C E R T I F I C A T E O F T R A N S M I T T A L

L.A. Superior Court Central

Appellate

THE PEOPLE VS. KEVIN PERELMAN	BR053990

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- no rebuttle against most important charges
5 yrs prior terrance ran up to me working with Karine Echigian saying I sued his mail box shut
Paid Off by Psych Community

A copy of the following:

( ) Order of this Date
( ) Memorandum Judgment
( ) Order Appointing Counsel
( ) Order Dismissing Appeal
( ) Notice Fixing Brief Dates
(✓) Opinion
( ) Order Denying Rehearing/Certification
( ) Order RE Continuance
( ) Remittitur
( ) Notice Setting Cause for Hearing

has been transmitted to above named parties (✓) and trial court ~~appeal clerk~~ Judge.

Dated: AUG 2 2 2019

By _____, Deputy

APPELLATE DIVISION OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KEVIN PERELMAN, Defendant and Appellant.	BR 053990 Van Nuys Trial Court No. 7VW04099 **OPINION**

INTRODUCTION

Defendant Kevin Perelman was convicted of making a criminal threat (Pen. Code, § 422, subd. (a))[1] based on an incident that occurred on May 18, 2017; battery (§ 242) based on an August 18, 2017, incident; unlawfully distributing handbills (L.A. Mun. Code (LAMC), § 28.01(a)) on September 20, 2017; unlawfully depositing handbills on a street, sidewalk or park (LAMC, § 28.01.1(b)) on March 21, 2017 through March 6, 2018; and two counts of creating a public nuisance (§ 370), on March 21, 2017 through August 2, 2017, and August 3, 2017 through September 20, 2017, respectively.[2] On appeal, defendant contends the judgment should be reversed because the court misinstructed the jury and because ordering that defendant

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

[2]Three counts of unlawfully depositing rubbish on a city street (LAMC, § 66.25) were dismissed on the People's motion in the furtherance of justice (§ 1385) prior to the start of trial.

admission of Guilt not true - Cover up posts from website before trial

serve 120 days in jail as a condition of probation constituted cruel and unusual punishment. Defendant also contends the prosecutor committed misconduct by vouching for the credibility of a witness. As discussed below, we affirm.

FACTS

Linda C.[3] (Linda) testified that she lived near defendant's condominium complex on Burbank Boulevard in Woodland Hills. From March 2017 to March 2018, she saw "hundreds" of defendant's business cards strewn "all over [the] neighborhood, inside my complex, outside my complex. Around the parks."[4] Linda saw defendant's cards "almost every day"—in alleys, on sidewalks, in the street, on cars—and was "always picking them up." She observed neighbors picking up cards as well. Linda once saw defendant throw "hundreds" of cards from his car on a windy day, making a "mess" and creating a "danger" from cards "flying all over the place" on a "busy street."

Brittany D. (Brittany) testified she also saw "trails of . . . [defendant's] business cards [that went] around the block." They were "all over" the neighborhood. She saw the cards left on cars "almost every day" from 2016 until July 2017, when she moved away from the neighborhood.

Los Angeles Police Department (LAPD) Officer Charles Dinse, a senior lead officer responsible for crime prevention in his assigned area, testified that he received numerous complaints about defendant's cards—i.e., that they were "all over" the area of defendant's condominium complex, as well as shopping centers and parks. On May 18, 2017,[5] while responding to an emergency call from the victim of defendant's criminal threat charge, Dinse observed "well over 100" of defendant's cards on cars and on the street. LAPD Officer Brent Rygh, a senior lead officer assigned to an area near Dinse's area, testified he saw more than

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[3]See California Rules of Court, rule 8.90.

[4]The cards stated: "www.KevinPerelmanTarget.com [¶] World wide [*sic*] campaign to remove me from society since childhood [¶] For Detailed Situations [¶] KevinPerelmanTarget.wordpress.com."

[5]All further unspecified dates are in 2017.

1,000 of defendant's cards on more than 25 occasions, on the streets near defendant's condominium complex, on cars, and on sidewalks.

Terrance S. (Terrance) testified he lived in the same condominium complex as defendant. Terrance was 75 years old, suffered from post-traumatic stress disorder (PTSD) due to his service in the army, and was taking "anger management classes." On May 18, Terrance saw defendant in the middle of the street "throwing these cards down." The cards were "everywhere" on the street and sidewalk. After defendant left, Terrance collected a "big handful" of "over 50" cards, leaving over 50 still lying on the street and sidewalk. Terrance took the cards to defendant's condominium, knocked on the door, rang the doorbell, then dropped the cards onto defendant's patio. Five minutes later, defendant approached Terrance and another neighbor on the sidewalk and asked if they "d[id] that." Defendant then walked in the middle of the street and started throwing or dropping cards on the ground. Terrance approached him and said "you can't do this," to which defendant responded, "If you try to do this one more time, I will slice you open." Terrance was afraid and believed the "bigger" and "stronger" defendant "meant it." He called 911 to report the threat.

Bailey B. (Bailey) also lived in the area of defendant's condominium complex, and he saw "thousands" of defendant's business cards in "various places all over the town," on sidewalks and driveways, on car windows, in parks, and on the ground. The cards were "all over the neighborhood all the time."

On August 18, at about 6:00 p.m., Bailey saw defendant throwing business cards on the street and placing them on car windows. As he approached defendant, Bailey saw him leave "dozens" of cards in a trail about 50 feet long and asked him to stop "littering." Defendant became animated and aggressive and "started ranting and raving." Bailey continued to ask defendant to stop littering, but defendant advanced toward Bailey and punched Bailey on the side of his face. The blow landed on his chin with such force that it knocked Bailey's glasses off and the two men fell to the ground. Defendant got on top of Bailey and continued to punch and grab him until Bailey finally restrained defendant with a headlock. After they both stood up, defendant swung his camera at Bailey, grazing his arm. Defendant fled and, a few minutes

later, while Bailey was on the phone with the 911 operator, he saw a car with defendant's web address or "logo" on the side speed away.

Defendant testified that, for a period of years, he operated a website that described a worldwide conspiracy against him and that his intent was to "create awareness of what [wa]s going on and explain that everything these people ha[d] been told [wa]sn't true about [him]." Defendant believed "literally" half the world knew where he lived and used "cryptic tactics and messages" to provoke him. Defendant did not operate the website for business purposes and "[couldn't] imagine how [he could] make money" off the site's operation. He never had any commercial advertising on the site. To let the world know about the conspiracy against him, defendant had business cards printed which contained his name and the address of his website. He distributed the cards to have individuals review his website and the information about the conspiracy. He distributed the cards by offering them to individuals, placing them on cars and at locations, including sometimes on the ground, where individuals would see them, pick them up, and then go to his website. Defendant admitted to printing and dispensing about 150,000 cards in the neighborhood in the preceding five to six years.

Defendant testified that Terrance was yelling at him when he went for a walk, and Terrance told him, "'You get back in your house.'" Defendant responded, "not super angry but sternly saying, 'If you don't let me take a walk, I will cut you down.'" Defendant claimed he only meant to tell Terrance, "Leave me alone. Get away from me. I don't want to hurt you. I'm trying to take my walk."[6]

DISCUSSION

Instructional Error

"We review de novo whether jury instructions state the law correctly. [Citation.]" (*People v. Jackson* (2010) 190 Cal.App.4th 918, 923.) "[A] trial judge must only give those instructions which are supported by substantial evidence. [Citations.]" (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.)

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[6]Defendant also testified, in essence, that he only struck Bailey in self-defense.

Defendant argues the court misinstructed the jury as to the charges of distributing handbills (LAMC, § 28.01(a)) and depositing handbills on a street, sidewalk or park (LAMC, § 28.01.1(b)). We find no instructional error.

LAMC section 28.01 provides, in relevant part, "(a) No person shall . . . throw, place or attach any handbill to or upon any vehicle. [¶] (b) For the purposes of this section, there shall be a presumption that the business, commercial activity or person whose name appears on any handbill so thrown, placed or attached, threw, placed or attached such handbill, or caused or directed that such handbill be thrown, placed or attached to or upon any vehicle. . . ." LAMC section 28.01.1, subdivision (b), provides, "No person shall cast, throw or deposit any tip sheet or hand-bill onto any street, sidewalk or park." "Handbill" is defined in LAMC section 28.00, which provides as follows: "'Hand-bill' shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

The prosecutor's theory of the case was that defendant violated LAMC section 28.01, subdivision (a), by placing his cards on vehicles, and violated LAMC section 28.01.1, subdivision (b), by strewing his cards on sidewalks and streets.

Regarding LAMC section 28.01, the court instructed the jury that, "[t]o prove that the defendant is guilty of this crime, the People must prove that the defendant distributed or caused or directed the distribution of any handbill to passengers on any street car, placed or attached any handbill to or upon any vehicle." The court also informed the jury that a "handbill" was "a commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice, or other written, printed, or painted matter calculated to attract attention to the public."[7] Regarding LAMC section 28.01.1, the court informed the jury that, to "prove that the

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[7]The court also added, "For the purposes of this section, there shall be a presumption that the business, commercial activity or person whose name appears on any handbill so thrown, placed or attached, threw, placed or attached such handbill, or caused or directed that such handbill be thrown, placed or attached to or upon any vehicle. Said business, commercial activity or person may rebut the foregoing presumption by the presentation of competent evidence that it, him or her did not cause or direct that any handbill be thrown, placed or attached to or upon any vehicle. [*Sic.*] [¶] In lieu of the use of this presumption, criminal liability may be established by direct evidence that the business,

defendant is guilty of this crime, the People must prove that, one, the defendant cast, threw, or deposited any handbill onto any street, sidewalk, or park."

The court's instructions virtually mirrored the LAMC. The instructions were not erroneous.

Defendant maintains that the court's instructions were in error because they failed to inform the jury that a "handbill" only includes cards and papers distributed and deposited for commercial purposes. He argues the statutes were intended to apply only to commercial endeavors and contends the court should have added to the instructions text he proposed as a special defense instruction, which read: "An item that is not for a commercial or business purpose does not constitute a handbill. [¶] *Or in the alternative* [¶] An item that is not for a commercial or business purpose but is distributed for the purpose of engaging in free speech does not constitute a handbill." (Original italics.)

We disagree that the statutes only apply to commercial "handbills." We thus conclude the court did not err in failing to provide the defense instructions.[8]

"To determine legislative intent, the court's first step in statutory construction is to 'look to the words themselves, giving them their ordinary meanings and construing them in context.' [Citation.]" (*People v. Salas* (2017) 9 Cal.App.5th 736, 742.) The definition of a handbill under LAMC section 28.00 includes "commercial advertising circular" among its list of specified items that comprise the category, but that is the only item qualified by the word "commercial" or "business." Further, the catchall item at the end of the list—i.e., "or other written, printed or painted matter calculated to attract attention of the public"—indicates the defining characteristic of the items on the list is not whether they are "commercial" but whether they are designed to attract public attention. In addition, the presumption portion of LAMC section 28.01 refers to "a presumption that the business, commercial activity *or person* whose

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commercial activity or person whose name appears on the handbill caused or directed that such handbill be thrown, placed or attached to or upon any vehicle."

[8]Defendant does not develop an argument as to why, if the statutes applied to non-commercial distribution and depositing of handbills, his special instruction should have been given.

name appears on any handbill [is the one that distributed the item]," exhibiting an intent not to confine the law to only business or commercial activity.

Defendant points to notes which follow LAMC section 28.01, which include the following: "The freedom of press guaranteed by the First Amendment of the Federal Constitution, and made applicable to the states by the Fourteenth Amendment has no application to the distribution of hand-bills on the streets for purely commercial advertising," and "[a] City ordinance making it unlawful to deposit advertising matter in or on motor vehicles parked on streets does not violate the constitutional guaranties of freedom of speech and of the press, and does not constitute an arbitrary and unreasonable restraint on the conduct of a lawful business." The notes reflect a concern that the code section does not run afoul of the protections afforded the exercise of free speech for "commercial advertising" under the First and Fourteenth Amendments. However, defendant cites no authority that the LAMC notes can be consulted to override the statute's clear text. (See *People v. Foote* (2001) 91 Cal.App.4th Supp. 7, 12 ["A failure to cite any relevant authority in support of an assertion results in a waiver of the right to appellate review of that assertion"].) Because the text of the statute is clear, we apply it as written. (See *People v. Cornett* (2012) 53 Cal.4th 1261, 1265 ["[t]he plain meaning controls if there is no ambiguity in the statutory language"].)

Defendant argues the court erred in instructing the jury as to defendant committing a public nuisance, in violation of section 370, because the court did not provide the jury with a second proposed special jury instruction he gave to the court. We reject the argument.

The court instructed the jury, "To prove the defendant is guilty of this crime, the People must prove . . . : [¶] One, that [defendant], by acting or failing to act, created a condition that was harmful to health or was indecent or offensive to the senses or was an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property or unlawfully obstructing the free passage or use in a customary manner of any navigable lake or river, bay, stream, canal, or basin, or any public park, square, street, or highway, or was a fire hazard to a person's property. [¶] Number 2, the condition affected a substantial number of people at the same time. [¶] Number 3, that an ordinary person would be reasonably annoyed

or disturbed by the condition. [¶] Four, that the seriousness of the harm outweighs the social utility of [defendant]'s conduct. [¶] Five, that the community did not consent to [defendant]'s conduct. [¶] Six, . . . that [defendant]'s conduct was the substantial factor in causing harm to the community."

Defendant's proposed instruction stated, "The exercise of free speech cannot be considered injurious to health, or be indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, to constitute being a public nuisance."

The court did not misinstruct the jury by failing to provide the defense instruction. The bulk of the language that makes up defendant's instruction simply repeated the definition of public nuisance set forth in section 370. Also, as with the handbill-related offenses, defendant elected to recast the offense so that the required harm could not be established by anything resulting from the exercise of "free speech" (a term he left undefined). This approach to the use of jury instructions to recast the statute to exclude the conduct for which he was charged as protected under the First Amendment appears to have no support in the law; at any rate, defendant cites none. (See Cal. Rules of Court, rule 8.883(a)(1)(A) [points in briefs must be supported by argument].)

The trial court did not err in failing to provide defendant's special instruction because it was an incorrect statement of the law. "[A] trial court may refuse a proffered instruction if it is an incorrect statement of law . . . . [Citation.] Instructions should also be refused if they might confuse the jury. [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 659; see *People v. Hendricks* (1988) 44 Cal.3d 635, 643 [in which the court "expressly and correctly followed the

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long settled rule that an instruction that may confuse the jury should not be given"].) The court correctly refused to provide the instruction because it was repetitive and confusing.[9]

Vouching

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."' [Citations.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298.) "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 971.)

Defendant argues the prosecutor improperly vouched for Terrance, the person who testified about defendant's criminal threat against him, because the prosecutor said during

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[9]Defendant in his opening brief includes citations to appellate opinions with regard to the First Amendment's protection of the distribution of leaflets for commercial and non-commercial purposes, but he fails to develop an argument as to whether the statutes with which he was charged, either on their face or as applied, were unconstitutional. (See Cal. Rules of Court, rule 8.883(a)(1)(A).) Also, although defendant includes in portions of his brief the contention that the trial court erred in denying his section 1118.1 motion, he does not develop any argument as to why the evidence was insufficient. Instead, defendant merely sets forth his contentions that the court misinstructed the jury, and in his appellant's reply brief he appears to disavow making any section 1118.1 argument by stating that "[t]he thrust of [defendant's] argument is that the jury was misinstructed on the law." To the extent defendant maintains reversal is warranted due to the denial of the section 1118.1 motion, we conclude the argument was forfeited, and if not forfeited, we find there was substantial evidence supporting the convictions.

closing argument that Terrance was "one of the more brutally honest witnesses I have ever come across . . . ." We find no reversible error.

When the prosecutor made this comment, defendant objected on the ground of "vouching for a witness," and the court overruled defendant's objection. But, the court immediately told the jury, "Let me add this. Ladies and gentlemen, the prosecutor's opinion as to the veracity of the witness does not matter or her opinion as to how this witness compares to anybody else in any other case doesn't matter. Disregard it." The prosecutor then explained that her point was that Terrance testified candidly about his personal issues, including his PTSD due to his military service and his undergoing anger management.

Even assuming the prosecutor's comment as to Terrance being "brutally honest" constituted vouching, reversal is unwarranted because it is not "reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.]" (*People v. Riggs*, *supra*, 44 Cal.4th at p. 298.)

Terrance testified he told defendant (with respect to depositing cards on the street) "you can't do this," and defendant responded, "If you try to do this one more time, I will slice you open." Defendant in his testimony did not deny he made this statement. Defendant admitted to threatening Terrance by telling him, "If you don't let me take a walk, I will cut you down." Moreover, the court instructed the jury immediately after the prosecutor's comment to "[d]isregard it," telling the jury "the prosecutor's opinion as to the veracity of the witness does not matter." We presume the jury followed the court's instruction. (See *People v. Thomas* (2012) 53 Cal.4th 771, 832.)

Cruel and Unusual Punishment

The court suspended imposition of sentence as to all of the counts, and placed defendant on probation for 36 months. As a condition of probation on the criminal threat conviction, the court ordered defendant to serve 30 days in jail, consecutive to 90 days in jail imposed as a probation condition on the battery charge. The court also ordered that defendant complete 52 weeks of mental health treatment through the Los Angeles County Department of Mental Health and to stay away from and have no contact with Terrance, Bailey, Linda, and Brittany.

I never said anything about punishment except befor trial on website in regards to worldwide torture ops

Defendant on appeal argues the sentence should be reversed because requiring him to serve 120 days in jail constituted unconstitutional cruel and unusual punishment. Defendant forfeited this argument by failing to raise the issue in the trial court. (See *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) However, to forestall a claim of ineffective assistance of counsel due to not asserting the issue in the trial court, we exercise our discretion to consider the argument. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7; *In re Victor L.* (2010) 182 Cal.App.4th 902, 928.)

Cruel and unusual punishment is prohibited by the Eighth Amendment to the United States Constitution.[10] With respect to a custodial sentence, "'the Eighth Amendment contains a "narrow proportionality principle," that "does not require strict proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime."' [Citation.]" (*In re Coley* (2012) 55 Cal.4th 524, 542 (*Coley*); see *Graham v. Florida* (2010) 560 U.S. 48, 59-60; *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1076.)

In assessing a claim of cruel and unusual punishment, "'[a] court must begin by comparing the gravity of the offense and severity of the sentence. [Citation.] "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [Citation.] If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual. [Citation.]' [Citation.]" (*Coley*, *supra*, 55 Cal.4th at p. 542.) Successful challenges based on gross disproportionality are "'exceedingly rare'" and are found only in an "'extreme'" case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73.)

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[10]Defendant's appellate counsel enumerated in his briefs that only the Eighth Amendment was violated. Therefore, we do not consider whether the sentence violated the California Constitution's bar to "cruel or unusual punishment." (Cal. Const., art. I, § 17.)

We conclude there was no disproportionality. With respect to the gravity of the offenses, a violation of section 422, subdivision (a), occurs when a person "willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out . . . ." Here, defendant willfully threatened to "slice" or "cut" Terrance—a crime that would result in great bodily injury, and 30 days in jail for making a criminal threat is not "grossly disproportionate" to the offense. (See *Coley*, *supra*, 55 Cal.4th at p. 542.)

A violation of section 242, subdivision (a), is proved when a person commits "any willful and unlawful use of force or violence upon the person of another." Bailey approached defendant and asked him to stop littering, and defendant threw a punch at Bailey and hit him in the chin. As with the 30-day incarceration on the criminal threat charge, 90 days in the county jail for the battery in this case cannot be construed as "grossly disproportionate."

Defendant argues that he should have been sentenced to undergo mental health treatment rather than being incarcerated. But, the trial court determined both incarceration and mental health treatment were warranted, and defendant has not shown that determination resulted in cruel and unusual punishment.

DISPOSITION

The judgment is affirmed.

Ricciardulli, J.

We concur:

P. McKay, P. J.

Richardson, J.