Filed 2/28/18 B.A. v. Dallin H. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

B.A., Plaintiff and Respondent, v. DALLIN H., Defendant and Appellant.	B277851 (Los Angeles County Super. Ct. No. VQ027421)

APPEAL from an order of the Superior Court of Los Angeles County. Doreen B. Boxer, Commissioner. Affirmed.

Dallin H., in pro. per.; Law Offices of Bryan J. Clifton and Bryan J. Clifton for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Dallin H. appeals from a five-year restraining order that the trial court entered pursuant to the Domestic Violence Protection Act (DVPA), Family Code section 6200 et. seq.[1] Dallin contends that the trial court applied the wrong legal standard and abused its discretion in deciding to grant the order. He also argues that the trial court erred in refusing his request to continue the hearing. We disagree and affirm.

BACKGROUND

B.A. and Dallin began dating in 2009. They moved to Utah in 2010, where they lived together. Their daughter, J.H., was born in 2010. B.A. separated from Dallin in January 2012 and moved with J.H. to California in August 2012. Dallin continues to reside in Utah.

1. *Proceedings in the Trial Court*

B.A.'s request for a domestic violence restraining order was heard on May 25 and July 19, 2016. At the initial hearing, the trial court determined from the parties that there had been prior proceedings in Utah concerning custody and visitation of J.H. Over a recess, the trial court contacted the Utah court and learned that the case there had been dismissed. The trial court therefore proceeded with the hearing.

The trial court heard testimony from the parties, who were both representing themselves. B.A. testified that her request for a restraining order was prompted by a recent incident involving

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[1] Subsequent undesignated statutory references are to the Family Code. To preserve the privacy of the minor child involved in this case, we redact the parties' names. No disrespect is intended. We identify the minor (J.H.) only by her first and last initials.

harassing text messages and telephone calls from a local telephone number with a 562 area code that she believed came from Dallin. B.A. offered a police report from the incident, which the trial court declined to consider on hearsay grounds. Neither party had other witnesses available, and both parties alluded to evidence of other relevant communications. In response to a suggestion by Dallin, the trial court therefore continued the hearing to permit the parties to gather evidence.

When the hearing resumed on July 19, 2016, B.A. was represented by counsel and her father and a police officer were present to testify. On the day of the hearing, B.A.'s counsel filed a memorandum of law and a request for judicial notice concerning certain pleadings from prosecutions of Dallin in Utah. B.A.'s counsel served copies of those pleadings on Dallin at the hearing. The trial court noted that the documents "really should have been served on [Dallin] five days ago," and questioned whether Dallin might want a continuance based upon receiving the documents for the first time at the hearing. After some further colloquy about exhibits, the trial court asked Dallin whether he was ready to proceed. Dallin said that he was ready.

Dallin also filed a request for judicial notice on the day of the hearing, asking that the trial court take notice of various court documents and police reports concerning events in Utah. Of these, the trial court ruled that it could consider: (1) B.A.'s request for a protective order and a temporary protective order issued by the Utah court on February 24, 2012, and (2) an order of dismissal on that same matter issued following a hearing on April 12, 2012.

B.A. testified and also introduced testimony from her father (Alex A.) and Deputy Sheriff Tarsicio De La Torre. During

Dallin's cross-examination of B.A., Dallin attempted to ask her about an e-mail that Dallin said he had received from an ex-boyfriend of B.A.'s in 2015. Dallin claimed that the email described "the behavior of which she would treat my child and invite other men around her life." The court sustained a hearsay objection. Dallin then asked for a continuance so that he could subpoena the boyfriend. The court asked Dallin when he had received the e-mail in question and Dallin said January of 2015. The court asked what Dallin had done to subpoena the boyfriend since the last hearing on May 25, 2016, and Dallin said nothing. The court then stated that it did not find good cause for a continuance.

At the conclusion of the hearing, the trial court granted a restraining order.

2. *Evidence of Abuse*[2]

a. *Prior incidents*

From 2010 to 2012, while B.A. and Dallin were living together, Dallin had a drinking problem. When he drank, he became violent. Dallin had a conviction for driving under the influence, for which he was placed on probation in 2012 or 2013 for three years.

Dallin claimed that he had been sober during the period of the probation. However, in November 2015 he sent several texts to B.A., apologizing for calling her while drunk.

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[2] Consistent with the substantial evidence standard of review, we summarize the facts in the light most favorable to B.A. as the prevailing party.

B.A. testified that, during the telephone call in November 2015 leading to Dallin's texted apology for calling while drunk, Dallin threatened to "come to my house and drag me out of the house by my hair in order to teach me a lesson." Dallin had threatened B.A. on more than 10 occasions in the last five years. He had previously struck her, pushed her, held her up against a wall, and pulled her hair.

Dallin's abuse while the parties lived together in Utah included multiple incidents involving "sexual contact." On one occasion in 2010, Dallin held a gun to B.A.'s head after they had been fishing with friends during the day.

Dallin's abuse continued after the parties separated. In an e-mail in 2012, Dallin threatened to kidnap J.H. After B.A. moved into her own apartment, Dallin sat outside her apartment window at night. She asked him to leave, but he did not.

B.A. called the Utah police more than once after incidents of abuse. Several times she stayed at a hotel or with a friend after the police came in response to a report and "separated us."

On February 24, 2012, B.A. requested and received a temporary protective order from the Utah court. Her request described an incident that had occurred the previous day, on February 23, 2012. When Dallin arrived at B.A.'s apartment to drop off J.H., Dallin "became agitated, because [B.A.] was running late from work." When she arrived home, Dallin "pushed his way into [B.A.'s] apartment" and "pushed [B.A.] into the kitchen wall." Dallin slapped B.A. on the back of her head, and J.H. began screaming. B.A. grabbed her phone from Dallin and called the police, but Dallin left before the police arrived.

B.A.'s request for a protective order in the Utah court also referred to several other incidents of abuse, including the

incident in which Dallin held a gun to her head. On or around February 18, 2012, Dallin "repeatedly called [B.A.] about 25 times at 1:00 in the morning." In January 2012, apparently before the parties separated, Dallin returned home from a bar while B.A. was sleeping downstairs. Dallin ripped the blankets off her and started screaming at her. B.A. attempted to run away, but Dallin trapped her in a corner and refused to let her leave. B.A. eventually called the police.

The Utah temporary protective order remained in place pending a scheduled hearing. After a hearing on April 12, 2012, the Utah court dismissed B.A.'s petition.

b. ***Incident leading to B.A.'s current request for a restraining order***

On March 9, 2016, B.A. received two text messages from a telephone number with a local Southern California 562 area code. The first message said, "you better run and hide because I am coming for you." The next text, sent about an hour and a half later, said, "to see you soon."

Then, on March 19, 2016, B.A.'s father, Alex, was with B.A. and other family members when he received a call from Dallin. Before the call, Alex had seen the text to B.A. from the number with the 562 area code. Dallin was calling from the same number. Dallin said, "do you know who this is?" He then said, "look out your window. I'm here for you." Alex told B.A. to call the police, which she did.

After B.A. had called the police, Alex received a text from his brother. The text forwarded a text the brother had received from the same 562 number. The text to Alex's brother said: "I would hope as an uncle you would let A.J. know how serious this is. I would hate to have something bad happen to their family.

See you soon, Danny." "A.J." is the name that close friends and family use for Alex. The text that B.A. received from the 562 number and the text to Alex's brother from that same number were attached to a police report that Officer De La Torre prepared when he arrived at the scene.

After De La Torre arrived in response to B.A.'s report, Alex received a call from the same 562 number. Alex placed the call on speaker and De La Torre listened in. Alex recognized the caller as Dallin. At some point during the call, the caller also identified himself as Dallin by saying that Alex could contact him at Dallin's e-mail address, which consisted of Dallin's full name.

De La Torre testified that B.A. and Alex identified the caller as B.A.'s "ex-husband," who was the father of B.A.'s daughter. De La Torre heard the caller make various threatening statements, including, "don't play stupid. My little B.A. wants to play victim. Do you understand." He also said, "I'm not going to let your bitch daughter out of it. I'm coming for my little girl. . . . I just want my visitation. . . . I will take matters into my own hands. I will go to prison before they take me away, take away my little daughter. I will straight take her out of home. I'm angry and hateful. I will fight to the death. . . . There will be hell to pay."

Dallin denied having a telephone with a 562 area code, or using a computer application to make it appear that his calls originated with a 562 number.

3. *The Trial Court's Findings*

The trial court found that B.A. has a "qualifying relationship" with Dallin sufficient to obtain a domestic violence restraining order. The trial court also found that B.A. "has proven by a preponderance of the evidence that an act or acts of

abuse within the meaning of Family Code section 6203 and 6320 were perpetrated by [Dallin] in that he had—he's threatened [B.A.], and he has disturbed her peace; and as a result of that, and based on the testimony, and since this conduct has been going on for quite some time, I'm going to be granting this restraining order for a period of five years."

The trial court noted that the officer's testimony about what was said during the telephone call with Dallin "was very important to my consideration." The trial court expressed the belief that "the witnesses testified very credibly on behalf of [B.A.]," specifically mentioning that Alex did not remember details about the telephone call on March 19 that De La Torre recalled. The trial court also commented on Dallin's demeanor, noting that he had a difficult time controlling himself during the hearing and appeared to "have an anger issue."

With respect to custody and visitation, the trial court explained that section 3044 creates a presumption against awarding sole or joint physical or legal custody to a party who has perpetrated domestic violence against the "other party seeking custody or against the child or the child's siblings within [the] previous five years." The trial court advised Dallin that "there are things that you need to prepare yourself to overcome that presumption. And one of those things that a court must consider is whether or not you have enrolled in and completed a batterer's treatment program." The trial court ordered Dallin to attend a 52 week batterer program.

After further colloquy with the parties, the trial court established a visitation schedule consisting of "FaceTime" calls three times a week and monthly monitored visits with J.H. for

Dallin. The trial court ordered another hearing on January 30, 2017, for a review of visitation.

The trial court issued a written restraining order dated July 19, 2016, that prohibited Dallin from contacting B.A., Alex, J.H., or Christy A. (B.A.'s stepmother), until July 18, 2021, subject to specified visitation. The order incorporated a minute order issued the same day that awarded "sole legal and physical custody" of J.H. to B.A., and ordered the visitation schedule described above.

DISCUSSION

1. *Jurisdiction*

We have a duty to consider sua sponte whether this court has jurisdiction to hear the appeal. (Cal. Rules of Court, rule 8.104(b); *Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.)

A domestic violence restraining order is appealable as an order granting an injunction. (Code Civ. Proc., § 904.1, subd. (a)(6); *Isidora M. v. Silvino M.* (2015) 239 Cal.App.4th 11, 16, fn. 4 (*Isidora*).) However, the record raises a question as to whether Dallin timely filed his notice of appeal. As discussed below, we conclude that he did.

Dallin filed his notice of appeal on September 21, 2016, more than 60 days after the trial court issued the restraining order.[3] However, Dallin's notice of appeal was timely if filed within 60 days of notice of entry of the order by the clerk or by a

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[3] Sixty days from July 19, 2016, was September 17, 2016, which was a Saturday. Thus, if the 60-day time period began to run on July 19th, the notice of appeal should have been filed by Monday, September 19, 2016.

party (or, failing notice, within 180 days after entry of the order). (Cal. Rules of Court, rule 8.104(a)(1)(A)–(C).) The appellate record contains a notice of entry served on the same day Dallin filed his notice of appeal, September 21, 2016. If that notice was the triggering event for the 60-day time period to file the notice of appeal, then Dallin's appeal was timely.

However, the record reflects that the clerk actually served a copy of the restraining order on July 19, 2016. The trial court's minute order on that date states that the parties were given a certified copy of the "Order after Hearing" and that "[n]o further service is required."

The trial court's statement that no further service is required appears to relate to the enforceability of the restraining order, not to the notice required to trigger the statutory time for filing a notice of appeal. (See § 6384, subd. (a) [providing that further notice of a restraining order is not necessary for enforcement if the restrained party received actual notice of the existence and substance of the order through personal appearance in court]; *In re Marriage of Lin* (2014) 225 Cal.App.4th 471, 475.) In any event, regardless of the trial court's intent, "[b]ecause appellate time limits are jurisdictional and cut off litigants' access to the courts, we strictly construe statutes and rules concerning the time in which to file a notice of appeal." (*Lin,* at p. 474.)

Other than the notice Dallin served on September 21, 2016, the appellate record does not contain a "Notice of Entry" of the restraining order or a file-endorsed copy of the restraining order showing the date that document was served. (Cal. Rules of Court, rule 8.104(a)(1)(A)–(B).) The trial court's minute order states that a "certified copy" of the "Order after Hearing" was

served on that date, but it does not reflect precisely what was served and does not confirm that the document served was "file-endorsed."[4] The statement in the minute order is therefore not sufficient to comply with a strict construction of the rule governing the timing of a notice of appeal. Thus, we conclude that the appeal is timely under California Rules of Court, rule 8.104(a)(1)(B).

2. *Standard of Review*

We review the trial court's decision to issue a restraining order under the DVPA for an abuse of discretion. (*Isidora, supra,* 239 Cal.App.4th at p. 16; *J.J. v. M.F.* (2014) 223 Cal.App.4th 968, 975.) We review the trial court's factual findings supporting the restraining order for substantial evidence. (*J.J.,* at p. 975; *Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822.) Under that standard, we " 'resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order.' " (*Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 849–850 (*Phillips*), quoting *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390.)

Although B.A. did not file a respondent's brief, we nevertheless examine Dallin's arguments in light of the record and the applicable law. (See Cal. Rules of Court, rule 8.220(a)(2);

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[4] The minute order states only that the "Order after Hearing" was served, without stating precisely what that order included. The minute order itself was incorporated into and made a part of the restraining order. The minute order is therefore unclear as to whether the clerk served a copy of the entire order that included the minute order itself.

Kennedy v. Eldridge (2011) 201 Cal.App.4th 1197, 1203 ["we do not treat the failure to file a respondent's brief as a 'default' (i.e., an admission of error) but independently examine the record and reverse only if prejudicial error is found"].)

We also review the trial court's denial of Dallin's request for a continuance for abuse of discretion. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823.)

3. *The Trial Court Did Not Apply the Wrong Legal Standard*

Dallin argues that the trial court must have applied the wrong legal standard because none of Dallin's "complained of" conduct fits within the statutory definition of abuse that is sufficient to justify a restraining order. The argument is not consistent with the record or the law.

As mentioned above, the trial court found "an act or acts of abuse" within the meaning of sections 6203 and 6320 based upon evidence that Dallin "threatened [B.A.]" and "disturbed her peace." Both of those categories of conduct may support a restraining order under the statutory scheme.

Section 6300 provides that a restraining order may issue based upon "reasonable proof of a past act or acts of abuse." Section 6203 defines "abuse" for purposes of the DVPA. Under that section, "[a]buse is not limited to the actual infliction of physical injury or assault." (§ 6203, subd. (b).) The definition of abuse includes "behavior that has been or could be enjoined pursuant to Section 6320." (§ 6203, subd. (a)(4).) Section 6320 in turn provides that a party may be enjoined from "threatening" or "disturbing the peace" of the other party. (§ 6320, subd. (a).) Thus, threats and acts that disturb the peace of the petitioning

party are sufficient to justify a restraining order under the governing statutes.

Courts have interpreted acts " ' " 'disturbing the peace" ' " " of another party broadly to include conduct that " ' "destroys the mental or emotional calm of the other party." ' " (*Phillips, supra,* 2 Cal.App.5th at p. 853, quoting *Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1146 (*Burquet*).) In *Phillips*, such conduct included banging on the door and windows of the petitioner's house during the night, sending harassing text messages, and posting personal information and photographs on social media. (*Phillips,* at p. 847.) In *Burquet,* conduct disturbing the plaintiff's peace included contacting the plaintiff by phone, e-mail and text against her wishes (including messages containing inappropriate sexual innuendos) and arriving unannounced at the plaintiff's residence and refusing to leave. (*Burquet, supra,* 223 Cal.App.4th at p. 1144.) In *In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483 at page 1498, the court concluded that the defendant destroyed "the mental or emotional calm" of the defendant's former wife by accessing, reading, and disclosing her confidential e-mails. And in *Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816 the court held that the defendant's acts of "isolation, control, and threats" that destroyed the plaintiff's mental and emotional calm demonstrated abuse "within the meaning of section 6320." (*Id.* at p. 822.) These cases all support the standard that the trial court applied here.[5]

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[5] Dallin is therefore incorrect in claiming that "[n]o officially reported cases have yet interpreted" the relevant statutes.

Dallin also claims that the trial court employed the wrong legal standard because it stated that it found "domestic violence *and/or* restrainable conduct." (Italics added.) He argues that the trial court could rely only upon domestic violence in issuing the restraining order.

Dallin does not include a cite to the record for the trial court's statement. The trial court's oral findings following the hearing did not include this statement. Rather, as discussed, the trial court expressly found "an act or acts of abuse," including threats and disturbing B.A.'s peace. In any event, the trial court could properly consider "restrainable acts" in determining whether to issue a restraining order, as section 6203 defines abuse to include behavior that "could be enjoined pursuant to Section 6320." (§ 6203, subd. (a)(4).)

4. *The Trial Court Did Not Abuse its Discretion in Granting the Restraining Order Based Upon the Evidence Presented*

The evidence supported the trial court's findings that Dallin engaged in threats and acts that disturbed B.A.'s peace. The evidence was sufficient to support the conclusion that Dallin used the 562 number to text and call B.A. and B.A.'s father and uncle. That evidence included testimony from B.A. and Alex that they recognized Dallin's voice during calls placed from that number. The caller also identified himself using Dallin's e-mail address. And the content of the conversation that De La Torre overheard—including the caller's reference to his "little girl" and his desire for "visitation"—clearly pointed to Dallin as the caller.

Dallin used that telephone number to send threatening texts to B.A. and to B.A.'s uncle. During the call that De La Torre overheard, Dallin threatened to "straight take [J.H.] out of

home" and said that he would "fight to the death" and "there will be hell to pay."

There was also evidence of previous threats, including an incident in which Dallin held a gun to B.A.'s head and a threat to kidnap J.H. More recently, in November 2015, Dallin threatened to "drag [B.A.] out of the house by [her] hair" to teach her a lesson.

The evidence showed that Dallin's conduct disturbed B.A.'s peace. When the couple separated, Dallin sat outside B.A.'s apartment at night despite her requests that he leave. Dallin's escalating threats caused B.A. concern "because the threats have gone from being text messages to phone calls to now involving family members." The evidence also showed a history of physical violence. That history, together with the increasing severity of Dallin's threats, caused B.A. to be "scared because I don't know what it means he'll go to." B.A. has had trouble sleeping and problems with her emotional health and depression.

Dallin makes various arguments concerning B.A.'s credibility and points out evidence contrary to her testimony. But those arguments are irrelevant in light of the standard under which we review the evidence below. The trial court's inferences from the evidence presented were reasonable. Thus, we must affirm the trial court's order even if other inferences could be drawn. (*Phillips, supra,* 2 Cal.App.5th at p. 851.)

5. *The Trial Court Did Not Abuse Its Discretion in Denying Dallin's Request for a Continuance*

In his supplemental brief, Dallin argues that the trial court erred in denying his request for a continuance during his cross-examination of B.A. because he was entitled to one continuance as a matter of right under section 245, subdivision (a). That

subdivision states that "[t]he respondent shall be entitled, as a matter of course, to one continuance for a reasonable period, to respond to the petition." (*Ibid.*)

Dallin's argument fails, because his request for a continuance in the middle of the July 19th hearing was after he had already received a continuance of almost two months to "respond to the petition." (§ 245, subd. (a).) The trial court ordered a continuance at the initial May 25th hearing to permit both parties to obtain additional evidence. Dallin asserts that the trial court "appeared to *sua sponte* continue the hearing to July 19th, 2016." But the record shows that the discussion of a continuance at the May 25th hearing began in response to Dallin's suggestion. In any event, whether or not Dallin made a formal request for a continuance, he received the one continuance to which he was entitled under section 245 to prepare his response to the petition. (*Ibid.*) The trial court was not required to grant another continuance as a matter of law.

Dallin also argues that the trial court abused its discretion by failing to grant a continuance under California Rules of Court, rule 3.1332(c), because B.A.'s counsel served him with numerous documents on the day of the hearing. The record shows that the court acted within its discretion.

Before the July 19th hearing began, the trial court gave Dallin an opportunity to request a continuance based on the documents that B.A. served that day. Dallin declined to do so, instead announcing that he was ready to proceed (while serving his own request for judicial notice at the hearing).

When Dallin requested a continuance much later in the hearing, it was not because of the late-served documents but because he wanted to subpoena a witness. The trial court

reasonably denied the request after learning that Dallin had done nothing to subpoena the witness in question since the prior hearing, even though he had received the e-mail that he wanted to introduce through that witness a year and a half earlier.

Finally, Dallin does not make any showing of prejudice from his receipt of documents on the day of the hearing. (See Cal. Const., art. VI, § 13; Code Civ. Proc. § 475.) The trial court did not consider any of the documents submitted with B.A.'s request for judicial notice. Although the court considered B.A.'s memorandum of law, Dallin does not identify anything in that memorandum that caused him any prejudice. Without a showing of prejudice from the trial court's denial of the continuance request, we may not reverse even if we were to conclude that the trial court abused its discretion.

DISPOSITION

The order is affirmed. B.A. is entitled to her costs on appeal, if any.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.