

FILED
Superior Court of California
County of Los Angeles

MAY 29 2013

John A. ... Executive Officer/Clerk
By B. Garcia, Deputy
B. Garcia

APPELLATE DIVISION OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,)	BR 050096
Plaintiff and Respondent,)	Central Trial Court
v.)	No. 2CA04539
KELLEY LYNCH,)	
Defendant and Appellant.)	OPINION

I. INTRODUCTION

Appellant Kelley Lynch was convicted after a jury trial of five counts of violating a court order (Pen. Code, § 273.6, subd. (a))¹, and two counts of making annoying telephone calls and sending annoying e-mails (§ 653m, subd. (b)). She appeals, arguing her convictions should be reversed for numerous reasons. As discussed below, we affirm.²

II. PROCEDURAL AND FACTUAL BACKGROUND

At trial, Leonard Cohen testified that he was a singer and a songwriter and that appellant was employed as his business and personal manager for about 17 years until she was dismissed in 2004. Starting after she was dismissed, appellant called Cohen dozens of times, leaving

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

²Appellant's petition for writ of habeas corpus was denied on today's date in case No. BX001309.

1 messages on his telephone, and sending him thousands of e-mails. Many of the calls and
2 e-mails contained threats to Cohen's personal safety and profane insults directed at Cohen.
3 Because appellant moved to Colorado, Cohen obtained a court order in Colorado barring
4 appellant from contacting him, and the Colorado order was registered in California when
5 appellant moved back to California. The telephone calls and e-mails continued largely
6 uninterrupted, even after the order was registered in California.

7 Cohen saved the telephone messages and e-mails on computer disks, and provided them
8 to his lawyers and the prosecutors. Cohen identified appellant's voice in the saved telephone
9 messages, and verified the e-mails based on both the e-mail address and content. The voice
10 messages were played for the jury, and the e-mails printed and stored in binders for admission
11 into evidence. One of Cohen's lawyers and two of the prosecutor's law clerks testified
12 regarding how they obtained and compiled the disks and binders.

13 Appellant testified that she had made the telephone calls and sent the e-mails, but had
14 done so only to obtain financial information from Cohen so she could prepare her tax returns
15 regarding income she received while working for him.

16 After appellant was convicted and sentenced, she filed a timely appeal.

17 *III. DISCUSSION*

18 A. Authenticity of Exhibits

19 Appellant argues that the admitted prosecution exhibits, the computer disk-stored
20 telephone messages and the binders containing the e-mails were not authenticated and therefore
21 inadmissible. We review claims of evidentiary error for abuse of discretion. (*People v. Dixon*
22 (2007) 153 Cal.App.4th 985, 997.)

23 The authenticity of a writing is a preliminary fact that must be established by the
24 proponent of the document before it may be admitted into evidence. (Evid. Code, § 1401,
25 subd. (a).) A "writing may be authenticated by 'the introduction of evidence sufficient to
26 sustain a finding that it is the writing that the proponent of the evidence claims it is' [citation],
27 ..." (*People v. Beckley* (2010) 185 Cal.App.4th 509, 514.) We find no abuse of discretion.
28 Cohen's recognition of appellant's voice on the telephone messages and identification of

1 appellant as sender of the e-mails were sufficient to allow authentication of the messages and e-
2 mails admitted into evidence.

3 B. First Amendment

4 Appellant argues that the telephone calls she made and e-mails she sent were protected
5 by the First Amendment to the United States Constitution. We reject the argument because
6 appellant's conduct of making repeated telephone calls and sending thousands of e-mails to
7 annoy Cohen was not constitutionally protected. (See *People v. Hernandez* (1991) 231
8 Cal.App.3d 1376, 1381-1382.)

9 C. Sufficiency of Evidence Regarding Section 653m Convictions

10 Appellant argues that there was insufficient evidence to support her convictions for
11 making annoying telephone calls and sending annoying e-mails because the calls and e-mails
12 were for the legitimate business purpose of compiling information to prepare her taxes. “[W]e
13 review the entire record in the light most favorable to the judgment to determine whether it
14 contains substantial evidence—that is, evidence that is reasonable, credible, and of solid
15 value—from which a reasonable trier of fact could find the defendant guilty beyond a
16 reasonable doubt.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 701.) “‘Conflicts and
17 even testimony which is subject to justifiable suspicion do not justify the reversal of a
18 judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of
19 a witness and the truth or falsity of the facts upon which a determination depends.’ [Citation.]”
20 (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

21 Section 653m, subdivision (b) requires that repeated telephone calls be made or repeated
22 e-mails be sent with the intent to annoy and not in the ordinary course and scope of business.
23 There was substantial evidence to support appellant's convictions of violating this section based
24 on the number and annoying content of the calls and e-mails. It was within the province of the
25 jury to disbelieve appellant's testimony that the calls and e-mails had a legitimate business
26 purpose.

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1 D. Denial of Continuance to Procure Witness

2 Appellant asserts that she was denied her right to call as a witness an employee of the
3 Internal Revenue Service (IRS) to explain her "tax predicament." We disagree.

4 After the prosecution rested, the court denied appellant's request to continue the trial in
5 order to locate the IRS witness. Following appellant's testimony, the court again denied
6 appellant's request to continue to secure the attendance of the witness. After the jury was
7 instructed, and prior to the attorneys' closing arguments, appellant made a third request for
8 continuance. Appellant argued that the IRS witness was located, but the witness was awaiting
9 receipt of "definitive word from his legal counsel" whether he would be allowed to testify.

10 The court's denial of a motion to continue is reviewed under an abuse of discretion
11 standard. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105-1106.) When a trial is already
12 underway and the continuance is sought to secure the attendance of a witness, the court must
13 consider the following: (1) due diligence to secure the witness's attendance; (2) the materiality
14 or cumulativeness of the witness's expected testimony; (3) the possibility of the testimony
15 being obtained by other means; and (4) whether the witness's presence will be obtained within
16 a reasonable time. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) We find no abuse. The
17 court determined that appellant was aware of the witness long before trial started, yet failed to
18 secure his attendance and was otherwise unable to inform the court when the witness would be
19 available to testify. Additionally, the witness testimony would have been largely cumulative,
20 since appellant already testified extensively about her tax problems.

21 E. Failure to Serve Restraining Order

22 Appellant argues that her convictions for violating section 273.6, subdivision (a) should
23 be reversed because the court order registered in California was never served on appellant. We
24 reject the argument because proof of service of the court order is not an element of the offense.
25 (*People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979.)

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1 F. Prosecutorial Misconduct

2 Appellant contends prosecutorial misconduct occurred based on the prosecutor's
3 argument before the jury that appellant stole money from Cohen.³ We reject appellant's
4 contention. Appellant failed to object to any misconduct in the trial court, and never requested
5 jury instruction to disregard the purported impropriety. (*People v. Carter* (2005) 36 Cal.4th
6 1215, 1263.)⁴

7 IV. DISPOSITION

8 The judgment of conviction is affirmed.

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12 Ricciardulli, J.

13 We concur.

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15 P. McKay, P. J.

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18 Kumar, J.

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21 ³Because it is not supported by argument or legal authority, we do not address appellant's
22 contention that the Los Angeles City Attorney's Office "should have recused itself." (*People v. Murray*
23 (2008) 167 Cal.App.4th 1133, 1143.)

24 ⁴Appellant further argues that "no reasonable jury could have convicted [her] beyond a
25 reasonable doubt for each and every element of the crime charged" and that the "insufficiency of the
26 evidence stems from testimony that is tainted." We do not address the arguments because, although
27 appellant provides us with legal authorities, the arguments are bereft of any factual underpinning or
28 citations to the record. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282; Cal. Rules of Court,
rule 8.883(a)(1)(B).) Additionally, appellant argues, in a single paragraph lacking any subheadings or
citation to authority, that "there is a myriad of issues which constitute a denial of fair trial of
[appellant]," and then proceeds to list various purported errors that occurred in the trial court. "We
conclude that an argument raised in such perfunctory fashion is waived." (*People v. Harper* (2000) 82
Cal.App.4th 1413, 1419, fn. 4.)

CERTIFICATE OF TRANSMITTAL

L.A. Superior Court Central

Appellate

<p>THE PEOPLE V. KELLEY LYNCH</p> <p>VS.</p>	<p>BR050096</p>
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has been transmitted to above named parties and trial court appeal clerk.

Dated: MAY 29 2013

By B. Garcia, Deputy

Appellate Division Superior Court

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