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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SERGIUS APOSTOLOS ORLOFF, Defendant and Appellant.	2d Crim. No. B275795 (Super. Ct. No. 2013020074) (Ventura County)

Sergius Apostolos Orloff appeals from an order revoking his probation and imposing a previously suspended prison sentence of eight years, eight months. We affirm.

Procedural Background

After a jury trial, appellant was convicted of making a criminal threat (Pen. Code, § 422)[1] and attempting, by means of a threat, to deter an executive officer from performing his duties. (§ 69.) The trial court found true allegations that he had been convicted of a prior serious felony within the meaning of section

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

667, subdivision (a)(1), and a prior serious or violent felony within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) In the exercise of its discretion, the court dismissed the strike and sentenced appellant to prison for eight years, eight months. It suspended execution of the sentence and placed him on probation on condition that he serve 365 days in county jail. Appellant appealed. We affirmed the judgment. (*People v. Orloff* (2016) 2 Cal.App.5th 947.)

In September 2015 appellant's probation was modified to prohibit him from contacting the Humane Society. In March 2016 he was charged with the following violations of probation: (1) with the intent to annoy or harass, he made repeated telephone calls to two probation officers in violation of section 653m, subdivision (b); (2) while incarcerated in the Ventura County jail, he broke a glass window in his cell door in violation of section 4600, subdivision (a); and (3) he contacted the Humane Society.

After an evidentiary hearing, the trial court found that appellant had committed the charged violations of probation. It revoked probation and imposed the previously suspended prison sentence of eight years, eight months.

Facts Underlying Probation Violations

In early January 2016 appellant telephoned the Humane Society in Ventura and left two voicemails for its employee, Tracy Vail. The "language" of the voicemails "was foul." Appellant threatened to report Vail's actions to "animal control" and to "seek restitution against" her. He complained that "Humane Society staff members had committed libel against him." He said that he would "be filing charges against the Humane Society."

On January 28, 2016, appellant's probation officer, Lisa Byrne, and another officer conducted a search of appellant's home. Appellant was in a wheelchair. During the search, appellant "became very agitated and upset. He began accusing [the officers] of threatening him, of hurting his service dog." The officers "were unable to get him to calm down. [They] were unable to get a word in between his rants of anger." The officers decided to leave the residence.

When Byrne returned to her office, she "discovered an entire full voicemail box with messages from [appellant]. Each one was at least two minutes long. . . . [H]e spoke until the machine cut him off." Appellant complained that Byrne had been "abusive" during the home search. "He threatened to contact Homeland [S]ecurity, the FBI, threatened to file charges against [her], to sue [her]." He said that Byrne had "disrespected him, . . . tor[n] his house up, [and] hurt his dog." "He told [Byrne] that he would be investigating [her], that he would hand [her] over on a silver platter. And basically he repeated the same thing [in] each and every message."

On her next work day, Byrne's voicemail box was again full with messages from appellant. "He spoke in each one until the machine cut him off. He said essentially the same things. He accused [Byrne] of using excessive force. He told [her] that . . . he would sue [her]. That [she] would be getting a bill from his veterinarian for assaulting his dog. [¶] He said he's launched an investigation with internal affairs, and that he's hired a[] private investigator." The messages "made [Byrne] concerned about [her] personal safety."

Christopher Martinez was a Senior Deputy Probation Officer who supervised Byrne. One of his "primary"

responsibilities was "to field complaints concerning officers under [his] supervision." On his voicemail, he received 14 messages from appellant. They began on January 28 and continued through February 1, 2016. Each message was about two to three minutes long. Appellant said "he was gonna be digging up dirt on Lisa Byrne." She was not welcome in his home. If she came there, he would "call her every four-letter word i[n] the books until she starts to treat him better." Appellant claimed that Martinez was "terrorizing him" and was "crooked." He threatened to take legal action against Martinez. He said he was going to call Homeland Security and the FBI. Martinez testified: "[O]ne of the things that stood out to me was . . . saying that he has . . . won previous lawsuits, and he did have money to be able to do this. And then he also said that . . . my behavior was unacceptable and *I will be dealt with*." (Italics added.) This "rattled" Martinez and caused him to fear for his safety. He considered arming himself and discussed with Byrne whether she should arm herself.

In March 2016 appellant was incarcerated in the Ventura County jail. Martin Nunes, a deputy sheriff, heard appellant banging on the door of his cell. Nunes walked to appellant's cell and saw a "spider crack" in the door's glass window. Appellant said "he broke the window because he wanted to get [the deputy's] attention." In his reply brief appellant acknowledges that he broke the window with his "walker."

Lack of Notice

At the conclusion of the probation violation hearing, the court stated, "I . . . find there's sufficient evidence to believe that you failed to submit to a search [i.e., the January 28, 2016 probation search of appellant's home], and that the attempt to

search was aborted by your conduct[,] [w]hich is another violation of your terms." Appellant claims: "The court's finding that [he] violated probation by failure to submit to a search must be vacated because there was no written notice that failure to submit to a search constituted a . . . violation of probation." (Capitalization omitted.)

The lack of notice was harmless beyond a reasonable doubt because the court found that appellant had committed the charged probation violations, which warranted the revocation of probation. "Thus, affording [appellant] a new probation revocation hearing would be a futile act . . . ." (*People v. Arreola* (1994) 7 Cal.4th 1144, 1162.)

Substantial Evidence: Violation of Section 653(m), Subdivision (b)

Appellant contends that there is no substantial evidence to support the trial court's finding that he violated section 653(m), subdivision (b), which provides: "Every person who, with intent to annoy or harass, makes repeated telephone calls . . . to another person is . . . guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls . . . made in good faith or during the ordinary course and scope of business."

"The standard of proof required at a probation violation hearing is a preponderance of the evidence to support the violation. [Citations.]" (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066.) This standard "'simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence . . . ."'" (*In re Angelia P.* (1981) 28 Cal.3d 908, 918.) We "view the evidence in the light most favorable to respondent and presume in support of the [trier of fact's finding] the existence of every fact the trier could

reasonably deduce from the evidence. [Citations.]" (*People v. Reilly* (1970) 3 Cal.3d 421, 425.)

Ample evidence supports the trial court's finding that appellant committed a violation of section 653(m), subdivision (b). Appellant relies on *People v. Powers* (2011) 193 Cal.App.4th 158, but it is distinguishable. Unlike appellant, the defendant in *Powers* was not charged with violating section 653(m), subdivision (b). Instead, he was charged with making phone calls during which he had used obscene language or had threatened to inflict injury with intent to annoy in violation of section 653(m), subdivision (a).[2] The recipient of the calls was an employee at the corporate office of Cold Stone Creamery. The employee's job was to listen to consumer complaints. In reversing the defendant's conviction, this court concluded: "The [telephone] messages are annoying rants concerning customer service. It is reasonable for someone to be annoyed by appellant's language. But the vulgarities uttered cannot be described as obscene, especially in the context of a customer service line maintained to take complaints. Except in extreme cases, we doubt that a person whose job it is to receive consumer complaints has a right to privacy against unwanted intrusion. [Citation.]" (*People v. Powers*, *supra*, at p. 166.)

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[2] Section 653(m), subdivision (a) provides: "Every person who, with intent to annoy, telephones . . . another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls . . . made in good faith."

Appellant's phone calls to the probation officers were not "annoying rants concerning customer service" made to persons "whose job it is to receive consumer complaints." (*People v. Powers*, *supra*, 193 Cal.App.4th at p. 166.) It is reasonable to infer that the probation officers had "a right to privacy" against appellant's intrusive and threatening calls. (*Ibid*; see also *People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1384 ["The purpose of section 653m is to deter people from making harassing telephone calls with the intent to annoy and thus, to secure an individual's right to privacy against unwanted intrusion"].)

We reject appellant's contention that the probation officers' "[t]estimony . . . was embellished to misconstrue that the voicemails presented a physical threat to their safety." There is no evidence that the officers "embellished" their testimony. Moreover, a physical threat to Officer Martinez's safety can reasonably be inferred from appellant's statement that Martinez "will be dealt with" and that appellant had the "money to be able to do this." In any event, a violation of section 653(m), subdivision (b) does not require a threat to the victim's safety.

We also reject appellant's claim in his reply brief that, regardless of whether he intended to annoy or harass the probation officers, his messages fall within the statutory exception for "telephone calls . . . made . . . during the ordinary course and scope of business." (§ 653m, subd. (b).) There is nothing ordinary about appellant's phone calls. In addition, the calls were not made during the course and scope of a business.

Alleged Violation of California Rules of Court

Appellant argues that the probation department's Notice of Charged Violations contravenes rule 4.411.5(a)(9)(A) of the California Rules of Court, which provides, "A probation

officer's *presentence investigation report* in a felony case must include . . . [a] reasoned discussion of the defendant's suitability and eligibility for probation . . . ." (Italics added.) Appellant asserts: "The Notice of Charges goads the court into imposing the executed sentence in place of a reasoned discussion."

Rule 4.411.5(a)(9)(A) is inapplicable here because the Notice of Charged Violations is not a "presentence investigation report." Appellant had previously been sentenced to prison for eight years, eight months, but the execution of the sentence was suspended.

The Notice of Charged Violations does not "goad" the court into imposing the suspended sentence. Based on a reasonable discussion of appellant's conduct since 2003, the notice recommends that the suspended sentence be ordered into effect.

Failure to Preserve Evidence

Appellant left eight voicemail messages for Officer Byrne. In trying to record the messages, she unintentionally erased five of them. Thus, only three messages were preserved. Appellant claims that the failure to preserve the five erased messages violated his right to due process pursuant to *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413]. But "in *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [109 S.Ct. 333, 337, 102 L.Ed.2d 281], the court held that 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" (*People v. Cooper* (1991) 53 Cal. 3d 771, 810.) There is no evidence that Byrne acted in bad faith.

Appellant contends that the trial court erroneously denied his request to exclude evidence of the five erased

messages. The contention is forfeited because it is not supported by meaningful legal analysis with citation to pertinent authority. The only authority cited is "*Morrissey*, supra, at[] p. 188," and appellant fails to explain how *Morrissey* supports his contention. *Morrissey* does not have a page 188. The correct citation is *Morrissey* v. *Brewer* (1972) 408 U.S. 471 [33 L.Ed.2d 484, 92 S.Ct. 2593].) "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 793; see also *In re Masoner* (2009) 179 Cal.App.4th 1531, 1538-1539; *In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

Absence of Express Finding that Appellant Made Telephone Calls with Intent to Annoy or Harass Another Person

After hearing the evidence the court stated, "I find that you did make repeated phone calls with the intent to annoy or harass, and to get your way and to get what you wanted, which is your pattern, repeatedly." Appellant claims that the trial court erred in failing to expressly find whether he had intended to annoy or harass "another person" as provided in section 653m, subdivision (b). But the clear implication of the court's statement is that it found that appellant had intended to annoy or harass Officers Byrne and Martinez as alleged in the Notice of Charged Violations.

Section 653m, Subdivision (b) Is Not Unconstitutionally Vague

Appellant asserts that section 653m, subdivision (b) is unconstitutionally vague. The argument was rejected in *People v. Astalis* (2014) 226 Cal.App.4th Supp. 1, 10-11. We find *Astalis* persuasive.

Allegedly Invalid Condition of Probation

The trial court's docket report shows that on September 22, 2015, the trial court granted the People's request to modify probation to prohibit appellant from contacting the Humane Society.[3] Appellant claims that this probation condition is invalid because it is not related to the crimes of which he was convicted or to future criminality. Instead, it proscribes lawful conduct. Appellant also claims that the condition is invalid because, in violation of section 1203.2, the People did not file a petition seeking modification of his probation.

The claims are forfeited because the record does not show that appellant challenged the probation condition when it was imposed. (*People v. Welch* (1993) 5 Cal.4th 228, 230, 237; *People v. Trujillo* (2015) 60 Cal.4th 850, 858-859.) The claims are also forfeited because a court reporter was present, but appellant has failed to provide a reporter's transcript of the proceedings. Without a reporter's transcript, we are unable to determine whether the court had valid reasons for imposing the probation condition or whether appellant agreed to the modification of probation. "It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal. [Citations.]" (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.)

[3] The entry in the docket report is as follows: "People's request re: probation modification is granted by the Court. The court orders probation modified as follows: Do not contact the Human[e] Society."

"De Minimis" Violation

Appellant contends that leaving two voicemails with the Humane Society "which contained no threats of violence is a de minimis violation, which - especially as a first time violation of probation - is undeserving of the imposition of the executed sentence." Appellant was found in violation of probation not only because he had contacted the Humane Society, but also because of the voicemail messages he had left with the probation officers. These messages cannot be characterized as a "de minimis" violation of probation.

Probation Conditions Were in Effect When Appellant Broke the Window in the Door of His Jail Cell

Before appellant broke the window in the door of his jail cell, his probation had been summarily revoked. Appellant argues that the summary revocation meant that his probation conditions were no longer in effect. Thus, the breaking of the window did not violate probation.

We disagree. "Summary revocation of a defendant's probation is simply a device by which the defendant may be brought before the court and jurisdiction retained before formal revocation proceedings commence. [Citation.]" (*People v. Bowen* (2004) 125 Cal.App.4th 101, 107.) After summary revocation, a defendant is still required to comply with the terms and conditions of his probation. (*Id*. at pp. 107-108; *People v. Lewis* (1992) 7 Cal.App.4th 1949, 1955-1956; *People v. Barkins* (1978) 81 Cal.App.3d 30, 32-33.)

Sufficiency of the Evidence: Violation of Section 4600(a)

Section 4600, subdivision (a) provides that it is a crime to "*willfully and intentionally* break[] down, pull[] down, or otherwise destroy[] or injure[] any jail, prison, or any public

property in any jail or prison . . . ." (Italics added.) Appellant claims that the evidence is insufficient to show that he "willfully and intentionally" broke a window in the door of his jail cell. The claim is based on appellant's statement at a disciplinary hearing that he had "'just freaked out.'"

Substantial evidence supports the trial court's finding that appellant "intentionally damaged jail property." Appellant told Deputy Nunes that "he broke the window because he wanted to get [the deputy's] attention."

Prosecutor's Relevance Objection

Appellant testified that, upon his incarceration in the county jail, he had been deprived of medications that he had been taking for the past 18 years. The trial court sustained the prosecutor's relevance objection to defense counsel's question whether, as a result of this deprivation, appellant had "suffer[ed] withdrawal." Appellant claims that the trial court erred.

"'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Appellant states, "[W]hether or not [he] was suffering the effects of withdrawal is directly relevant to whether he willfully and intentionally broke the jail glass [window]." This conclusory statement is insufficient to show that the trial court erred. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408 ["conclusory claims of error will fail"].) Appellant fails to explain how his experiencing the effects of withdrawal would have a tendency in reason to prove that he did not willfully and intentionally break the window in the door of his jail cell.

Moreover, appellant forfeited the claim of error because in the trial court he did not make an offer of proof and

"[t]he substance, purpose, and relevance of the excluded evidence was [not] made known to the court by the questions asked . . . ." (Evid. Code, § 354, subd. (a); see *People v. Lightsey* (2012) 54 Cal.4th 668, 727 ["We cannot conclude the trial court abused its discretion by sustaining the objection to this question when defendant made no offer of proof at trial explaining why the witness should have been permitted to answer the question"]; *People v. Whitt* (1990) 51 Cal.3d 620, 648 ["the 'offer-of-proof' requirement gives the trial court an opportunity to change its ruling in the event the question is so vague or preliminary that the relevance is not clear"].)

The Trial Court Exercised Its Discretion

Appellant maintains that the trial court failed to exercise its discretion whether to reinstate or terminate probation. (See *People v. Bolian* (2014) 231 Cal.App.4th 1415, 1421 ["The decision whether to reinstate probation or terminate probation (and thus send the defendant to prison) rests within the broad discretion of the trial court"].)

""The general rule is that on a silent record the "'trial court is presumed to have been aware of and followed the applicable law"' when exercising its discretion.' [Citations.] [Appellant] has failed to carry his burden to show the [trial] court failed to exercise its discretion and we must presume it did. [Citation.]" (*Ruelas v. Superior Court* (2015) 235 Cal.App.4th 374, 383.)

Disposition

The order revoking probation and imposing the previously suspended prison sentence of eight years, eight months is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Nancy Ayers, Judge

Superior Court County of Ventura

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