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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MICHAEL PATRICK KELLY, Defendant and Appellant.	2d Crim. No. B296697 (Super. Ct. No. 2016037654) (Ventura County)

Michael Patrick Kelly appeals a judgment following his conviction of false personation of another (Pen. Code, § 529, subd. (a)(3)[1]) (count 1), unauthorized use of personal identifying information of another (§ 530.5, subd. (a)) (count 2), and disobeying a court order (§ 166, subd. (a)(4)) (count 3). The court placed Kelly on formal probation for 36 months and ordered him to serve 180 days in county jail. We conclude, among other things, that: 1) the workplace violence restraining order (Code

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

Civ. Proc., § 527.8) issued against Kelly was not overbroad, and 2) Kelly's conduct violated sections 529 and 530.5. We affirm.

FACTS

Kelly was a Thousand Oaks "independent investment advisor" who had a contract with Charles Schwab Co., Inc. (Schwab). He was not a Schwab employee. Schwab terminated the contract. Kelly filed an arbitration claim against Schwab with the Financial Institutions Regulatory Authority (FINRA).

On March 12, 2013, Schwab filed a petition for workplace violence restraining order against Kelly. It said, "[Kelly] has engaged in a campaign of harassment, threats, and intimidation against Schwab and its employees that is escalating in nature . . . ."

Arden Miller, the director of Schwab's legal department, testified his office is in Phoenix, Arizona. He called Kelly to advise him that Schwab was terminating the contract with Kelly's firm. He told Kelly the contract permitted Schwab to terminate that business relationship "at any time." During a subsequent phone conversation, he told Kelly not to talk to Schwab employees. Kelly had to contact Kevin Lewis of the Schwab legal department who was handling Kelly's FINRA claim.

In March 2013, Kelly placed letters addressed to Miller on his car at his office and on his door at his home. His home is 31 miles away from the office.

In the letters Kelly said, among other things, "I know exactly . . . what you do for Charles Schwab. And I know you have what I need. You have the smoking gun, Arden, and I need to get it." The letters ended by Kelly stating, "There are two ways this can go, Arden, you can call or e-mail me anonymous,

outside the reach of your employer. . . . We can arrange for transfer of the evidence. Two, you can kick me to the side of the road, turn this over to the Schwab attorneys *and hide*." (Italics added.)

Miller was "fearful" because of the threat that he should "hide." He contacted law enforcement. He believed the letters were "a credible threat of violence." He was concerned that Kelly, or someone working on his behalf, "traveled all the way from California to Arizona to stake out [his] home and car and leave threatening letters." He had not given Kelly his home address. He had not told Kelly what type of car he drove. Miller learned that in another case "[a] restraining order . . . issued against [Kelly] for threatening to ring the life out of someone." Miller was not involved in the decision to terminate Kelly's contract. He was concerned for those at Schwab who were involved in that "process."

Lewis told Kelly to communicate with him, not with Schwab employees. Kelly ignored him and sent a "threatening email" to eight members of Schwab's senior management team. Lewis testified those emails were "unsolicited" and "harassing." Kelly's communications with Lewis contained "veiled threats." Lewis said Kelly had no "legitimate reason" to contact either Schwab's senior management or "other Schwab employees." Kelly had no accounts with Schwab, no current contractual relationship, and "no reason to contact the company."

On April 26, 2013, the trial court issued a workplace violence restraining order against Kelly with an April 25, 2016, expiration date. It ordered Kelly to "stay at least 100 yards away from any of Schwab's offices." It prohibited him from "initiating" contact or "communicating with any current Schwab employee,

except for peaceable conduct required to conduct a deposition or appear at other legal proceedings involving Schwab employees as allowed in the appropriate forum."

Kelly had an arbitration case against Schwab. In 2014, Kelly knew that the workplace violence injunction was in effect, which prohibited him from contacting Schwab employees. He decided to contact Schwab without using his own name. He used the name "Craig Cross." Cross was "a powerful advisor with a firm of approximately four billion under management." Cross did not use Schwab as a "broker, dealer, and custodian." He "used Fidelity."

Kelly contacted James New at Schwab, pretending to be Cross. He told New that "confidentiality" was important. During a phone conversation with New, Kelly obtained the name of another Schwab employee – Jonathan Beatty. Kelly sent emails to Beatty pretending to be Cross. He created a "Gmail address" using Cross's name.

Beatty, a Schwab senior vice president, met with Kelly at a restaurant. Kelly, pretending to be Cross, said he was considering leaving his firm Halbert Hargrove and starting a new firm. He would take his clients from his current firm and have Schwab be their custodian and transfer assets to Schwab. Kelly wanted to obtain information about advisors who had contracts with Schwab who had compliance issues. Believing Kelly was Cross, Schwab provided confidential information to Kelly about the names of advisors with compliance issues.

Kelly met Beatty again at a restaurant in Long Beach in October 2014. Beatty asked, "What's this all about?" Kelly said, "It's not what this is all about. It's a matter of how much money your company's gonna pay to keep this information secret."

Beatty said, "We're not gonna have that conversation" and walked away. Beatty testified this was "an attempt to try to extort money [from Schwab]."

Cross did not give Kelly permission to use his name, his job title, or his company's name, Halbert Hargrove, "for any purpose." He did not know Kelly. Cross did not contact New or Beatty. In 2017, he discovered that his name was being used without his permission when he received a call from the police.

Kelly testified he believed Schwab would provide information to Cross that it would not provide to him. He used Cross's name because he "met the profile" to "get inside" Schwab.

Kelly testified he "did everything [he] could to put a moat around Mr. Cross." "I didn't want to hurt him." He stressed "confidentiality" so the Schwab employees he contacted "wouldn't reach out to [the real Cross]." He believed Schwab had different standards for firms based on the amount of money the firms had under management. As part of arbitration, he deposed two people from Schwab. He did not believe they provided him with the information he was seeking. Kelly testified his goal was "to determine how [Schwab] terminated advisors." He believed his firm's small amount of money under account management was related to why Schwab terminated the contract.

Kelly pretended to be Cross to contact Michelle Thetford at Schwab and to investigate Schwab's "compliance policies and protocols." He used the information he obtained from Schwab for his litigation. He did not threaten Beatty or Thetford. In his October meeting with Beatty, he told him he had information "direct from three large advisors of compliance issues that Schwab never reported to the [Securities and Exchange

Commission (SEC)] and that Schwab bullies small advisors and then doesn't disclose [violations by] the big advisors."

The police contacted Kelly and asked whether he had been using Cross's name in his contacts with Schwab. Kelly denied that he used Cross's name. He testified that he had lied to the police by making that denial.

The jury returned guilty verdicts on the three charged counts of false personation of another, unauthorized use of personal identifying information, and disobeying a court order. Kelly filed a new trial motion claiming the restraining order "was unconstitutionally overbroad." The trial court denied the motion. It ruled it had authority to rule on the validity of the restraining order issued by another judge in 2013. It found the restraining order was not overbroad. It was narrowly tailored to fit the circumstances.

DISCUSSION

An Overbroad Workplace Violence Restraining Order

Kelly contends the workplace violence restraining order (Code Civ. Proc., § 527.8), which prohibited him from contacting any Schwab employee, was "unconstitutionally overbroad," and therefore counts 2 and 3 must be reversed. We disagree.

Code of Civil Procedure section 527.8, subdivision (a) provides, "Any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an order after hearing on behalf of the employee *and, at the discretion of the court, any number of other employees* at *the workplace*, and, if appropriate, *other employees* at other workplaces of the employer." (Italics added.)

Kelly does not challenge that his threats against some Schwab employees authorized a restraining order against him. He claims, "In this case, the *threat of violence was limited to two employees* of a company that employed 1,300 people." He concedes that "an order preventing [him] from contacting any Schwab employee *guaranteed that no Schwab employee would be subject to violence or a threat of violence,*" but he argues the order was "much broader in scope" than necessary and unconstitutional. (Italics added.)

Threats of violence fall outside the scope of the constitutionally protected rights of free speech and association. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1112.) Consequently, "if the elements of [Code of Civil Procedure] section 527.5 are met," the type of speech that is properly enjoined under that statute "is not constitutionally protected and an injunction is appropriate." (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 537.)

Kelly notes that because the restraining order was an underlying factor in two of the charged offenses, the validity of that order is a relevant issue. (*People v. Gonzalez* (1996) 12 Cal.4th 804, 808, 816.) The constitutional rights of an enjoined party may be violated where an injunction unnecessarily restricts the right to make lawful contact with others or is overbroad. (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1161; *In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

The restraining order lists three protected people by name – Arden Miller, Karen Miller and Kevin Lewis. With certain exceptions, it prohibits Kelly from initiating contact "with any current Schwab employee."

Kelly suggests the employees he did not contact may not receive the protection of the injunction. We disagree.

The statute vests discretion in the trial court to extend protection to "any number of other employees." (Code Civ. Proc., § 527.8, subd. (a).) The goal is to allow the employer to protect the workplace. "[A]n employer subjected to generalized threats of workplace violence may obtain relief under section 527.8 on behalf of an employee who is a logical target of the threats, *even if the employee was not specifically identified by the harasser*." (*USS-Posco Industries v. Edwards* (2003) 111 Cal.App.4th 436, 438, italics added.) Where some employees and their employer are threatened, courts have issued injunctions to protect all the employees, not just the ones who received the threats or interacted with the harasser. (*In re M.B.* (2011) 201 Cal.App.4th 1057, 1062 [the order listed "[a]ll employees and staff" of a public agency to be protected by the injunction].) "The content of a threat does not define the scope of the injunction." (*City of San Jose v. Garbett*, *supra*, 190 Cal.App.4th at p. 545.) The statute authorizes the court to prevent the person who made threats from contacting or coming "within a specified distance of" a workplace. (Code Civ. Proc. § 527.8, subd. (b)(6)(A).)

The People contend Kelly's threatening behavior was not confined to the three people identified as protected people in the restraining order. They claim he engaged "in an escalating threatening course of conduct directed toward Schwab employees" and the trial court could reasonably infer the current Schwab employees needed protection. We agree.

In its petition for a workforce violence restraining order, Schwab said Kelly had engaged in an escalating "campaign of harassment, threats, and intimidation against Schwab and its

employees." Miller testified about his fear because of Kelly's threat, but he was also concerned about the safety of the other Schwab employees who were actually involved in the decision to terminate Kelly's contract. Lewis said, "After initiating the FINRA arbitration, Kelly attempted on multiple occasions to communicate 'confidentially' with Schwab employees," even though he knew "Schwab was represented by counsel." Lewis told him to communicate only with him. Kelly responded by sending a "*threatening email* to members of Schwab's *senior management team*, including Charles Schwab, Walter Bettinger, Jay Allen, Bernard Clark, Carrie Dwyer, Lisa Hunt, Joseph Martinetto and James McCool . . . ." (Italics added.) Those emails were "unsolicited" and "harassing," and Kelly's communications with Lewis contained "veiled threats."

The trial court properly extended protection to Schwab's current employees. It could reasonably infer Kelly had a pattern of targeting a wide range of individuals. It found that in a prior case there was a "similar civil harassment proceeding" brought against Kelly. Lewis testified that in that case Kelly had "threatened to take physical violence" against an attorney because Kelly had "lost a motion." Lewis declared that a FINRA arbitration proceeding involving Kelly and Schwab had to be cancelled. He said, "[I]t is my belief that FINRA refused to hear the case *due to safety concerns* based on *Mr. Kelly's behavior towards FINRA and the arbitration panel*." (Italics added.)

The trial court found Kelly was not "truthful" in his opposition to the restraining order. Because of that, it did not "have a good feeling about what might happen in the future." Kelly placed "threatening letters" on Miller's car at his Schwab office and on his door at his home. Lewis testified this was "very

worrisome" because Kelly took "the time to track down where one of [their] employees lives, and to find their car and place information on them that is threatening." The range of his threats was not confined to Schwab offices in California. Miller lived in Arizona and his Schwab office was in Phoenix. The court found Kelly was not able to "restrict [himself] from crossing certain [borders] that most people are able to do." Kelly "engaged in a course of conduct [that] . . . Schwab should not have to deal with."

There are cases where an injunction prohibiting all contact with an entire workforce may be overbroad. (*Balboa Island Village Inn, Inc. v. Lemen*, *supra*, 40 Cal.4th at p. 1161.) In *Balboa Island*, the court ruled that an injunction that prohibited "any type of contact with a known Village Inn employee" was broader than necessary. (*Ibid.*) Injunctions should not exceed the necessary scope of protection. An order that "imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of [the order]." (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

The People claim the restraining order "was properly tailored to not infringe on [Kelly's] rights." We agree.

The trial court questioned Kelly to make sure the restraining order would not interfere with Kelly's right to contact "friends" or "relatives" at Schwab. Kelly told the court, "I have no friends working at Schwab." The court also was properly concerned that the order not restrict Kelly's right to conduct business. From Lewis's testimony, it could reasonably infer Kelly had no current business accounts or business associates at Schwab, and no reason to contact that company for business purposes. Lewis testified Kelly had no "legitimate reason" to

contact Schwab "senior executives" or "other Schwab employees." "They have no relationship with him or his business." Kelly had no accounts with Schwab, no contractual relationships, and "no reason to contact the company." The court asked Kelly, "Why should you be allowed to go within a hundred yards of the Schwab offices?" In response Kelly did not provide a single business-related reason. He merely said he "could stumble within a hundred yards of a Schwab office" by accident or because he would not know the location of the Schwab offices. But the court assured him that he could not be held in contempt for such accidental contacts.

Moreover, the restraining order did not prohibit all contact between Schwab employees and Kelly. Schwab employees could contact Kelly. The order only prohibited him from "initiating" that contact. The order allowed him to contact Schwab employees for legal proceedings. It provided, "Peaceful written contact through a lawyer or a process server or other person for service of legal papers related to a court case is allowed and does not violate this order." Kelly could "conduct a deposition or appear at other legal proceedings involving Schwab employees as allowed in the appropriate forum." Kelly claimed he was a whistle blower. But that does not include the right to violate a lawfully issued injunction. Nor does it allow one who engages in threatening conduct to claim that behavior is constitutionally protected. (*People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p. 1112.) The restraining order was valid.

False Personation of Another (§ 529)

Cross testified he did not give Kelly permission to use his name, title, or company name for any purpose. Kelly admits he "impersonated Cross." He claims he did so "to get information

from Schwab" to show it terminated contracts "with small firms for minor infractions," but would not do so for firms with "a larger amount of money under management." He contends this conduct did not violate section 529, the crime of false personation of another person (count 1). We disagree.

Under section 529, it is a crime for "[e]very person who falsely personates another in either his or her private or official capacity, and in that assumed character . . . [¶] [d]oes any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, *or whereby any benefit might accrue to the party personating* . . . ." (*Id.*, subd. (a)(3), italics added.)

Kelly claimed there was no intent to harm Cross. He said that "the [im]personation was done in a way to shield Cross from harm, and Cross testified he suffered no detriment."

Kelly claims the statute does not cover his conduct. But this statute "is framed in language reasonably susceptible of *only one interpretation*: that the Legislature sought to deter and to punish *all acts* by an impersonator that *might result in a liability or a benefit*, whether or not such a consequence was intended or even foreseen." (*People v. Rathert* (2000) 24 Cal.4th 200, 206, italics added.) "The impersonator's act, moreover, is criminal provided it *might* result in any such consequence; no higher degree of probability is required." (*Ibid.*) "[T]he word 'benefit' as used in the statute is not limited to pecuniary or material gain. The word 'benefit' denotes *any form of advantage*." (*People v. Vaughn* (1961) 196 Cal.App.2d 622, 630, italics added.)

Kelly claims Cross testified that his actions caused no detriment. But that is not entirely accurate. Cross was asked,

"Have you suffered any particular detriment based on the use of your name without permission?" Cross: "Not that I am aware of *to date*, *but we have been looking at our records*." (Italics added.) That testimony did not prevent a trier of fact from finding that there might be a detriment. His answer was not a categorical "no." He also had the detriment of having to participate in the police investigation of the use of his name and to testify in the criminal case.

Kelly also concedes that "[i]t could be argued that [his] conduct might have resulted in a benefit to him." In fact, he testified he used information he received from Schwab while posing as Cross in his litigation against Schwab. He also used it to file a SEC and report. Beatty's testimony shows he attempted to obtain money from Schwab with this information. These were benefits or "advantage[s]" he obtained by falsely claiming he was Cross. (*People v. Vaughn*, *supra*, 196 Cal.App.2d at p. 630.)

Kelly claims, however, that the statute does not include all acts of impersonation. Our Supreme Court has held section 529 "clearly was not designed to eliminate [certain] innocuous [impersonation] practices." (*People v. Rathert*, *supra*, 24 Cal.4th at p. 208.) It noted that "[t]he ancient customs of masquerade and trick-or-treating antedate, and have survived, the enactment of section 529." (*Ibid.*) The statute necessarily excludes these innocuous activities. (*Ibid.*)

Kelly claims his conduct was "innocuous" and falls within this exclusion. But the jury could find that was not the case. It could reasonably infer that Kelly deceived Beatty by using a false name and obtained confidential information from Schwab. Beatty testified Kelly made "an attempt to try to extort money [from Schwab]." Kelly testified he felt he had legitimate reasons

to communicate with Schwab employees. But the credibility of his testimony was a matter for the jury to decide, and ultimately reject. It could reject his claim that he engaged in legitimate discovery because of his pattern of conduct against Schwab before and after the restraining order. Kelly admitted he lied to the police regarding whether he used Cross's name. That showed his consciousness of guilt. Jurors could reasonably infer his impersonation provided Kelly the benefit of continuing his unlawful penetration and attack on Schwab using the unlawful means of violating a court order. His conduct did not fall outside the purview of section 529. (*People v. Rathert*, *supra*, 24 Cal.4th at p. 206.)

Use of Personal Identity Information

(§ 530.5, subd. (a).)

Kelly contends his conduct did not violate section 530.5, subdivision (a). We disagree.

The elements of this crime are: "(1) that the person willfully obtain personal identifying information belonging to someone else; (2) that the person use that information for any unlawful purpose; and (3) that the person who uses the personal identifying information do so without the consent of the person whose personal identifying information is being used." (*People v. Barba* (2012) 211 Cal.App.4th 214, 223.) "[I]t is the use of the identifying information for an unlawful purpose that completes the crime." (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 455.) Using such information to violate a restraining order is a use "for an unlawful purpose." (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 533.)

The People contend Kelly used Cross's identity without his consent to violate the restraining order.

Kelly argues his initial telephone call to Schwab was the violation of the restraining order and "[he] performed that act before he identified himself as Cross." But, as the People correctly note, his initial phone call was only the first part of a course of conduct he used to initiate contact with Schwab employees. Kelly also incorrectly assumes the initial call is the only violation of the restraining order. Kelly's testimony shows that on multiple occasions he initiated contact with Schwab employees by claiming to be Cross. He violated the restraining order each time he started conversations or emailed information to employees who would not have talked with him, or provided information, had they known his true identity.

Kelly used identity theft to penetrate Schwab. He testified he used Cross's name and title to "get inside" Schwab. His contacts with New, Beatty and Thetford were achieved because they thought Kelly was Cross. He sent emails to Beatty pretending to be Cross. He created a Gmail address using Cross's name. The restraining order prohibited this conduct.

Moreover, the trial court instructed the jury on the elements of section 530.5, subdivision (a). The statute broadly includes the use of the identifying information for "*any* unlawful purpose." (*People v. Tittotson*, *supra*, 157 Cal.App.4th at p. 533.)

Here the evidence shows Kelly used the identifying information to achieve multiple unlawful purposes. In addition to using it to violate the restraining order, he used it to deceive Beatty and Schwab and obtain confidential information from Schwab that he had no right to take by deception. It is a crime to unlawfully break into a business office to take records. Kelly achieved that result by claiming to be Cross. From Beatty's testimony, a trier of fact could reasonably infer that after

obtaining that information, Kelly attempted to obtain money from Schwab in exchange for not making that information public.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Gilbert A. Romero, Judge

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