a domestic violence restraining order. Appellant admitted to three prior convictions under sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i). The court struck two of appellant's strike priors, and sentenced him to a total of six years in state prison.

Appellant raises two contentions on appeal: that the trial court prejudicially abused its discretion by admitting hearsay evidence, compelling reversal of the stalking conviction, and that the court prejudicially abused its discretion in limiting cross-examination of Jane Doe, the victim of the battery and the stalking, again compelling reversal of the stalking charge. We affirm.

The Evidence

Battery

The battery was alleged to have taken place on August 23, 2010. The victim was appellant's estranged wife, Jane Doe, who was the mother of his five year old son. She testified that:

On August 23, 2010, she and appellant had been married for about four and half years and separated for two years, although, due to issues in the relationship, they had only lived together on and off even prior to the separation.

On that date, as she drove home from work, she received a phone call from her aunt, who said that appellant had called her, furious, and said that he was coming to get

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

Jane Doe. Earlier that day, appellant sent a text message to Jane Doe's cousin, saying that he had a bullet with Jane Doe's name on it. Multiple other individuals had contacted her with regard to appellant and what he might do to her, causing her to fear for her safety.

This evidence was admitted over defense objections, with an admonishment to the jury that the statements were not offered for the truth of the content of the statements, but only to explain Jane Doe's state of mind, and her actions as a result of hearing the statements.

On receiving the phone call from her aunt, Jane Doe decided to leave her youngest child at day care and took her older child there as well, before she went home.

As she drove onto her street, she saw bright lights and a car coming toward her very quickly, so that she thought it would hit her. The car, driven by appellant, screeched to a halt about five inches from her car.

Appellant got out of his car and began banging on her car window. Jane Doe managed to drive into her driveway. She honked the horn to alert her aunt, with whom she lived, and the neighbors.

When she got out of the car, appellant started swearing at her and hitting her. He pushed her against her car, hit her in the face, slapped her, then grabbed her by the shoulders and arms and kneed her in the abdomen. At that point, Jane Doe's aunt and some neighbors came out to the street. They called police. Jane Doe was able to get into the house and wait for police. Appellant left the area.

Jane Doe testified that she did not drive away when she saw appellant because she feared that he would follow her, cut her off, and attack her in a place where she could not get help. She also testified that prior to August 23, there had been several similar incidents, where appellant had called and threatened her, so that she could not go home.

Sheriff's Deputy Kevin Herriott responded to the call. He was a witness at trial. Deputy Herriott testified that he observed bruising on Jane Doe's arms, which looked as though she had been grabbed. She also had a red mark on her neck and small bruises on her legs.

Jane Doe's aunt, Maria Ibarra, also testified about the incident, for the prosecution. When she heard the car horn honk, she looked out the window and saw Jane Doe in the car and appellant hitting the car window. She went outside and told appellant to leave. He did not, so she yelled for the neighbors, Yolanda and Vincent Gomez, who came out of their house. She told them to call police. She then got Jane Doe out of the car, with Yolanda's help. Appellant tried to grab her, then pushed them, spat at them, and ran. He was very angry and used bad words, so that she was scared for herself and for Jane Doe. Ibarra saw bruises on Jane Doe's arm and leg. She did not see appellant punch or kick Jane Doe.

The defense called Yolanda Gomez. She testified that at the date and time in question, she heard arguing outside her house. She stepped outside and saw Jane Doe in her car and appellant outside, verbally abusing her. She "got up in his face" and told him to stop. When he did not, she told Jane Doe to drive into the driveway. Jane Doe got out of her car and appellant spit in her face. Gomez did not see appellant grab, kick, or hit Jane Doe, or push Jane Doe or Ibarra, and did not see Ibarra intervene.

Stalking

This offense was alleged to have taken place between August 23, 2010, and October 12, 2010.

In addition to the evidence recounted above, Jane Doe testified that on October 12, 2010, about 5:00 o'clock in the morning, while she was getting ready for work, appellant called constantly. She ignored the calls, and appellant began banging on her front door, demanding that she open the door, swearing at her, calling her a "bitch," and a "whore," and saying "just wait until I get you." Jane Doe was afraid that appellant would break the window near the door, and break in. She took her children to the back bedroom and called police.

Officers asked that she look out a window and see if he was still there. She eventually did so, and saw appellant going through her car, to which he had keys.[2] Later, she realized that items were missing, including a laptop computer and some of her older son's baseball equipment.

Sheriff's Deputy Mariann Oliver responded to the call and was a witness at trial. While she was talking to Jane Doe, Jane Doe's telephone rang five or six times. Oliver spoke to the caller, who identified himself as Jane Doe's husband. Deputy Oliver told the caller that he was in violation of a restraining order, and to stop calling.

Jane Doe testified to other attempts appellant made to contact her: he would call and email her at work, as many as 10 emails or 15 phone calls a day. Jane Doe worked at a school, and appellant would call her supervisor and leave voice mails for her, and would try to get her fired. This conduct began when they separated in 2009, and never stopped. On cross-examination, Jane Doe testified that between August and October 2010, there were fewer voice mails, perhaps three a month, and fewer emails, perhaps 20 a month. She also testified, however, that in several telephone calls during that period, appellant threatened to kill her.

Appellant also contacted her aunt, cousin, and sister, constantly, "just as the same as he would with me." After a time, she and her relatives had agreed that they would not tell her about the calls unless it was an emergency, because the calls caused her so much stress.

Violation of the domestic violence restraining order

Jane Doe was also the person protected by the domestic violence restraining order. Violation of the order was alleged to have occurred on August 23, 2010.

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[2] Jane Doe testified that appellant had never permitted her to have all the keys to her car, or, when they lived together, the key to the garage, where some of her possessions were stored. Once, after she had left him, she returned to find the windows nailed shut. She also testified that appellant had managed all the money, so that she felt trapped.

In addition to the evidence already described, Jane Doe testified about the incident which caused her to seek and obtain the restraining order: in July 2007, shortly after she and appellant married, appellant assaulted her after they had a verbal argument. He pinned her down on the bed, slapped her, pulled her into the kitchen and slammed her head into the sink. When she ran, he chased her and pulled her by the hair.

Police were called, and Sheriff's Deputy Phillip Leyva responded. He was a witness at trial and testified that he observed bruising on her arm, and assisted her in obtaining the restraining order.

Jane Doe testified that as a result of the abuse, she went to the emergency room, where a social worker questioned her. Soon thereafter DCFS removed her children from her home. In order to get them back she and appellant attended counseling. Jane Doe testified that after this incident, she never again sought medical attention for injuries appellant inflicted, although there were other incidents of abuse between the July 2007 incident and October of 2010, because she was afraid that her children would once again be taken away by DCFS.

Annoying telephone calls

Jane Doe's next door neighbor, Vincent Gomez, was alleged to be the victim of the annoying telephone calls, alleged to have taken place on October 12, 2010.

Vincent Gomez testified that on October 12, 2010, he received two threatening calls from someone he did not know, but who mentioned Jane Doe. When he saw police officers outside Jane Doe's home, he connected the two incidents and went outside to talk to police. He received another phone call, and handed the phone to Deputy Oliver, who testified that the person making the calls was the same person who had called Jane Doe. Deputy Oliver told the caller to stop calling.

Gomez testified that in the next three days, he received 56 text messages from that same number. They were obscene. The messages stopped only when he terminated text message service. The tone of the messages was that appellant believed that Gomez was engaged in a sexual relationship with Jane Doe.

Discussion

1. Hearsay

Under section 646.9, subdivision (a), "Any 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." Where, as here, there is a court order prohibiting that behavior, the conduct is a felony. (§ 646.9, subd. (b).)

Appellant argues that the court erred in admitting hearsay, and that without the hearsay, there was insufficient evidence for the "credible threats" element of the stalking conviction.

Specifically, he contends that the court erred by admitting:

-- Jane Doe's testimony about her aunt's statement, on August 23, 2010, that appellant had called, furious, and threatened Jane Doe,

-- Jane Doe's testimony that appellant sent a threatening text message to her cousin, that same day,

-- Jane Doe's testimony that multiple individuals had contacted her that day to say that they were concerned about appellant and what he might do to her,

-- Jane Doe's testimony that after she and appellant separated, he constantly called her relatives.

First, Jane Doe's testimony that appellant had constantly called her relatives since the separation is not hearsay. Nor was there any hearsay or foundational objection to this testimony. Next, as we earlier noted, the other evidence was admitted only to show Jane Doe's state of mind and subsequent actions, and the jury was so informed. Appellant, however, argues that that was not a legitimate purpose, because Jane Doe's state of mind and subsequent actions were not an issue.

Jane Doe's state of mind and her subsequent actions were relevant, at least to the extent that without this background, a jury would not have understood where her children

were. This was relevant because the defense was that she had barred appellant from seeing his son, and that his attempts to contact her were attempts to arrange to see his son.[3] Indeed, in closing argument in the trial court the defense argued that Jane Doe left her children in child care not because she feared appellant, but because she did not want him to see his son. He makes the same argument on appeal.

And, although appellant now argues that the prosecution did not need to show that Jane Doe acted rationally in response to a threat, because her actions were manifestly reasonable, at trial, the tenor of the cross-examination was that her actions were not reasonable: she did not drive away when confronted with appellant, and throughout the separation, she refused to discuss the question of child custody with appellant.

Appellant argues that his constitutional right to due process was violated, because without the hearsay, the jury could not have found felony stalking, beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), but we agree with respondent that even if there was error in admitting these statements, it was not prejudicial. We see no reasonable probability that without the admission of the hearsay evidence appellant would have achieved a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant argues that the verdict of battery, the lesser included offense, means that the jury found Jane Doe not particularly credible. Appellant notes that her account of the events of August 23, 2010 did not match the accounts given by Ibarra and Yolanda Gomez and also cites her testimony, on cross-examination, that she did not take appellant's phone calls or read his emails. From all this he concludes that without the hearsay evidence, the jury would not have found that appellant made credible threats.

First, as we read Jane Doe's testimony, she did not testify that she had never read any of appellant's emails or listened to his voice mails (so that she would not know

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[3] There is very little evidence to that effect, but it was the tone of the cross-examination of Jane Doe.

whether they included threats), but that after a certain amount of experience with appellant's emails and phone calls, she attempted to avoid knowledge of the content.

Next, while it is true that the jury found battery, we cannot see that this means that Jane Doe's testimony concerning threats made through others could have changed the result here. Jane Doe testified that appellant called her repeatedly on October 12, banged on her door and threatened her on that date, threatened her over the phone approximately three times between August and October 2010, physically assaulted her in June 2007, and assaulted her several times more between that date and October of 2010. That evidence was the basis for the stalking charge, and if the jury had not substantially credited Jane Doe's testimony, it would not have convicted. Moreover, if the jury had disbelieved her when she testified about threats to herself, it would not have found her credible when she testified about threats through others.

Appellant argues that Jane Doe's testimony concerning appellant's calls to her aunt and cousin and other relatives corroborated her testimony about threats made to her, and so was prejudicial. Jane Doe's testimony concerning threats to others did not corroborate her testimony about threats to herself, it was nothing more than additional testimony from the same witness on the same subject.

2. Cross-examination

The defense cross-examined Jane Doe on the terms of the restraining order, her attitude toward appellant seeing his son (asking for instance, whether there was a court order for visits, and on learning that there was not, asking "So you took it upon yourself to deny [appellant] visitation with your son?"), appellant's attempts to see his son, and her current financial arrangements with appellant, then cross-examined extensively concerning the events of August 23, 2010.

Defense counsel also questioned Jane Doe on DCFS's involvement with her family, asking, for instance, "did it have to do with your drinking?" In response to a question, Jane Doe testified that she refused medical attention on August 23, 2010 because she feared DCFS. Counsel asked, "You believe and you wanted the jury to

understand that you're driving home alone, no children, you are attacked, and you think that you're going to get your children taken away from you?" Jane Doe answered, "yes." After a few more questions, which were about the injuries Jane Doe suffered on August 23, the noon recess was called.

When the case was called again, Jane Doe was cross-examined on the events of October 10, 2010, and the calls and emails she received from appellant between August and October. Counsel then asked her whether she had seen appellant at the church they both attended, and whether she had spoken to the pastor.

The court then asked to see counsel in chambers. The court warned defense counsel to be aware of privilege issues concerning Jane Doe's conversations with her pastor. Defense counsel said that he wished only to establish that when appellant appeared in church, Jane Doe would take the children and go. The court also informed counsel that DCFS might well detain the children of a domestic violence victim who did not leave her abuser, and ruled that counsel could not question Jane Doe further on that subject.

The court then sustained its own objection under Evidence Code section 352, ruling that "I've given you leeway in terms of what role she is playing in this, if any, in terms of denial of visitation. That he is just simply trying to make arrangements for visitation . . . is the purposes of the emails or phone calls, but I think I've given you enough under [Evidence Code] section 352 where I think it's now going to reach the point where now it's undue consumption of time on collateral issue. . . . [b]ecause his conduct is what is at issue, not whether she's rebuffing his contact with her." The court ruled that the defense that there was "a legitimate basis upon a legitimate dispute," was before the jury, and told counsel to move on to other subjects.

Counsel did so, cross-examining on such subjects as the threatening phone calls, the events of August 23, 2010, and similar subjects.

Appellant contends that by limiting cross-examination, the court prevented him from questioning Jane Doe about events relating to appellant's visits with his son, and her

unwillingness to let him see his son, and deprived him of the chance to undermine her credibility. He argues that he was denied the opportunity to set forth the obstacles he faced in seeing his son and fully explore the reasons for his repeated attempts to contact Jane Doe.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

We can see no abuse of discretion here. The defense was not limited in cross-examination on the facts of the assault, stalking, or domestic violence restraining order violation, and had, as the trial court found, ample opportunity to attempt to present the defense through cross-examination. Defense counsel had had an opportunity to attempt to elicit from Jane Doe evidence that appellant's contacts were in furtherance of his desire to see his son or for some other legitimate purpose. That defense was before the jury. Appellant was not deprived of his ability to present a defense, and there was no abuse of discretion in the court's Evidence Code section 352 ruling.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J. KRIEGLER, J.